ANDREAS FOLLESDAL
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Toward a more just WTO: Which justice, whose interpretation?

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0 Introduction

Recurring protests against the WTO trading system are vocal and vivid indications that many individuals and NGOs regard these trade agreements and their way of settling disputes as grossly illegitimate.[1] Trade liberalization not only seems to be WTO's *grundnorm*[2] but is said to trump respect for human rights,[3] the environment,[4] and global distributive justice. Thus several authors, civil society organizations and states regard the WTO system as a central cause and culprit of the world's present vast income disparities. Joseph Stiglitz underscores that 'the IMF, World Bank and WTO…set the rules of the game…in ways that, all too often, have served the interests of the more advanced industrialized countries – and particular interests within those countries – rather than those of the developing world'.[5]

Many critics and defenders of the WTO system agree that it must be understood, assessed and possibly reformed *in context*. Diagnoses and proposed prescriptions require an understanding of how the treaties and the bodies of the WTO are but important parts of a tangled web of domestic and international institutions and actors. This 'global basic structure' ('GBS') consists of institutions, rules and practices

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[2] C. Carmody, F. Garcia, and J. Linarelli, 'Introduction', in C. Carmody, F. J. Garcia and J. Linarelli (eds.), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge: Cambridge University Press, 2012), p. 1-26, 2.
[3] S. Joseph, 'Trade Law and Investment Law', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 841–870.
[4] K. Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation in the WTO Dispute Settlement System* (Alphen aan den Rijn: Kluwer Law International, 2011).
[5] J. Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2002), p. 214.

in complex interdependence, including states, treaties and their courts and treaty bodies. It is the overall impact of the GBS that creates such injustice as there is, and reforms must consider the complex interdependence between the WTO system and other central actors, not least states.

Thus constructive critics demand better government of this GBS as a whole, and of the WTO system in particular. The former objective is to be secured by global democratic arrangements,[6] by international legal primacy of international human rights obligations[7] or both – with careful assessment of conflicts between these normative standards.[8] Hotly contested proposals for improving the WTO system range from fundamental revision of the treaties enforced by the WTO, over proposals to make rights to trade conditional on human rights protection and to prohibit unfair gains from trade,[9] to increased transparency and accountability of the WTO dispute settlement mechanism, e.g. towards NGOs.[10]

Critics of such protests may firstly dismiss the objections as 'category mistakes', holding that standards of justice cannot apply to entities such as the WTO system. A second line of response would be that even granting that there are such risks, several reform proposals are ill-founded. To alleviate whatever injustice the WTO system is complicit in, less radical changes than fundamental treaty changes may suffice.

The present chapter challenges the first of these counter-arguments, and supports the second, as regards WTO and global distribute justice. The chapter leaves urgent issues of the environment and many human rights concerns aside – though some of the arguments are also relevant for some of these issues. The focus is on the

[6] D. Archibugi, D. Held, and M. Kohler, (eds.), *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Oxford: Polity Press, 1998).
[7] T. W. Pogge, *World Poverty and Human Rights, 2nd Edition* (Oxford: Polity Press, 2008); S. Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005).
[8] C. C. Gould, *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004); M. Goodhart, 'Human Rights and Global Democracy', *Ethics and International Affairs*, 22 (2008), 395–420.
[9] M. Risse, *On Global Justice* (Princeton: Princeton University Press, p 281-360.
[10] A. S. Chilton & R. W. Davis, 'Equality, Procedural Justice, and the World Trade Organization' *Intercultural human rights law review*, 7 (2012), 101–151.

WTO dispute settlement mechanism (DSM, 'Mechanism'), especially the adjudicatory panels and the Appellate Body ('AB'). They serve central roles within the global trade regimes, and have been a model for other dispute settlement regimes such as the ASEAN Enhanced Dispute Settlement Mechanism.[11]

This article has three main objectives. It firstly defends the diagnoses that the WTO system contributes to global distributive injustice, against some potentially devastating criticisms. The substantive contents of the principles of global justice are not central to the arguments, but to fix ideas the next section of this introduction sketches the contours of such principles. Section 1 briefly explains why the GBS is a subject that merits particular normative concern. Section 2 rebuts one strand of the 'category mistake' criticism, namely that there is no such GBS. Section 3 challenges a second criticism, that the WTO system is not part of our present GBS.

The second objective is to challenge the prescriptions many critics hitherto have promoted, for two main reasons. Section 4 argues that principles of global justice for the GBS as a whole drastically underdetermine reform proposals for the Mechanism. Furthermore, many critics underestimate the scope of discretion international judges and panel members enjoy in interpreting and specifying treaties.[12] The upshot is that broad scale reforms may be neither possible nor effective – but also not necessary. Radical treaty changes are unlikely since many of them require consensus among states. Instead, the AB may change its interpretative practice to make significant moves toward a more just WTO system. The third contribution, in sections 5 and 6, is to start to explore ways that the existing WTO system may become more just if members of the panels and of the AB develop their interpretive standards in one or more of four ways.

These observations also illustrate the mutual contributions of political theory and

[11] R. Beckman, et al., *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in Asean Instruments* (Cambridge: Cambridge University Press, 2016).

[12] Extending the perceptive arguments from the area of international human rights found in C. McCrudden, 'Human Rights: Law, Politics and Philosophy' *https://www.wzb.eu/sites/default/files/u32/chr_mccrudden_human_rights_law_politics_and_philosophy.pdf* (2014).

legal scholarship. They show how normative political arguments may help structure and sometimes lay to rest current controversies. They also contribute to enhance normative political theory, insisting that their research agenda must include the interpretive practices of judges and arbitrators. Indeed, I argue that these practices are part of the (global) basic structure. Members of the AB and of the panels may therefore have to be more attentive to and transparent concerning how normative considerations already affect these legal practices, and where considerations of global distributive justice might be appropriate.

This introduction concludes with some brief background information about the nature of principles of global distributive justice. Of particular interest are aspects of their interpretative techniques noted in the introduction to this volume: the role of precedence, reference to other tribunals and other areas of law, and the discretion these bodies accord domestic authorities.

0.1 Principles of Global Distributive Justice

For purposes of these arguments the currently best defended principles of global distributive justice need not be specified in detail, though some components need mention to indicate some salient points of agreement and disagreement. Citizens and foreigners may have sound normative claims on the set of global institutions as a whole that it satisfies the minimum vital needs of all, e.g. in the form of international obligations to secure certain human rights or to otherwise reduce or remove extreme global poverty. Such claims have been defended by several prominent authors.[13] Beyond this minimum, several authors posit that global distributive justice requires some constraints on permissible inequalities, possibly even defending a requirement of equal shares of income and wealth among individuals. On such views the standards

[13] J. Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), p. 38, 105; S. Freeman, 'Distributive Justice and the Law of Peoples', in R. Martin & D. Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006), p. 243-260; M. Blake, 'Distributive Justice, State Coercion, and Autonomy', *Philosophy and public affairs* 30 (2001), 257–96; T. Nagel, 'The Problem of Global Justice', *Philosophy and public affairs*, 33 (2005), 113–147; cf C. Barry & L. Valentini, 'Egalitarian Challenges to Global Egalitarianism: A Critique', *Review of International Studies*, 35 (2009), 485–512.

of global distributive justice are 'comparative principles concerned not merely with how individuals fare or are treated in absolute terms, but also in comparison with others'.[14] Such principles might for instance address the distribution of the benefits of international trade, in the form of equitable returns to all parties to the transaction. The relevant point here is that any such claims beyond a minimum floor concerning human rights are principles of *global distributive justice*. Some critics deny that such principles apply to the WTO and its mechanism at all.

0.2 The World Trade Organization Dispute Settlement Mechanism

Many critics of the WTO system will agree that liberalized trade can be an important means to secure and promote the vital interests and human rights of many individuals.[15] A central strand of criticism, also voiced by Director General of the WTO Pascal Lamy, concerns the design of the present WTO system: its treaties, rules and procedures, and how the WTO DSM appears to give undue priority to the objective of more open markets for goods and services.[16] The WTO mechanism may thus give too little weight to arguably more important values such as human rights constraints or environmental concerns[17] – or considerations of global distributive justice.[18] The trade policies promoted by the WTO system are claimed to have several potential weaknesses: they 'risk undermining human rights and policy coherence at home and abroad'.[19] For instance, the WTO system disfavours many developing states who complain that the WTO system permits high tariffs – 'tariff peaks'[20] – on their products

[14] A. Abizadeh, 'Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice', *Philosophy and Public Affairs*, 35 (2007), 318–58..
[15] F. Teson & J. Klick, 'Global Justice and Trade', in Chi Carmody, et al. (eds.), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge, Cambridge University Press, 2012), p. 2017–260.
[16] P. Lamy, 'The Place and Role of the WTO (WTO Law) in the International Legal Order', *WTO*, (2006), . https://www.wto.org/english/news_e/sppl_e/sppl94_e.htm
[17] J. Lagomarsino, 'WTO Dispute Settlement and Sustainable Development: Legitimacy Through Holistic Treaty Interpretation', *Pace Environmental law review*, 28 (2011), 545-567; discussed by C. D. Creamer & Z. Godzimirska, '(De-)Legitimation at the WTO Dispute Settlement Mechanism', *Vanderbilt Journal of transnational law*, 49 (2016), 1-38, 2.
[18] E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', *European Journal of International Law*, 13 (2002), 621–650.
[19] *Ibid.*, 625.
[20] https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm

in important markets. The 2013 Bali agreement improved some aspects for the world's poorest countries as regards duty-free access for their goods to other states, granted them some greater scope for farm subsidies and provided administrative assistance to handle the procedures.[21] Critics hold that these measures did not go far enough.

Is the WTO mechanism part of an unjust 'global basic structure' (GBS), and if so: what are the implications for what the WTO panels and AB should do?

1 Why the 'Basic Structure' merits particular principles of distributive justice

This section lays out salient aspects of the domestic and global 'basic structure'. Many present-day discussions about political justice take the subject matter to be 'basic structure of society' ('BS'), a term of art forged by the philosopher John Rawls. It includes 'the political constitution and the principal economic and social arrangements' and other rule-regulated practices that affect what people chose to do.[22] Rawls held that special principles of distributive justice apply to this topic. When subjects live their lives within the same BS, this affects the substantive normative claims they have on it and thus on one another. There are several reasons why the BS is subject to such special principles of justice; reasons that merit consideration to determine whether they also hold for subjects of a *global* basic structure ('GBS') – possibly including the WTO system.

Firstly, the direct impact on individuals' lives of the distribution of benefits of the BS is drastic. Consider the effects of career opportunities, income and wealth, and legal powers of property, which Rawls labels 'social primary goods' (SPGs). Secondly, the BS provides stable expectations about others' future behaviour, structures that shape individuals' life plans and aspirations. Thirdly, these SPGs are social constructs,

[21] Ministerial Conference, 'Agreement on Trade Facilitation, 7 December 2013 (the Bali Agreement)' *WT/MIN(13)/36*, *WT/L/911* (2013).
[22] J. Rawls, 'The Basic Structure as Subject', in J. Rawls (ed.), *Political Liberalism* (New York: Columbia, 1993), p. 257–288.

constituted by individuals' institutionalized cooperation within the BS. These goods are thus constituted by subjects' patterned, rule-regulated behaviour. A fourth reason to regard the BS as a special topic of justice is that it allows a certain institutional division of labour, between the BS itself, and the rules individuals follow in particular interactions.[23] The BS should be set up to ensure domestic distributive justice, a requirement that is too complex for individuals to pursue given the indirect and systemic impact of their private actions. A final reason the BS should be assessed by particular principles of distributive justice is that the state maintains it on threat of coercion, with subjects who cannot escape. The upshot of these arguments within Rawls' theory is that the BS of a society should be held to particular standards of justice which take as a baseline equal shares among citizens.

Do similar arguments apply to the GBS, – possibly including the WTO system, – in support of special principles of global distributive justice?

2 'There is no Global Basic Structure'

This section defends the view that there is a global basic structure (GBS) of which the WTO system is a part, against several objections. For clarification let us talk of a possible GBS as rules, practices and institutions that structure individuals' actions and shared practices, and otherwise serves the functions of the domestic BS as discussed above – wherever on the globe the individuals are.

If it exists in our present world order, a GBS thus includes domestic BSes, as well as an international basic structure. The latter includes a wide range of international law and international institutions and organizations. These include international rules about sovereignty to 'background' rules and institutions that enable states and private parties to agree on issues including trade, investment, currency exchange= and travel. These international rules and practices, together with domestic BSes, combine to have large effects on individuals.

[23] S. Scheffler, 'Is the Basic Structure Basic?', in C. Sypnowich (ed.), *The Egalitarian Conscience: Essays in Honour of G. A. Cohen* (Oxford: Oxford University Press, 2006), p. 102–130, 268–9.

Note that the set of rule-governed practices of the GBS share several of the normatively salient features of domestic BSes. They impact fundamentally on individuals' starting points, life chances and preference formation – though often mediated by states, which enjoy rights and immunities due to international rules and practices of state sovereignty.

Several scholars object that the present international institutions are not part of a GBS of a kind that can ground claims of distributive justice among its subjects. If they are right, those who criticize the injustice of the WTO system may be dismissed as fundamentally confused. The critics are making a 'category mistake' since the WTO system is not the sort of entity to which standards of distributive justice can apply.[24] What are we to make of objections of the kind that the impact, source, means or objectives of such international laws, international institutions and other international public practices are so different in kind from domestic institutions as to make principles of distributive justice inapplicable?[25]

Some hold that any impact of international law is both caused by and mediated by domestic political choices. Any distributive claims of justice therefore have domestic BS as their subject. International norms and institutions are 'secondary':

> [T]here may be trade and other agreements among governments specifying original norms, and procedures for making norms, that are independent of any particular people's legal system. But these original global norms…are supervenient upon peoples' existing property, economic, and political systems - the basic social institutions that structure and regulate their everyday life. Moreover, whatever jurisdiction global regulators and courts have, they have been granted and continue to enjoy only by virtue of the political acts of different peoples.[26]

[24] G. Ryle, *The Concept of Mind* (Chicago: University of Chicago Press, 1949), p. 16–17.
[25] For further objections and discussion, cf. A. Follesdal, 'The Distributive Justice of a Global Basic Structure: A Category Mistake?', *Politics, Philosophy and Economics* 10 (2011), 46–65.
[26] Freeman, Distributive justice, p. 18.

In response, consider firstly that the authority, powers and immunities of states are themselves partly defined by international law and institutions. Secondly, states' opportunity spaces and relative bargaining power vis-à-vis multinationals and other states are profoundly affected by the GBS, for instance when agricultural subsidies in rich countries are protected against countervailing measures by the rules of the WTO system. Important decisions are made at the domestic level, and much harm may be wrought by domestic authorities.[27] But their power and decisions are often framed by international rules, for instance those that allow authoritarian states access to international markets and thus to maintain their power. Other international rules could have refused to recognize dictators' claims to their country's resources or right to international lending.

Thirdly, the WTO is a gatekeeper of great importance to very many states, so much so that many governments have few de facto political options but to join this regime. These factors are exacerbated by the dynamic development of many treaties, including those enforced by the WTO system. Philippe Sands expresses the point thus:

> [T]he rules, once adopted, take on a logic and a life of their own. They do not stay within the neat boundaries that states thought they were creating when they were negotiated. You can see that most clearly in the rules on free trade and foreign investment.[28]

The upshot is that while states remain the primary political organizations of our global order, this does not detract from the claim that the GBS in principle can be subject to principles of global distributive justice. Its impact on individuals is sufficiently similar in kind to that of domestic basic structures. If the WTO system is part of the global basic structure, it may thus be subject to such normative assessment.

[27] M. Risse, 'How Does the Global Order Harm the Poor?', *Philosophy and Public Affairs* 33 (2005), 349–376, 356–79.
[28] P. Sands, *Lawless World* (London: Allen Lane, 2005), p. 8.

3 There is a Global Basic Structure – but the WTO is not part of it

This section explores and rejects the claim that the WTO system is somehow 'outside' the scope of the GBS and hence beyond the domain to be assessed by principles of global distributive justice. The upshot is that the WTO system should be assessed according to how well it contributes to promote and maintain global distributive justice.

Some authors may agree that there is a GBS whose distributive justice may be assessed, but deny that international trade agreements and their bodies are part of it. Such a claim might seem to support various attempts to insulate the WTO system from normative criticism, e.g. defending the position that

> WTO Members remain responsible and liable for their human rights violations, but their responsibility cannot be pursued or enforced before WTO adjudicating bodies… In situations of conflict between the system of human rights law and that of WTO law, it may be best considered as a matter for states to decide, rather than for WTO adjudicating bodies.[29]

Consider one line of defence of this position:

> International trade law is founded on the primary value of promoting individual economic exchanges, about the value of specialization and the economic welfare that results from specialization and exchange. Rather than focusing on the independence of States, international trade law highlights the concept of interdependence. In fact, when we talk of international trade law and of international law we are dealing with two regimes, with two systems that in quite a fundamental way are talking about different things.[30]

[29] Expressed in – though not necessarily shared by – G. Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, 13 (2002), 753–814, 814.
[30] D. McRae, 'The Contribution of International Trade Law to the Development of International Law', *Recuil des Cours*, 260 (1996), 116–17.

One defence of this view may hold that just as the law of contract regulating voluntary agreements is outside the domestic BS, voluntary international trade agreements are not part of the GBS. However, two rebuttals are appropriate.

Firstly, one may deny the first premise and argue that the domestic law of contract *is* part of the BS, because it is

> a perfect fit for the institutional division of labour Rawls has in mind, as it "allows us to abstract from the enormous complexities of the innumerable transactions of daily life and frees us from having to keep track of the changing relative positions of particular individuals."[31]

Secondly, the arguments canvassed above entail that the WTO system has an impact that merits inclusion in the GBS. The treaties enforced by the WTO system provide precisely such background structures that have a large distributive impact:

> If leaving certain areas of interaction unregulated will heavily distort the 'division of advantages that arises from social cooperation over time', there is a case for saying that some phenomena are not, but ought to be, regulated or at least shaped and informed by the influence of the basic structure. Consider, for instance, the case of international agreements and 'chosen behaviour' between global actors.[32]

The upshot is that the WTO system is part of the GBS, the distributive impact of which should be assessed by appropriate principles of global distributive justice.

We now turn to consider implications for how the design and decisions of the WTO mechanism may be guided by such principles of justice.

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[31] J. Klijnsma, 'Contract Law as Fairness' *Ratio Juris* 28, (2012), 68-88,p. 77 , citing J. Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001), p. 51.

[32] M. Ronzoni, 'Two Concepts of Basic Structure, and Their Relevance to Global Justice', *Global Justice: Theory Practice Rhetoric*, 1 (2008), 68–85, 80.

4 How should principles of global distributive justice apply to the WTO System?

Considerations of global distributive justice should be brought to bear on the WTO system, but how, and by whom? The masters of the treaties must clearly take responsibility to ensure that these treaties satisfy or promote principles of distributive justice. The difficulties of formal treaty change may also require other actors to heed such principles, including judges and panel members with some discretion. Such good faith efforts to realize principles of distributive justice within institutions that are parts of the GBS face several challenges. Consider three forms of 'underdetermination' by principles of (global) distributive justice.

Firstly, the normative tradition of political philosophy presented above argues about standards for the *comparative assessment of alternative sets of institutions and practices*. Thus the claim that the present GBS is unjust implies that there could be another, stable GBS that would be less unjust, e.g. one with other rules upheld by the WTO system. Such counterfactual statements are problematic in general, and especially in these cases. Consider that while suffering endured under the present GBS may be massive, this GBS may still be better than any politically and practically feasible alternative. Against this 'Panglossian' objection, some hold firstly that counterfactuals are no more problematic for normative arguments than e.g. in economics. Moreover, changes in certain features of the GBS would arguably be very likely to improve the situation for some without engendering worse outcomes for others. Such suggestions might include to remove rich and powerful states' current ability to protect their markets from developing countries' products.[33] Critics may still maintain that our conditions of complex interdependence make it very difficult to discern which changes to the present regimes would plausibly make for a more just

[33] T. W. Pogge, 'The Role of International Law in Reproducing Massive Poverty', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 417–436.

system.[34]

A second underdetermination stems from the broad subject matter of a GBS. Principles of distributive justice do not on their own indicate which of several possible changes should be undertaken to enhance the distributive justice of the GBS. Quite different alternative changes to the GBS may be equal from the point of view of justice, as long as the effects render the system as a whole more just to the same extent. Philosophical considerations on their own neither aspire to nor can overcome a 'limited knowledge of remedies'.[35] To illustrate, consider two very different changes to the GBS. The WTO system could remove tariffs for agricultural products from the least developing countries, or appropriate international bodies could impose a tax on financial transactions to the benefit of developing countries.[36] If either of these very different alternative changes improve the distributive justice of the GBS overall, the normative theory does not indicate which change should occur. Indeed, Ratner observes that:

> perhaps trade law is not the proper place to fix the problems of global poverty or deprivations of basic human rights of the economic kind. Rather, other measures, for example more development assistance outside the trade context, or sanctions against violators, would be more efficient (economically) or effective (politically).[37]

Such underdetermination is especially unfortunate when seeking to alleviate present injustice, where each sub-optimal alternative entails difficult trade-offs and continued injustice inflicting harm on some.[38] In response, I submit that it is no

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[34] R. L. Howse & R. Teitel, 'Global Justice, Poverty and the International Economic Order', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010), p. 437–449.
[35] J. P. Trachtman, 'Doing Justice: The Economics and Politics of International Distributive Justice', in Chi Carmody, et al. (eds.), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge: Cambridge University Press, 2012), p. 273–286, 273, 277.
[36] J. M. Keynes, *The General Theory of Employment, Interest, and Money* (San Diego: Harcourt Brace Jovanovich, 1953), 147-164; J. Tobin, 'A Proposal for International Monetary Reform', *Eastern economic journal* 4 (1978), 153-159.
[37] S. R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015), p. 346.
[38] Ronzoni, Two Concepts, 83.

objection that normative political philosophy on its own underdetermines alternatives. This rather underscores the need for multi-disciplinary insights concerning empirical impact and feasibility, to inform political prudence and democratic decision-making about which improvements to implement.

For our purposes, an important, third form of underdetermination stems from the loose links between institutions and the particular practices that they engender. The same formal set of legal rules and allocation of legal powers to various bodies may contribute to widely diverse sets of actual practices.

In particular, the same rules for market transaction and property may be used by actors to yield strikingly different patterns of final distributions of material goods and services. We return to this below; note here that this is a challenge to the normative theories' apparent focus on sets of institutions regarded as formal rules. The BS or the GBS might be assessed by counterfactual assessment of which practices they are most likely to give rise to, or by counterfactual assessment of which of them are most likely to avoid the normatively worst distribution.

A further, related challenge is that it sometimes is difficult to maintain a strict distinction between background structure and decisions by actors who manoeuvre against that backdrop. In particular, for our topic it is important to keep in mind that treaties are often less precise than domestic legislation, leaving international courts and tribunals more interpretative discretion than their domestic counterparts. Thus the DSM of the WTO system is unavoidably required to engage in treaty interpretation. And 'dynamic' treaty interpretation also becomes more necessary over time to adjust to changing circumstances, especially when sufficient consensus about treaty change is difficult to secure.

The combination of these forms of underdetermination cautions against reliance only on normative arguments in favour of particular reform proposals: such proposals would also need to be supported by arguments that such proposals are required, politically more feasible, etc. Thus Robert Howse and Ruti Teitel observe against Thomas Pogge's concrete suggestions for WTO reform that

> the effects of rules are not really *foreseeable* without considering how they are interpreted and by whom, and so this is an issue that is crucial to the very argument that Pogge makes in his essay.[39]

Presumably, Howse and Teitel would agree that different rules do affect the discretionary space for interpretation – otherwise it is difficult to explain why states mistakenly spend resources negotiating treaty texts. This caveat notwithstanding, they seem correct in noting that

> the TRIPs agreement, which contains significant limitation or balancing clauses, need not have negative effects on the well-being of people in poor countries. However, certain narrow developed country interests managed to largely capture the interpretative space with respect to TRIPs.... it is far from clear that more poverty would be eliminated through these new rules, given existing interpretative practices, than would be eliminated through changing the interpretative practices and culture surrounding the existing rules, and especially integrating existing positive international human rights law into the interpretation of the economic rules.[40]

In partial response, note that the GBS as defined here includes not only institutions, but also rules and practices that shape actors' expectations and plans.[41] Thus the GBS includes not only treaty texts, but also established practices of authoritative interpretation. The justice of 'trade law' cannot be assessed independently of how it is interpreted and applied. To illustrate: Ratner observes that some criticisms against international trade law are overdrawn, since

> the actual workings of the law undercut simple conclusions regarding trade law's justice. Trade law can be interpreted to deny a state policy space to protect human rights, but on two core issues – conflict diamonds and HIV

[39] , Howse and Teitel Global justice, 446–47.
[40] *Ibid.*, 447.
[41] T. W. Pogge, 'The Role of International Law in Reproducing Massive Poverty', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 417–436, 417.

medicines – states avoided a direct conflict.[42]

This has at least two implications for discussions about the justice of the WTO system and strategies to render the international courts and tribunals more just. On the one hand, the 'good news' may be that treaty changes may not be required, insofar as the outcomes also depend on interpretation of the written rules. On the other hand, insofar as much hinges on interpretation and discretion, the risks remain. The bad news is that just outcomes appears to depend completely on the goodwill of the interpreters: 'The decision-makers will need to accept the priority of basic human rights in their interpretations of the texts.'[43]

What conclusions may be drawn from these various forms of underdetermination for strategies to reduce any present injustice of the WTO system? For our purposes, two modest premises seem plausible to draw on.

Firstly, other things equal, changes should be *incremental* rather than drastic. A risk of this prudential approach is certainly that abhorrent institutions are kept with only cosmetic improvements – resulting in piecemeal 'local' improvements at the cost of forsaking 'global' improvements.[44] However, the effects of large scale or revolutionary changes to a BS and a GBS are extremely difficult to predict.

Secondly, we might prefer that new institutions or practices should be such that they can remain in place also under later reforms, rather than be temporary arrangements that must later be dismantled. Such strategies may better promote stability and predictability.

5 Four paths of changes to interpretation of the WTO System

One conclusion from these forms of underdetermination is that the distributive justice of the GBS, and of the WTO system in particular, might not require drastic changes to

[42] Ratner,The thin theory, 347.
[43] *Ibid*., 337.
[44] E. J. Elster, 'Arguments for Constitutional Choice: Reflections on the Transition to Socialism', in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), p. 303–326, 306.

the rules of the system. Such drastic changes appear neither required nor effective. This is not to deny that other important relevant normative standards may counsel more thorough-going reforms, such as standards of international rule of law, or transparency may require very different procedures for selection of panel members. The concern in the present discussion is limited to the requirements of global distributive justice.

It would appear very difficult to secure the requisite consensus among the states for treaty changes to explicitly include reference to standards of global distributive justice or international obligations pertaining to minimum human rights. However, several authors note that there is wide room for interpreting trade treaties and agreements when the judges and arbitrators are engaged in dispute resolution. This may improve the distributive justice of the WTO system drastically.

To exemplify some such changes to the interpretative practices of judges and panel members, the following section sketches some of the interpretative practices that the WTO DSM might develop more fully. The claim is not that such interpretational shifts are likely to occur, but that the DSM has a wide scope of discretion. Four interrelated features show how trade dispute resolution bodies have engaged in systemic interpretation to include a variety of international law sources, and that this practice may also come to include further considerations of distributive justice and human rights concerns. The four features are those indicated by the editors in their introduction, albeit in a different order. Some final reflections consider how the judges and arbitrators may be moved or nudged toward such changes.

5.1 Authority to specify the contents of non-trade exemption clauses

Several treaties allow states derogations, e.g. on the basis of emergencies, public order, etc. Similarly, the General Agreement on Tariffs and Trade (GATT)[45] and the General

[45] 'GATT – General Agreement on Tariffs and Trade' *https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf* (1994).

Agreement on Trade in Services (GATS)[46] allow states to act on such concerns. GATT Article XX and GATS XIV on General Exceptions lay out several specific instances where members may be exempted from GATT or GATS rules – as long as 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (GATT XX).

Exceptions are allowed if necessary to protect 'public morals' as it is stated in the treaty[47]– and this has been interpreted to include concerns about seal welfare;[48] to protect human, animal or plant life or health;[49] or to conserve exhaustible natural resources.[50] GATS has similar clauses.[51] Several authors argue that these exemptions should include international human rights law.[52]

The burden of argument for states defending an exemption varies among the international courts and tribunals. There is some disagreement as to how much discretion states enjoy when claiming the right to derogate, but the Panel adjudicating *China-Audio-visual Products* acknowledged some 'margin of appreciation' to the Member State to apply the term 'public morals' 'according to their own systems and scales of values'.[53] As regards moral or cultural factors, or precautionary measures, several international courts and tribunals have a low standard of proof; an example is the EFTA Court case on the Norwegian monopoly on gaming machines[54] and the *Philip*

[46] 'General Agreement on Trade in Services – GATS'.
[47] GATT XX:a.
[48] Ec – Seal Products, (Appellate body); A. E. Appleton, 'PILl and IEl: Will Seal Deaths Resurrect the Dream of International Legal Coherence?', *Questions of International Law*, 1 (2014), http://www.qil-qdi.org/pil-iel-will-seal-deaths-resurrect-dream-international-legal-coherence/
[49] GATT XX:b.
[50] GATT XX:g.
[51] GATS XIVa.
[52] S. H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', *Journal of international economic law*, 5 (2002), 162–63; Petersmann, Time for 'Global Compact' , 625; M. J. Trebilcock and R. L. Howse, 'Trade Policy and Labour Standards', *Minnesota Journal of Global Trade*, 14 (2005), 261-; further references in M. Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine', *The Yale Journal of International Law*, 33 (2008), 215–251.
[53] Panel Report, China – Publications and Audiovisual Products, WT/DS363/R and Corr.1 adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261, para. 7.759; ref Marceau and Reto.
[54] Case E-1/06, *EFTA Surveillance Authority* v. *Norway* [2007] EFTA Court Report 8, paragraphs 29 and 51.

Morris case.[55] The EFTA Court refrains from detailed review about the plausibility of benefits to morals or health from national measures.[56]

Some argue that the WTO judges do and should defer on the basis of the principle *dubio mitius* which

> requires that where there are two plausible approaches to the interpretation of a treaty provision, the treaty interpreter adopt the interpretation that is less restrictive of the sovereignty of the state or states undertaking the obligation in question.[57]

The WTO panels may hitherto be less willing to defer to states' defences, but this is a matter of interpretation of the treaties, and could change without requiring a treaty change.

As to the application of the exemption clauses of GATT XX, the AB has relied on a 'principle of effectiveness' to grant WTO Members the right to invoke non-trade concerns, as 'equal in value and importance to the market access rights of WTO Members'.[58] The domain of exemptions seems underspecified, and the AB appears to allow states great discretion about the objectives they appeal to. For instance, it would not seem to require a change in the treaty text for the AB to allow 'public morals' to include international human rights obligations or global distributive justice norms which are widely shared among states – e.g. as expressed in the Millennium Development Goals, or in core labour standards.

5.2 Evolutionary interpretation

The ICTs enjoy little *de jure* authority to engage in dynamic or evolutive interpretation beyond that stated by the object and purpose of the treaty.[59] To the contrary, the Marrakesh Agreement insists that the political organs (Ministerial Conference and

[55] Ref Case E-16/10, *Philip Morris* [2011] EFTA Court Report 330, paragraph 82. [Ref to chapter in this volume].
[56] [ref in this volume xxx]
[57] Trebilcock and Howse,Trade policy, 261.
[58] [ref to a contribution to the volume –].
[59] United Nations, Vienna Convention on the Law of Treaties United Nations Treaty Series, vol. 1155, p. 331, 1969), Art 31.1 and 31.3.c.

General Council) retain the power of authoritative interpretation of the WTO covered agreements.[60]

As a matter of actual practice, the WTO panels have allowed *amicus* submissions without any bases in the relevant treaties. While there may be a grey area between specification of a treaty norm and evolutionary interpretation, many scholars point to several cases as evidence of evolutionary interpretation by WTO bodies, starting with how 'exhaustible natural resources' was defined in *US Shrimp* to include endangered species.[61]

One way such dynamic interpretation may occur is through perceived consensus among states. Thus the AB members appear to rely on such perceptions in some decisions:

> the dicta in Korea—Beef — stating that the more state measures are designed to pursue 'common interests or values' ('rather than narrow national interests)', the more likely they will be accepted by the AB as necessary to achieve state objectives under article XX — are now routinely cited and its terms debated throughout the proceedings.[62]

One source of such consensus may be the 'common constitutional traditions' of the member states. In the European region, the Court of Justice of the European Union, the EFTA Court and the European Court of Human Rights invoke constitutional and other traditions common to the member states to interpret – dynamically – human rights norms.[63] The Canadian Supreme Court has stated that values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review'[64] – even unimplemented treaties.[65] Some human

[60] The Marrakesh Agreement Establishing the World Trade Organization.
[61] (Marceau and Reto, this volume).
[62] A. Stone Sweet and T. L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization', *Journal of law and courts*, 1 (2013), 61–88, 85.
[63] A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press, 2004).
[64] Baker, ref contribution to this volume.
[65] in Baker ref contribution to this volume..

rights treaties that enjoy very close to universal state consent may be taken to express such a consensus, arguably appropriate for the GATT exception clauses.[66]

As for standards of distributive justice, universal consensus is currently less plausible. At the regional level, possible sources may include EU treaties that commit the member states to 'economic, social and territorial cohesion, and solidarity among Member States'. [67]

5.3 Increased significance of case law

One significant shift not only in its interpretational tradition but in the role of the WTO system is due to the development of a tradition of precedent, which is not mentioned in the founding WTO documents. The role of the panels and the AB has for a long time gone beyond primarily adjudicating individual cases by applying rules in single disputes, in the direction of becoming mechanisms that shape and stabilize the actors' expectations by making rules. Such developments are widely recognized, and one might argue that the system should also explicitly acknowledge that the AB is in fact creating law. Such statements may contribute to increase the appropriate discussions about the legitimacy of the AB. This function is strictly speaking beyond the immediate objectives the parties may have had in setting up the WTO system, yet merits detailed study and assessment.[68] Note that such a movement also leads the WTO panels and the AB in particular to take a more 'constitutional' perspective, in the sense of considering the longer term effects of one-shot decisions, and the division of labour among them and other institutions and actors. Such a constitutional turn may increase the salience among the AB members of human rights constraints and considerations of global distributive justice – and may increase the pressure on the AB by NGOs to

[66] Office of the United Nations High Commissioner for Human Rights, 'Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights', *HR/PUB/05/5* (2005).
[67] European Council, 'Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007', *Official Journal of the European Union*, 50 (2007), , Art. 3.
[68] US-Wool Shirts and Blouses – Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R and Corr.1. adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323. Ref to other contribution in the volume?

do so.

Such developments toward a practice of stabilizing norms have occurred – to some extent – as regards the consideration of environmental concerns. Similar developments may arise as regards human rights or other global distributive justice issues.[69] Note that this is just intended as an example of a change that *may* give more room for considerations of human rights or global distributive justice; precedents may also emerge that are completely dismissive of such concerns.

5.4 Systemic interpretation

The WTO system may develop a more consistent practice for how to include other treaties in the interpretation. Art. 3.2 of the DSU holds that the recommendations and rulings of the Dispute Settlement Bodies – presumably including the interpretations – cannot add to or diminish the rights and obligations of the WTO Members provided in the WTO covered agreements. However, a completely insular interpretational practice of WTO law as a 'self-contained regime' has never been maintained. Thus the AB maintained that WTO covered agreements cannot be interpreted 'in clinical isolation from public international law'.[70] Many scholars note that there is pressure on the WTO mechanism toward more systemic interpretation to incorporate international public law.[71] Several argue that there are no formal hindrances against this, though its scope is contested. Some thus hold that the WTO covered agreements should be interpreted in accordance with international human rights law:

> a good faith interpretation of the provisions of the WTO, including its exception provisions, should lead to a reading and application of WTO law consistent with human rights. The recent Doha Declaration on TRIPS and Public Health is a good example of such a possible coherent reading of WTO provisions taking

[69] (ref to other contribution in this volume?).
[70] US — Gasoline, p. 17, DSR 1996:I, p. 3 at 16 (WT/DS2/AB/R).
[71] S. Hindelang and M. Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press, 2016).

into account potentially relevant human rights law.[72]

Similarly, Margot Salomon and others argue that present international human rights law – including protections against abject poverty – has implications for interpreting and applying international economic law.[73] This is not to deny that such more expansive attempts by members of a WTO body to include human rights considerations or other concerns of global distributive justice may violate current interpretations of WTO rules. The point is rather that there seems to be room for changes in these interpretations.

These sketches of four paths of changes to interpretational practices of ICTs have had a limited objective, namely to indicate how such shifts may include much – if not all – of what global distributive justice may require.

Note that several of these changes may be characterized as 'constitutionalization' of international trade law, in that they nudge the arbitrators and members of the AB to consider their particular judgments as important but limited parts of a Global Basic Structure, with precedential effects, based on systemic and evolutionary interpretations. This is not to argue that the four paths imply that the WTO system should be 'constitutionalized' in whatever way possible. Several scholars point out that such developments risk that private economic interests are given priority over other more weighty societal concerns. Moreover, neither the panels nor the AB are selected or well-positioned to address all such conflicts.[74] Rather, the upshot is that formal treaty reforms may not be what global distributive justice requires, but rather changes in interpretive practices by the WTO system.

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[72] Marceau, WTO Dispute Settlement, 753; cf Appleton, PIL and IEL.

[73] M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2008); R. G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011); K. N. Schefer, (ed) *Poverty and the International Economic Legal System: Duties to the World's Poor* , (Cambridge: Cambridge University Press, 2013).

[74] R. L. Howse & C. Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?', *Governance*, 16 (2003), 73-94; A. v. Bogdandy, 'Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship', in J. A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (Dordrecht: Kluwer, 2001), p. 609–674.

Are such changes in interpretative practices possible, and if so what might be suitable strategies? In conclusion, I indicate some examples drawing on the comparisons available in this volume to illustrate how such changes may come about.

6 How might desirable interpretational changes come about?

In conclusion, some lessons might be gathered about how to promote the appropriate 'judicial ethos' among the panellists and AB members of the WTO system, so that they include considerations of human rights and global distributive justice in their interpretational practice.

Two background observations are relevant. Firstly, it has been a long-standing concern that ad hoc judges (and thus ad hoc panels) are more likely than permanent courts or tribunals to be partial to the state that appoints them.[75] Thus permanent courts may be expected to give more consideration to the longer term effects and indirect effects of their judgments beyond the particular case. They may be somewhat more likely to take on such 'constitutional' perspectives, including attention to their impact on the expectations of the parties, the value of predictability and their need to maintain social legitimacy under conditions of complex interdependence on other actors including treaty bodies, states, domestic courts and NGOs. Thus the AB members may be more appropriate subjects for such considerations than WTO panel members, who may in turn be guided by the practices of the AB.

Secondly, several observers note that some of these shifts – toward precedent, systemic interpretation, etc. – involve a trade-off in support for the WTO system from the 'insiders' to the particular dispute to the 'outsiders' – including other parties, both potential litigants and the general public. Thus xx notes that

> The WTO-DSM bodies seem to have enhanced the legitimacy of their decisions for the insiders (WTO Members) by grounding the decisions in the text of the

[75] Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. 233; cited by M. S. McDougal, et al., *The Interpretation of International Agreements and World Public Order* (New Haven: New Haven Press, 1994), p. 358.

treaty, as the text gives way to the intentions of the Parties, but the same approach has drawn flak from the outsiders on account of not being as integrative as envisaged by the VCLT.[76]

These findings suggest that strategies to change interpretative practices should seek to enhance the self-perception of AB members and panel arbitrators as being part of a profession with a constitutional perspective. Furthermore, it is strategically important that AB members' and panel arbitrators' are aware of how third parties perceive the legitimacy of the AB and panels.

Consider two ways to increase the ICTs' concern to maintain their social legitimacy among third parties to the particular disputes they address, by modifying their interpretational practices so as to incorporate more concerns about global distributive justice.

6.1 Solange judgments on behalf of international human rights and distributive justice

One strategy for reforming interpretational practices may be a particular form of *judicial 'dialogue'*, by which other courts and tribunals, domestic, regional or international, exercise pressure on the WTO system. An example as regards human rights may be found in the European Union: the German Constitutional Court made clear in several 'Solange' judgments that its deference to the European Court of Justice (ECJ, now the Court of Justice of the European Union) was contingent upon the ECJ's respect for human rights.[77] The ECJ responded *inter alia* by a dynamic interpretation of the EU treaties, so as to include human rights into the EU treaties. Similar strategies may be contemplated by other domestic, regional and international courts and tribunals vis-à-vis the WTO system.

[76] [Ref to author in the volume]

[77] Bundesverfassungsgericht, 'Solange I: Internationale Handelsgesellschaft v. Einfuhr Und Vorratsstelle Für Getreide Und Futtermittel' *BVerfGE 37, 271* (1974); Bundesverfassungsgericht, 'Solange II: Wuensche Handelsgesellschaft' (1986); J. Frowein, 'Solange Ii', *Common Market Law Review*, 25 (1988), 201.

6.2 Public pressure

Several scholars have noted that international courts and tribunals are sensitive to informal pressure from third parties, such as NGOs and civil society more broadly. Thus Jagdish Bhagwati was (unpleasantly) astounded

> that the appellate court, in effect, reversed long-standing jurisprudence on process and production methods in the Shrimp/Turtle case. I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.[78]

As Bhagwati claimed, there is of course no reason to believe that such pressure will always be toward normatively preferable changes. Not all civil society bodies are particularly civil, responsive to all affected parties or particularly prescient. Those risks notwithstanding, one intriguing research challenge is to understand better why and how individual judges and arbitrators in general, and in the WTO system in particular, may be affected by public 'diffuse' support or lack thereof.

Conclusion

Several authors, civil society organizations and states criticize the 'global basic structure' – our tangled web of domestic and international institutions, rules and practices – as drastically unjust. The WTO system is often singled out as a major culprit, since their rulings serve to maintain such distributive injustice. This chapter offers some support for this diagnosis, in particular rebutting claims that the WTO system should be exempt from criticisms that it promotes global injustice. The chapter also counsels a more cautious assessment of possible prescriptions than several critics have promoted. Improvements must heed several challenges, in particular that normative standards underdetermine reform proposals, suggesting that broad scale

[78] J. Bhagwati, 'After Seattle: Free Trade and the WTO', in Roger Porter, Pierre Sauve, Arvind Subramanian, Americo Zampetti, (eds.), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium* (Washington DC: Brookings Institution Press, 2001), p. 225.

reforms may be not possible, effective or necessary. The final sections of the chapter thus explored ways that the existing WTO system may become more just by developing the interpretive standards of the members of the AB and the panel members in one or more of four ways. This neither assumes nor entails that there are no, or should not be any, limits to interpretative practices. But the legitimate limits of such practices for the WTO system remain to be determined. The chapter contributes to normative political theory by insisting on the need to understand better the importance of interpretive practices of judges and arbitrators; and to research on the international judiciary by pointing out where and how normative considerations already affect the legal practice.

This is not to ignore warnings that the members of the AB and panels of the WTO system may be ill-equipped to promote global distributive justice. They may lack a clear sense of the implications of such decisions and their precedential effects. There may be little reason to believe that they can assess overall impact, and identify how to best adjust.[79] It is also important to insist that there are several ways to secure more harmony among the treaties, where some may be worse than the present fragmentation.[80] However, the members of panels and the AB cannot refrain from interpretation: that is not an alternative. And given the nature of the state system, it is not clear that any other institutions are better situated than our current crop of international courts, tribunals and adjudicative bodies to move toward a less unjust world order.

The judges and members of these treaty bodies have the legal authority to interpret the existing rules, and cannot avoid interpreting – in ways that are informed by, or which support, some such considerations. Three contributions of scholarship may be to firstly remind them of that responsibility. Secondly, scholars may remind

[79] R. L. Howse and R. Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', *Global Policy Journal*, 1 (2010), 127-136..

[80] J. Alvarez, 'How Not to Link: Instututional Conundrums of an Expanded Trade Regime', *Widener Law Symposium Journal*, 7 (2001), 1-20; J. Alvarez, 'Beware Boundary Crossing', in T. Kahana and A. Scolnicov (eds.), *Boundaries of Rights, Boundaries of State* (Cambridge: Cambridge University Press) 2016 - to appear.

members of the WTO mechanism that to ignore the distributive consequences of their decisions is also to rely on normative theories of distributive justice:

> Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.[81]

Thirdly, faced with the fact that some principles of global distributive justice are vague and contested, one lesson may still be that in this as in many other matters, '[i]t is better to be vaguely right than exactly wrong'.[82]

[81] Keynes, 383.
[82] C. Read, *Logic: Deductive and Inductive* (London: Simpkin, Marshall, Hamilton, Kent & Co, 1914), 272