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International Trade Law: Free Trade, Fair Trade, and Trade in Stolen Goods

In 2018, the value of international trade in goods and services was more than 25 trillion US dollars.[1] This was a 3 percent increase over the previous year, and marked the eighth straight year in which the value of international trade had increased. While the United States, China, and several European countries remained the world's leading traders, developing economies had a 44 percent share in world merchandise trade, and a 34 percent share of world trade in commercial services. Although it contributes a smaller share to most countries' economies than does domestic exchanges of goods and services, international trade directly impacts the lives of hundreds of millions of people around the world in significant ways, and indirectly shapes the lives of billions more.

International trade is governed by international legal rules set out in hundreds of agreements between states. The most well-known of these is the Marrakesh agreement establishing the World Trade Organization (WTO), and the various Annexes to which the WTO's member states have subsequently agreed. As of 2019, only sixteen countries remain outside the WTO agreement, most of which are either small island countries or entities that are not universally recognized as states. Other important multilateral (i.e., multistate) trade agreements include the North American Free Trade Agreement (recently superseded by the US–Mexico-Canada Agreement), the European Union, the Southern Common Market (or Mercosur), the ASEAN Free Trade Area, and recently, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Many countries are also party to multiple bilateral trade agreements, such as the Australia–United States Free Trade Agreement, the Comprehensive Economic and Trade Agreement between Canada and the EU, and the China–Peru Free Trade Agreement.

Our concern in this chapter is with the moral justifiability of the legal rules governing the exchange of goods and services across international borders set out in agreements like those listed above. We begin in section I with the economic

[1] The data presented in this paragraph comes from the World Trade Organization's *World Trade Statistical Review* 2019, available at www.wto.org/english/res_e/statis_e/wts2019_e/wts19_toc_e.htm (last accessed December 6, 2019).

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argument for free trade, namely, that the elimination of barriers to international trade such as tariffs or import quotas facilitates the efficient use of natural and human resources. In section II, we consider three moral arguments for free trade: (1) by increasing the rate of economic growth, free trade contributes to the goal of maximizing aggregate or total human welfare; (2) free trade provides an especially effective mechanism for assisting those living in multidimensional poverty to escape it; and (3) free trade follows from our duty to respect individual freedom, and in particular, individuals' rights to property and freedom of contract. Moral arguments for constraints on cross-border trade are the subject of section III. Specifically, we examine whether either permissible partiality to compatriots or considerations of fairness require states to restrict or place conditions on international trade. We conclude in section IV by considering the claim that as citizens of states that import oil and other natural resources from countries ruled by tyrants, and as consumers of those resources, we facilitate and engage in trade in stolen goods.

I THE ECONOMIC ARGUMENT FOR TRADE

Why should states engage in trade, and so, all else equal, eliminate or forbear from erecting barriers to doing so? For example, why should a state that currently imposes a high tariff on manufactured goods such as cars and computers, or on agricultural products such as soy beans and shrimp, reduce or eliminate those tariffs, or maintain a low- or no-tariff policy if it already has one? The most common answer is that by doing so the state will achieve a higher rate of economic growth than it will if it maintains or adopts more protectionist measures, that is, laws or policies that make economic exchanges across international borders costlier. In other words, by encouraging international trade a state will make itself richer than it will become if it adopts less trade-friendly laws and policies. This is so because international trade enables a society to generate more value from its limited natural and human resources, or what is the same, to use those resources more efficiently.

Most importantly, international trade facilitates production in accordance with each society's comparative advantage. Suppose state A produces both computers and cars for consumption in its domestic market, but that it does better at building the former than the latter. Trade with other states enables state A to generate more value from its limited resources by importing those goods it produces less efficiently, while focusing on producing those goods it can manufacture more efficiently. The more state A can shift its productive resources to manufacturing computers, while still meeting domestic demand for cars, the more value it will generate from the use of those resources. This is true even if state A is better at producing both computers and cars than is any other state. The comparison in comparative advantage is not between states but between the different productive activities a single state may undertake. The point is really a simple one. As much as possible, states should seek to engage in those activities that generate the most value. Insofar as trade with other

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states allows them to shift some of their resources from less productive to more productive activities, trade makes them richer.

International trade spurs economic growth in myriad other ways as well. For instance, it often makes possible greater division of labor, economies of scale, and specialization than can be achieved within a single state. As a consequence, the cost of products drops and/or their quality (and so their value) increases. Moreover, the efficiency gains produced by the division of labor, economies of scale, and specialization free up resources that can be put to other uses. Oftentimes, international trade enhances competition in domestic markets, particularly in states with smaller economies where the size of the domestic market favors the emergence of monopoly or oligopoly. Finally, international trade facilitates innovation by rapidly disseminating new ideas and, through greater competition, strengthening producers' incentives to improve their existing products and to create new ones.

On its face, then, the case for free trade seems quite compelling. Trade enables a state to generate more value from its limited resources, and so grow richer. Yet resistance to lowering barriers to trade, or calls to raise them higher, comes from many quarters. Consider, first, those who argue that under the right conditions a state can actually do better at growing its economy by adopting certain protectionist measures than if it embraces free trade. For example, under certain conditions state A may be able to improve its terms of trade with state B by raising an existing tariff or imposing a new one on imports from the latter. These conditions include state B not retaliating by raising an existing tariff or imposing a new one on goods it imports from state A, the tariff not resulting in decreases in the efficiency of state A's use of its resources that exceed the income gains produced by paying for fewer imports from state B, and consumers in state A not simply substituting products imported from state C for the now more expensive goods produced in state B. Still, at least in theory, a tariff that reduces imports without too much impact on exports or the efficient use of domestic resources will make a state richer than if it goes without that tariff, and so sends more money to other states to pay for the larger amount of goods it imports from them.

Likewise, as a matter of economic theory infant industry protections serve to maximize a state's national income over the medium to long term. For instance, high tariffs on computers may allow domestic computer manufacturers the time to gain the skills and size they need to compete with computer manufacturers located in other countries. Without the protected market tariffs provide, these domestic firms would not be able to compete with foreign manufacturers, and so would not remain in business long enough to become competitive in a relatively open market. Particularly where infant industry protection serves to move more of a country's labor force from low-productivity occupations such as farming small plots of land to higher-productivity occupations such as manufacturing, they provide a superior boost to economic growth than what would be achieved in their absence. As in the terms of trade example described above, however, the income-maximizing

argument for infant industry protection goes through only if certain conditions are met. Most importantly, those protections need to be removed once domestic producers have had time to grow to the point where they can compete with foreign producers.[2] If they are not, citizens of this state will lose out on the various gains from international trade described earlier. In concrete terms, the computers available to them will likely be inferior in quality and higher in price, which will result in lower productivity than would occur in the absence of those tariffs. Moreover, the production of domestic computers is likely to be less efficient, and indeed, the most efficient use of the country's resources may turn out not to involve computer manufacturing at all.

While conceding that in theory protectionist measures can sometimes be justifiable on income-maximizing grounds, advocates of free trade contend that this is rarely so in practice. Rather, attempts to impose tariffs or to use other measures to improve the terms of trade produce retaliatory measures or inefficient reallocation of domestic resources that make a state's economy smaller than it would have been in their absence. Similarly, domestic producers who have benefited from infant industry protections frequently work hard to preserve them long after the point where doing so produces a net benefit to the present and future citizens of their state.[3] From the standpoint of evaluating trade policies in terms of their impact on a state's economic growth, protectionist measures appear difficult to defend.[4]

A second, especially vocal, set of agents who advocate for protectionist measures are those individuals within a state who stand to lose from their elimination, or to gain if they are put in place. While lower barriers to trade in cars may allow state A to produce to its comparative advantage in computers, and so reap greater value in total from its limited resources, this policy will likely also produce job losses in the car-manufacturing sector (as well as financial loses for the owners of companies in this sector). Some of those workers may quickly find employment with computer-manufacturing companies, conveniently located where they currently live, and so end up no worse off. Others may end up employed by new companies, possibly in new industries, that exist only because state A is now using its limited resources more efficiently, thereby freeing up resources that can be put to other uses. And all may benefit from reductions in the price of computers and an improvement in their quality that comes from greater economies of scale in the computer manufacturing industry. Nevertheless, taking all of this into account some workers will still end up

[2] Indeed, the commitment to reduce or eliminate infant industry protections must be credible or domestic producers may have little incentive to take the steps necessary to become globally competitive.

[3] Some might argue that defenders of free trade are too quick to dismiss the possibility of designing rules and institutions that reduce these risks. Even if this is true, however, advocates of free trade are right to caution against too quick a move from theory to practice.

[4] Note that this conclusion does not rule out a defense of trade barriers on fairness grounds. It may be that some (risk of) reduction in economic growth is a cost we ought to bear in order to ensure that states or individuals are treated fairly. See the discussion in section III.

worse off than they would have been had the tariffs remained in place, and the same is true for some investors in the car-manufacturing sector. Even where this is not *actually* the case some workers and owners may *mistakenly believe* it is, because the benefits they receive from lower barriers to international trade are hard to identify and often realized in the future (for instance, only with the emergence of new industries) while the costs of a lost job are clear and immediate. Finally, many workers and owners view their jobs not merely as a means to satisfying material needs and desires but also as a central element of their identity and their conception of a good life. It is (almost) as much a part of their sense of who they are and what makes their life worthwhile as their familial roles as mothers, fathers, sisters, brothers, and so on, or their membership in a religious or political community. Where this is the case, many individuals may prefer the preservation of their jobs or companies over the prospect of a certain amount of material gain that will follow from reducing barriers to international trade. Taken together, these considerations provide strong incentives for people in import-competing industries to pressure political officeholders to create, maintain, or increase barriers to trade that make foreign firms less competitive in state A's domestic market. We will consider below whether these considerations ever *justify* protectionist measures. Here, our concern is simply to explain why some individuals support protectionist measures even though lower barriers to trade enable faster economic growth.

The fact that under the right conditions certain barriers to trade can make a state richer than it would otherwise be, as well as the presence of domestic interest groups that benefit from particular protectionist measures, explains why states enter into international trade agreements. Many political leaders recognize that international trade can be mutually beneficial – good for their own economy as well as for the economies of the states with whom they trade. But they also recognize that other states may be tempted to adopt protectionist measures, for either or both of the reasons noted above, and that other states have the same concern toward them. Thus, states need to provide one another with assurance that they will not adopt beggar-thy-neighbor trade policies; for example, that political leaders will not give in to demands for protection from domestic producers who fare worse in the market as a result of lowered barriers to competition. International trade agreements that create binding legal obligations on states help address this assurance problem. First, they enable political officeholders to respond to domestic pressure for protection from international competition by claiming that their hands are tied. While they may sympathize with the plight of those facing tougher competition as a result of freer trade, the law prevents them from responding with protectionist measures. But second, and perhaps more importantly, by reducing barriers to trade international agreements contribute to the growth of export industries whose workers and owners can be negatively affected by any protectionist measures other states impose in retaliation for state A raising barriers of its own. These workers and owners can, and often will, offer domestic support to political leaders who resist calls for

protectionism, or withdraw support from those who do not. In short, while the initial argument for free trade is an economic one premised on efficiency, the argument for trade agreements or treaties is a political one.[5]

The discussion in this section supports two conclusions. First, in general, states benefit by lowering barriers to international trade, at least in the sense that they grow richer in material terms than they would were they to retain or adopt protectionist measures. Second, international trade law, which is primarily the product of bilateral and multilateral international trade agreements, plays a crucial role in enabling states to reap the rewards of trade. It does so by providing them with assurance that their trading partners will not give in to the temptation to pursue beggar-thy-neighbor policies, or to sacrifice long-term gains for immediate political benefits. By themselves, however, these observations provide neither a moral justification for engaging in trade nor a specific moral standard (or standards) we can use to morally assess the arrangements set out in any particular trade agreement. Rather, we still need a moral argument demonstrating that reducing barriers to trade is morally permissible or perhaps even obligatory because of its contribution to economic growth, or as we shall see, because respect for individual autonomy demands it. In addition, we need to consider whether there are any moral considerations that qualify the pursuit of economic growth; for example, certain conditions it must satisfy, or constraints on the means we may adopt to advance this goal. It is to these tasks that we turn in the next three sections.

II THE MORAL ARGUMENT FOR TRADE

Some defenders of free (or freer) trade advocate for it on the grounds that it maximizes aggregate or total human welfare.[6] Consider two versions of this argument. The first defines human welfare in terms of preference satisfaction. Individuals are presumed to have preference rankings over outcomes, and to do better (in other words, enjoy greater welfare) when one of their higher ranked preferences is satisfied than when one of their lower ranked preferences is satisfied. For example, suppose I rank getting a free piece of pizza over having to pay $1 for a slice, and I rank paying $1 for a piece of pizza over going without pizza at all (but having one more dollar in my wallet). If you give me a piece of pizza for free, you will maximize my welfare. If you do not and I buy a piece of pizza for $1 instead, I will be

[5] The argument in the text also serves as a response to those who maintain that state A will often do best by reducing barriers to trade even when other states do not. While this may be true, the adoption of such a policy will often be political suicide, as those domestic actors harmed by such a policy will have an easy time making the case that other states are taking advantage of state A, and that state A needs leaders who will stand up for its citizens by adopting protectionist measures. International trade agreements reduce political leaders' vulnerability to losing office as a result of such arguments.

[6] This view is probably most common among economists, although often neither explicitly formulated nor defended. However, it has its defenders in other disciplines (including philosophy) and some economists reject it, typically in favor of the individual liberty/autonomy argument discussed below.

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less well off than I might have been, but still better off than if I have no opportunity to buy pizza and therefore go without it. Now, suppose that morally defensible laws and public policy, including those that regulate trade, ought to maximize human welfare. Given a preference satisfaction account of human welfare, trade law and policy are morally justifiable if and only if they maximally satisfy the preferences of those subject to (or affected by) it. Markets, or at least well-functioning markets, are especially well-suited to maximizing aggregate preference satisfaction; that is, to enabling many individuals to satisfy higher ranked preferences. Insofar as free trade improves the performance of markets in myriad ways as described in the previous section, it follows that international trade enhances preference satisfaction, and so better serves the goal of maximizing human welfare than does protectionism.

The second version of the aggregate welfare maximizing moral argument for free trade substitutes an objective account of human welfare for the subjective account of human welfare as preference satisfaction. On this account, human welfare is a matter of getting what is good for you and not merely what you happen to want. Put another way, it is a matter of enjoying those elements that make up a truly flourishing life for human beings, not leading whatever way of life you happen to desire.[7] Increased economic growth can promote human flourishing in many ways; for example, by enabling people to escape conditions that leave them vulnerable to disease and funding new research into cures for those illnesses people still suffer, or by expanding the available types of employment and entertainment as well as people's ability to pursue them. Given that free trade produces faster economic growth than occurs in the presence of barriers to trade, it can better serve the goal of maximizing objective human welfare than will the adoption of protectionism.[8]

Both versions of the aggregate welfare maximizing argument for free trade confront numerous objections, starting with the specific conceptions of human welfare they invoke. For example, critics of the preference satisfaction account argue that when people's preferences are the product of oppressive social practices their satisfaction does not provide a compelling account of what it is for a person's life to go well. People's preferences may also reflect false factual beliefs, in which case satisfying them may not provide people what they really want, meaning what they would desire were their preference ranking based on true factual beliefs.[9] In one sense, the objective account of human welfare fares better than the preference

[7] Of course, satisfying some of your desires and successfully pursuing certain projects you set for yourself may be among those elements that make up an objectively good human life. The key distinction is that on an objective account of human welfare the value of those things that contribute to a good life do not depend entirely, or in some cases at all, on whether they are valued by the person whose life it is.

[8] As we will discuss below, the success of both versions of the aggregate welfare maximizing argument for free trade may depend on the adoption of additional laws and policies that do not directly concern the international exchange of goods and services.

[9] For discussion of these and other objections to a preference satisfaction account of welfare, see Daniel M. Hausman and Michael S. McPherson, *Economic Analysis, Moral Philosophy, and Public Policy, 2nd Edition* (Cambridge: Cambridge University Press, 2006), pp. 118–29.

satisfaction account, since reflective people generally agree that wanting something does not always suffice to make it good for a person, and not wanting something does not necessarily entail that getting it adds nothing to a person's welfare. Still, there are plenty of disputes regarding the elements of an objectively good life for human beings, whether specific elements are necessary or sufficient for an objectively good life, and how important each element is in comparison to the others. These disputes make it harder to determine whether free (or freer) trade or specific protectionist measures better contribute to maximizing human welfare. Indeed, the contested nature of the good life is sometimes invoked to justify reliance on preference satisfaction when evaluating law and public policy. The argument is that these should be designed to maximize preference satisfaction not because the good life is getting what you want but because in general individuals are more likely to correctly identify what is truly good for them than are legislators or policymakers. How often and under what conditions this is true is a matter of serious debate, however, and any attempt to answer these questions may well depend on an objective account of human welfare, and so have to contend with all of the disputes that accompany it.

Many critics also reject the premise that morally defensible law and public policy should aim to maximize *total* welfare, without regard for the distribution of gains and losses in welfare among the state's citizens (or all those affected, which may include many noncitizens). In principle, the aggregate welfare maximizing argument justifies a trade policy or legal regime that produces fabulous lives for a few, while also leaving everyone else destitute, as long as the result is more welfare in total than would be achieved under any other policy or legal regime. This implication strikes many people as deeply problematic, and a sufficient reason to deny the moral relevance of gains or losses to *aggregate* welfare. Defenders of maximizing aggregate welfare counter that such a scenario is extremely unlikely. Indeed, given certain uncontroversial facts about human beings, such as the diminishing marginal utility that characterizes our consumption of any good, the goal of maximizing aggregate welfare is far more likely to justify laws and policies that produce a fairly egalitarian distribution of resources, and perhaps also opportunities. Some critics will remain unimpressed with this rejoinder, however, since it still denies that human beings enjoy a certain type of moral status that places significant *principled* limits on sacrificing the welfare of some to increase the welfare of others.

Setting aside this general dispute between consequentialists and nonconsequentialists, few challenge the claim that the aggregate welfare maximizing argument for free trade depends on how the gains from trade are distributed. Rather, disagreement centers on what follows from that observation. Advocates of free trade argue that aggregate welfare maximization is best achieved via a two-step process. First, a state should adopt laws and policies, including those that reduce or eliminate barriers to trade, that maximize the size of its economy. Second, it should adopt laws and policies that distribute the resources and opportunities its economy produces so

that they maximize the total welfare of its citizens (or, perhaps, all those affected by its laws and policies). In crafting the latter laws and policies, however, the state should be careful not to reduce economic growth. Put another way, a state should try to make its economic "pie" as big as possible, and then adopt policies that ensure the "pie" is distributed in such a way that it maximizes aggregate welfare. It should avoid policies that result in a smaller pie, and so leaves less to be distributed to its citizens, even if those policies ensure that some of its citizens will enjoy more pie than they would in the absence of those protectionist measures.

Thus, those who argue for free trade on aggregate welfare maximizing grounds may also defend redistributive domestic policies, including those that specifically target individuals made worse off as a result of international trade. These trade adjustment assistance (TAA) programs can include training in new skills, assistance in job searches, an extension of the duration during which workers are eligible for unemployment benefits, and supplementary payments to workers whose new jobs pay them less than their old ones. Much depends on the specifics of the program, however. Unsurprisingly, some advocates of free trade maintain that displaced workers will be far better served by reducing or eliminating domestic market-distorting practices such as occupational licensing or zoning laws that make housing in economically dynamic cities prohibitively expensive than they will be by trade adjustment assistance programs. Moreover, whatever domestic policy conclusions may be warranted as a matter of ideal theory, we still confront the question of what we ought to do in nonideal circumstances. Expanding trade adjustment assistance programs may be more politically feasible than reforming occupational licensing laws or zoning rules that severely limit residential development. Or, perhaps, if neither robust TAA measures nor domestic market-expanding measures are politically feasible, then certain protectionist measures that contribute directly or indirectly to a more egalitarian distribution of the gains from a slower growing economy could prove to be aggregate welfare maximizing. Regardless, two key points warrant emphasis. First, on the aggregate welfare-maximizing approach the justifiability of a law or policy depends on both immediate and more distant consequences, for example, on lower barriers to trade and domestic policies that shape how the gains from trade are distributed. Second, any conclusion depends heavily on empirical claims regarding how our natural and social worlds work, or could be made to work.

Even those who deny that morality requires that we attempt to maximize aggregate welfare typically accept more modest welfare-promoting duties, such as a duty to alleviate the suffering of those who live in multidimensional poverty, or who are at risk of falling into it.[10] Some defend this conclusion by appeal to basic moral rights, arguing that the weighty interests all human beings have in freedom from the

[10] As the name suggests, a multidimensional account conceives of poverty in terms of a set of deprivations, some of which are components of well-being and some of which are reliable and relatively easy to measure proxies for risks to human well-being. One common multidimensional conception of poverty includes measures of health (for example, malnourishment), education (such as years of

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deprivations that characterize multidimensional poverty ground claims against all other human beings to assistance in escaping or avoiding it. A duty to alleviate poverty may also be defended as an instance of Good Samaritanism; that is, a duty to rescue others from grave harm when doing so is not too costly. Finally, the duty to assist the global poor may arise as a consequence of their shared membership or participation in the global economic and/or political order (in which case, the global poor may be owed more than just assistance in escaping or avoiding multidimensional poverty). Whatever its foundation, nearly every theorist of global justice, as well as nearly every scholar or practitioner of international trade law, defends (or assumes) the existence of a duty to alleviate poverty. Contemporary debates regarding the relationship between trade and poverty alleviation center on the contribution specific trade rules make to enhancing or alleviating poverty, not on the moral relevance of these effects.

Some theorists contest the assumption that the moral justifiability of law, including trade law, turns on whether it promotes human welfare, let alone whether it maximizes it. Many of these critics maintain instead that morally justifiable law serves the goal of protecting individual freedom or autonomy. This includes freedom from assault or rape, of course, as well as freedom of speech and association. It also includes liberty of contract, however; the right to dispose of one's labor and one's property as one wishes consistent with respect for others' freedom or autonomy. No doubt the desire to improve their own lives, and that of friends and family, is what normally motivates people to engage in trade. Nevertheless, the moral case for reducing barriers to trade does not depend on its producing such improvements, on its promoting or maximizing welfare, even though it often will. Rather, the moral case for free trade rests on respect for individuals as creatures capable of choosing for themselves how to live their lives.

The success of this argument as a defense of free trade likely depends on the nature and scope of the rights to contract and to property. If those rights are natural or prepolitical, any laws that constrain their exercise beyond what is necessary to respect and protect other natural or prepolitical rights will be morally unjustifiable. Given that protectionist laws are unlikely to satisfy this condition, a liberal or libertarian natural-rights conception of the rights to contract and property likely entails the moral justifiability (indeed, necessity) of free trade. Alternatively, it may be that the rights to contract and property should be understood as derived from principles of justice that specify fair terms of cooperation for members of a political society. This may entail that individuals have no right to engage in economic exchanges, including international ones, that will produce an unfair distribution of burdens and benefits among the members of this society. Protectionist measures that preclude these sorts of exchanges will not violate

schooling), and living standards (type of cooking fuel, source of drinking water). For a helpful introduction, see the Oxford Poverty and Human Development Initiative's "Global Multidimensional Poverty Index 2019," available at https://ophi.org.uk/wp-content/uploads/G-MPI_Report_2019_PDF.pdf (last accessed December 10, 2019).

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individual's right to contract (for the exchange of goods and services), since the scope of that right is set by the terms for fair cooperation. Still, the goal of protecting individual freedom or autonomy may provide a powerful argument in favor of trade, and so law that facilitates trade, even if it also justifies certain conditions or limits on it.

Consider, for example, barriers to trade in agricultural products. Both developed and developing countries currently employ a mixture of at the border measures such as tariffs and import quotas and behind the border measures such as subsidies and sanitary regulations to favor domestic farmers over foreign ones. In doing so, they interfere with, and often prevent altogether, voluntary transactions between domestic consumers and foreign producers. If foreign farmers are willing to sell their crop at a lower price than are domestic producers, and domestic consumers prefer to buy cheaper agricultural products from foreign farmers than more expensive agricultural products from domestic farmers, the state will need to offer a compelling moral justification for using coercion to prevent this exchange, or for shaping the terms on which it may be carried out. Indeed, in the case of agricultural goods, this conclusion also follows if we take the promotion of aggregate welfare to be the moral standard that norms governing international trade must meet if they are to be morally defensible. Arguably, the same is true if we evaluate norms regulating trade from the standpoint of poverty reduction. The devil is in the details, however. Incomplete trade liberalization can leave the poor worse off than they were even if full liberalization would have improved their lot and/or shrunk their number. Domestic policy choices are also crucially important, since a corrupt governing elite can deprive poor farmers of the benefits that flow from freer trade.

In short, whether we ground it in a duty to maximize aggregate welfare, a more limited duty to alleviate and ultimately eliminate poverty, or a duty to respect individual freedom or autonomy, there is a compelling moral case for facilitating and engaging in trade. In fact, few thoughtful people deny this. The debate between advocates of free trade and defenders of fair trade does not concern whether or not to engage in trade. Both acknowledge that there are weighty moral considerations that favor international exchange. Rather, the debate concerns the terms on which trade must be conducted if it is to serve the moral values listed above. The point may be put this way: while the promotion of human welfare and/or respect for individual autonomy creates a presumption in favor of eliminating barriers to trade, those same values, or perhaps some other equally important value, may qualify or override that presumption, at least under nonideal circumstances. In the next section, I consider several arguments to this effect.

III MORAL ARGUMENTS FOR CONSTRAINTS ON TRADE

A *The Argument from Permissible Partiality to Compatriots*

Many people believe that members of a political community are permitted and perhaps even required to exercise greater concern for one another's welfare than they

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are for the welfare of nonmembers. Citizens of the United States, for example, have a moral right and perhaps a moral duty to prioritize the flourishing of their fellow citizens over the flourishing of citizens of other countries. Under certain conditions, the moral permissibility of partiality to compatriots might be thought to justify raising or maintaining barriers to trade even though this will reduce the rate of economic growth in (some) other countries, and so lead to lower gains in welfare for (some) people living in those countries than they would otherwise enjoy. In other words, a state's right to give greater weight to the welfare of its own citizens justifies its adopting trade policies that benefit its own citizens but that also produce a lesser gain in total global welfare than would occur in the absence of those protectionist measures.

One response to this defense of restrictions on trade is to reject the claim that compatriots have a right, let alone a duty, to give greater weight to one another's welfare than they do to the welfare of those who are not members of their political community. Yet even if we grant the moral permissibility of partiality to compatriots the justifiability of restrictions on trade does not necessarily follow. Most importantly, there are limits to the morally permissible partiality people may exercise toward those to whom they stand in a special relationship. Many readers will likely agree that I may improve my daughter's chances of making the soccer team by practicing with her, even though I do not extend that same benefit to the other girls who also wish to make the team. But surely it is impermissible for me to improve my daughter's chances of being selected for the team by breaking the legs of her competitors. This suggests that our duties to respect certain rights held by all people constrain what we are morally permitted to do to benefit those to whom we bear a special relationship. Assuming this is just as true for compatriots as it is for family members, trade restrictions will only be justifiable on the basis of permissible partiality if they do not violate these rights.

If the rights that limit permissible partiality include the freedom to contract and to acquire and dispose of property then permissible partiality to compatriots will not provide a moral justification for any trade restrictions. That is because protectionist measures interfere with the exercise of the rights to contract and to property by both members and nonmembers of the political community who wish to engage in exchange with one another. This argument rests on a highly contentious notion of property, however, and perhaps also a disputable understanding of the scope of freedom of contract. Yet a similar, albeit narrower, conclusion may follow from a more widely accepted claim regarding those rights that limit permissible partiality, namely, that they include the right to adequate nutrition, to clean drinking water, to adequate shelter, and to freedom from the other deprivations that characterize multidimensional poverty. If trade restrictions prevent (some of) those suffering from multidimensional poverty from escaping these circumstances either by engaging in international trade or benefiting from others doing so, then those measures fall outside the scope of permissible partiality, and instead count as wrongs done to

those whose rights they violate. As we noted in the previous section, restrictions on trade in agricultural products may frequently satisfy this condition. Two points regarding this argument are worth noting, however. First, in some cases it may be possible to contest the claim that the trade restrictions are the cause of the rights violations. Rather, the deprivations suffered by those living in multidimensional poverty may be due to the absence, incompetence, or corruption of domestic government, so that the elimination of the protective measures would make no difference to the incidence of these deprivations.[11] Second, it may be that while some protectionist measures fall afoul of rights that limit the scope of permissible partiality to compatriots, not all do. For instance, the use of import quotas on films to protect domestic filmmakers from foreign competition may not violate foreign filmmakers' rights, in the same way that my practicing soccer with my daughter may give her an advantage over her competitors for a spot on the team but not violate their rights. If so, then such quotas may be an example of morally permissible partiality to compatriots.

Many of those who believe that, within limits, states may favor their own citizens over foreigners will deny that favoritism or partiality is permissible when it comes to the state's treatment of its own citizens. Rather, the state ought to display equal concern for the welfare of each of its citizens, and/or equal respect for their autonomy. While in some cases that may involve extending certain rights or benefits to some but not others, or imposing (or enforcing) duties on some but not others, these differential forms of treatment will reflect divergences in need, ability, or circumstances, and not in the weight or importance the state attaches to the welfare or autonomy of its citizens. The problem with protectionist measures is that even if they fall within the ambit of permissible partiality between states, those same measures are likely to fall afoul of the requirement that states treat their own citizens impartially. This is so because in adopting protectionist measures that preserve some jobs, the state also prevents the creation of other jobs, namely, those that would have arisen as a result of the greater efficiency realized through international trade. While tariffs on auto imports may protect some jobs in car manufacturing, they also prevent jobs from appearing in those industries that provide the goods and services people would consume (more of) if they had the opportunity to spend less to buy a car. Consequently, some people who would have worked in those industries will go unemployed instead, or earn lower incomes than they would have received in those industries, or work jobs they find less satisfying or fulfilling. Of course, these consequences may also befall some workers employed by car manufacturers if the tariffs are eliminated. But insofar as protectionism leads to slower economic growth,

[11] One might also argue that while a state's protectionist measures do contribute to the persistence of multidimensional poverty in other states, this would not be the case if rulers in those other states fulfilled their moral obligations to their subjects, and that one state should not have to forgo what would otherwise be morally permissible partiality just because the rulers of another state are treating their subjects unjustly.

and that leads in turn to higher unemployment (and oftentimes lower wages, except for those in the protected industry), it amounts to a choice to benefit a smaller number of better off citizens at the expense of a larger number of worse-off citizens. Such a choice is incompatible with equal concern for each and every citizen. Moreover, trade restrictions that compel consumers to pay more for products so that domestic producers can keep their jobs or earn higher wages are an affront to the former's autonomy.[12] In Kantian terms, protectionist measures treat consumers as a mere means to promoting the welfare of the protected workers.

While permissible (or obligatory) partiality to compatriots is occasionally invoked to justify trade restrictions, the far more common claim is that such measures are necessary to ensure that trade is fair. A careful review of these claims reveals a number of different conceptions of fairness, or arguably, a number of distinct moral complaints only some of which can be understood as specifications or interpretations of the concept of fairness.[13] In what follows, I examine two such arguments. The first, developed by Aaron James, holds that trade is morally defensible only if the gains from trade are distributed fairly, both between states and among the citizens of a single state. The second argument, advanced by Matthias Risse and Gabriel Wollner, defends the claim that norms governing trade are unfair if they enable or facilitate exploitative exchanges of goods and services.

B *Fair Trade and Equitable Outcomes*

Aaron James contends that justice in international trade requires that the gains from trade be distributed equitably.[14] An equitable distribution, he argues, is one that satisfies the following three principles:

> *Collective due care*: Trading nations are to protect people against the harms of trade (either by temporary trade barriers or "safeguards," or, under free trade, by direct compensation or social insurance schemes). Specifically, no person's life prospects are to be worse than they would have been had his or her society been a closed society.
>
> *International relative gains*: Gains to each trading society, adjusted according to their respective national endowments (including population size, resource base, level of development) are to be distributed equally, unless unequal gains flow (say, via special trade privileges) to poor countries.

[12] Fernando Teson, "Why Free Trade Is Required by Justice," *Social Philosophy and Policy* 29, 1 (2012): 135.

[13] See David Miller, "Free Trade: What Does It Mean and Why Does It Matter?" *Journal of Moral Philosophy* 14, 3 (2017): 249–69. On the concept/conception distinction, see Hart, *Concept* [pp. 144–59, 1st edition] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 5, Dworkin, *Law's Empire*, p. 71.

[14] Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (New York: Oxford University Press, 2012).

> *Domestic relative gains*: Gains to a given trading society are to be distributed equally among its affected members, unless special reasons justify inequality of gain as acceptable to each (as, for example, when inequality in rewards incentivizes productive activity in a way that maximizes prospects for the worst off over time).[15]

The first principle speaks to the distribution of the burdens produced by international trade, while the last two address the distribution of the benefits. As some of the parenthetical remarks in James' statement of these principles indicate, they provide the moral rationale for the adoption of a range of trade-related laws and policies. Specifically, they indicate that a just international trade regime may include both limits on free trade, such as infant industry protections that enable developing countries to reap a greater share of the gains from trade than do developed ones, and conditions on free trade, such as domestic social insurance schemes that ensure that the members of no social class end up worse off as a result of trade than they would have been had their country not engaged in it.

James begins his defense of fair trade, understood as a practice of trade that satisfies the three principles specified above, with the following observation: All states face a choice between reducing and raising barriers to trade, between engaging in international trade and pursuing autarky, meaning total economic independence or self-sufficiency.[16] Each state knows that it will achieve greater economic growth if it lowers its own barriers to trade and its trading partners reciprocate, but each is also aware that its neighbors may choose not to reciprocate, instead adopting beggar-thy-neighbor policies that favor their own economic growth at other states' expense. In short, and as was explained in the first section of this chapter, states confront an assurance problem: whether it is rational for them to pursue the greater economic growth international trade can provide depends on how confident they are that other states will cooperate by not adopting beggar-thy-neighbor policies. James argues that an international practice among states of reliance on common markets provides the necessary assurance.[17] That practice consists of norm-governed coordination on policies needed to create and maintain a common market, say, a market in automobiles that spans multiple countries. This coordination is the product of each state's expectation that other states will pursue the policies necessary for a common market, and its responsiveness to a like expectation from those other states. These expectations are set and adjusted in various ways, including multilateral treaties such as the WTO and NAFTA (or USMCA), bilateral treaties such as the United States–Korea Free Trade Agreement, informal diplomatic understandings, and advocacy by interest groups including nongovernmental organizations, multinational corporations, and unions. The goal of spurring economic growth, one shared by all states, provides the organizing aim for this process of negotiating each state's contribution

[15] Ibid, pp. 17–18.
[16] Ibid, pp. 52–6.
[17] Ibid, pp. 56–9.

to the collective enterprise of sustaining a common market. In sum, states provide one another with the confidence necessary to overcome the assurance problem they confront by displaying a "willingness to establish a practice of mutual market reliance that will last . . . confirm[ing] this over time in routine mutually beneficial commerce, and . . . constructively address[ing] new sources of uncertainty as they arise with diplomatic and policy assurances."[18]

On James' account, the possibility of reaping the benefits of international trade depends on a collective undertaking among states. It is their practice of mutual reliance on common markets that creates the norm governed social space in which individuals and firms can engage in the international exchanges of goods and services. As in any case where agents cooperate to produce some good, each has a claim against the others to fair terms of cooperation, or as James puts it, to structural equity. This requires that the international social practice of mutual reliance on common markets be designed so that "it distributes the benefits and burdens it creates according to a pattern that is reasonably acceptable to every country and class affected."[19] As participants in this social practice, contributors to the collective effort to create and sustain the background conditions necessary for international exchanges of goods and services, each of us can ask: "[I]s my country, or my class, or, more specifically, am I, being given fair terms? Can we, or I, find our shared international arrangements reasonably acceptable, given the costs I am [or we are] being asked to bear?"[20] James maintains that only if the international practice of mutual reliance on common markets satisfies the principles of due care, international relative gains, and domestic relative gains can we answer these questions in the affirmative.

As a cooperative undertaking that makes economic growth possible, states' practice of mutual reliance on common markets poses two questions of fair division: first, how should the gains from trade be distributed between states, and second, how should the gains from trade be distributed among the members of each state? In both cases, James maintains that three considerations favor an equal division.[21] First, all participants in the social practice that makes international trade possible are equal in moral status. No state or individual enjoys an inherent moral superiority that entitles it, him, or her to a greater share of the value produced through international exchanges in goods and services. Second, all of the participants in the practice have a similar interest in obtaining greater rather than lesser shares of the net benefit they help to create. No state will accept as a reasonable justification for its receipt of a lesser share of the gains from trade that it simply cares less about these benefits than does a state that receives a greater share. The same is true for individuals within a single state; all else equal, each would rather be richer than poorer. Finally, no

[18] Ibid, p. 59.
[19] Aaron James, "A Theory of Fairness in Trade," *Moral Philosophy and Politics* 1, 2 (2014): 179.
[20] James, *Fairness in Practice*, p. 14.
[21] Ibid, pp. 168–79.

state or individual can point to any special entitlements that gives it, him, or her a claim to a greater share of the benefit made possible by the practice of mutual reliance on common markets. In particular, James rejects the claim that states or individuals may be entitled to unequal shares of the gains from trade in virtue of differences in the contributions they make to creating and sustaining a common market. This conclusion rests partly on skepticism regarding the possibility of a nonarbitrary measure of contribution to creating and sustaining a common market, and partly on skepticism regarding the moral importance of contribution in a context where the choice of whether to participate in a cooperative scheme is not fully voluntary. For these three reasons, then, equality provides the default answer to the question of how the gains from trade ought to be distributed. While inequalities in the distribution of the gains from trade are not categorically prohibited, their defense requires an appeal to considerations powerful enough to warrant deviating from equality.

The principle of due care describes one such consideration. It identifies as unfair any reduction in barriers to trade that benefit some members of a society while leaving other members worse off over the course of their entire lifetime than they would have been had their society not engaged in trade.[22] To assess this claim, it may be useful to borrow John Rawls' device of a veil of ignorance.[23] Individuals behind a veil of ignorance lack knowledge of particular facts about themselves or their society. The point is to exclude from deliberation about the rules under which we ought to interact with one another any morally arbitrary considerations, or in other words, to prevent us from selecting rules that are unjustifiably biased in our favor, such that others would rightly view those rules as unfair. Suppose that from behind the veil of ignorance we can choose from three options: R1 prohibits trade, R2 involves a change to those rules that opens our society to trade, thereby producing both winners and losers in our society, while R3 involves a change to the rules that opens our society to trade but also creates a scheme to compensate those who lose out from greater international competition. Under R3 there are no losers, but there are also fewer winners and/or smaller gains for those who benefit from the reduction of this particular barrier to trade. Since we do not know whether we are among those who stand to benefit or (absent compensation) to lose from our society becoming more open to international trade, we should adopt the standpoint of winners and losers under the three options, and consider from those vantage points the strength of any objection we might have to the pursuit of each option. If we imagine ourselves among the winners, we will object to the pursuit of R3 over R2 since this will leaves us less well off than we would otherwise be. However, if we imagine ourselves among

[22] The qualifier "over the course of their entire lifetime" is crucial here, since initial setbacks may sometimes be compensated for (and then some) in the longer run. For a response to the claim that lowering barriers to trade ultimately benefits everyone, and that therefore no one has a claim to compensation or protection, see James, *Fairness in Practice*, pp. 209–12.

[23] Rawls, *Theory of Justice*, pp. 136–42.

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the losers than we will object to the pursuit of R2 over R3, since that is the policy that will leave us worse off. Having imagined ourselves into both positions, we can then consider which objection is the more powerful one. Having thought about it from both perspectives, would we really think it unfair to make some members of our society accept a lesser benefit (or a lesser chance of being a beneficiary) so as to ensure that the change did not worsen the lives of other members of our society? James thinks not: "Other things being equal, the objection 'I am made worse off' is more powerful than 'I could have been better off,' in which case either market protection or compensation of the loser carries the day."[24]

The principle of due care does not protect all members of a society from the harms trade can cause, however. James asserts that the privileged "lack a reasonable objection to being disadvantaged if this provides significant benefits to people who are less well-off, especially given the substantial opportunities for adaptation afforded by their greater wealth."[25] Their ability to recover from the disruptions of trade, and indeed to take advantage of the new opportunities it creates, makes it far more likely that the well-off will receive a net benefit from moves toward a more open economy, at least over the course of their lifetime, than is true for lesser, and especially the least, advantaged people in society. The principle of domestic relative gains also figures here, however, since trade liberalization may sometime mark a significant improvement when measured against that standard even if it also leads to a reduction in the economic well-being of the more advantaged. Put another way, where domestic actors are not morally entitled to (all of) the economic advantages they enjoy, a change in law or policy that deprives them of (some of) those advantages will not be unfair, even if it leaves them worse off than they would otherwise be. For example, trade liberalization may leave a former monopolist worse off while also marking a significant advance in a society's realization of domestic justice.

The need to ensure that no member of our society will be harmed by a policy or law that reduces barriers to trade provides one moral justification for distributing the gains from trade unequally. The prospect of making all members of society better off than they otherwise would be provides a second. In a Rawlsian vein, James notes that "from a domestic point of view, the gains from trade chiefly result from a national-level choice of policy," and that "as the fruit of domestic social cooperation . . . [they] cannot be said to be owned by anyone independently of what distribution is fair."[26] A fair distribution, James suggests, is one that satisfies Rawls' difference principle, which holds that economic inequality is permissible if and only if it works to the

[24] James, *Fairness in Practice*, p. 207. Note, however, that because we do have a legitimate interest in growing our income, the winners in R3 have a powerful objection to the pursuit of R1 over R3, while no one has a powerful objection to the pursuit of R3 over R1 (since compensation ensures that no one is made worse off if R3 is adopted than if R1 had been pursued instead).

[25] Ibid, p. 209.

[26] Ibid, p. 219.

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greatest benefit of the least advantaged members of society.[27] In general, permitting individuals to keep a greater share of the value they produce motivates them to be more productive, leading in the aggregate to greater economic growth. Even the least well-off in society will find an unequal distribution of the gains from trade reasonably acceptable if they are a necessary feature of an economic order that maximally improves their economic well-being in comparison to what it would be were the gains from trade distributed equally among all members of their society. Thus we arrive at the principle of domestic relative gains, according to which "gains to a given trading society are to be distributed equally among its affected members, unless special reasons justify inequality of gain as acceptable to each."[28]

Turning to the distribution of the gains from trade between states, the principle of international relative gains identifies two bases for deviation from the moral presumption in favor of equality. The first concerns the need to adjust for differences in each state's trade-independent endowments, such as the size of its population, its natural resource base, and cultural norms that affect its citizens' productivity: "Endowment sensitivity simply reflects the limited aim of trade practice, namely to *improve* upon endowments roughly as given (through specialization and exchange), rather than to redistribute the benefits of those endowments as such."[29] Unless we strip out those elements of economic growth that owe to each state's trade-independent endowments, an equal distribution will unfairly transfer to other states some of the income a well-endowed state would have generated even in the absence of trade.

James offers as a second justification for an unequal distribution of the gains from trade between states the fact that an equal division imposes very different opportunity costs on rich and poor states. A fair distribution, he maintains, will give some priority to those who are worse off in absolute terms, since the marginal utility they gain will far exceed the marginal disutility the richest or most developed states lose. James invokes the following analogy to support this conclusion. Suppose two friends regularly dine together, with one paying for their meal on some occasions, and another paying for their meal on others. If their wealth is roughly equal, and so too is the cost of their meal, then fairness requires that they each pay for a (roughly) equal number of meals. But if one diner is far wealthier than the other, then James maintains that she ought to pay for more of their meals together, since the opportunity cost to her of paying for their meals is far less than it is for her companion. The same conclusion holds vis-à-vis the distribution of the gains from trade between states. To insist on an equal division between rich and poor states amounts to prioritizing a relatively small gain for those who are already well off over a larger gain for those who are not.[30]

[27] Rawls, *Theory of Justice*, pp. 60–82.
[28] James, *Fairness in Practice*, p. 18.
[29] Ibid, p. 222.
[30] Ibid, pp. 224–5.

Even if James rightly claims that fairness requires that the wealthier diner pay for a greater share of the meals she and her companion take together, we might resist the extension of that claim to the distribution of the gains from trade between states. In particular, friends necessarily have a concern for one another's well-being that states need not (and likely do not), even if they cooperate with one another to create and sustain common markets. A rich friend who failed to pay for a larger share of the meals she shared with her companion could be rightly criticized for her lack of concern with the impact her choice had on her companion's welfare. If we alter the scenario so that the two individuals dine together only because doing so is mutually beneficial – perhaps they get a table more quickly than they would had they each dined alone – then it becomes much more difficult to see how the poorer diner could have a *fairness* claim against the wealthier one that she pay for more of the meals they eat together. That is not the only kind of claim the poorer diner could make, however. If an equal division would threaten her ability to meet her basic needs then she might well have a claim to the rich diner paying for a larger share of the meals they eat together. The same might be true if equal division would significantly lengthen the time it would take the poorer diner to improve her well-being (for instance, by paying for an education). But again, this would not be a matter of fair treatment, neither would it be a claim that could be directed only to the rich diner, since there might be other individuals for whom the opportunity cost of helping the poor diner would be the same or even lower. The same sort of reasoning might well apply in the case of rich states obligations to poor ones. If so, then we can accept James conclusion, namely, that a just international trade regime should allocate a larger share of the (nontrade endowment adjusted) benefits to poor states than to rich ones, while denying his claim that doing so is a matter of fairness, a duty that arises out of the fact that rich and poor states engage in a shared social practice of mutual reliance on common markets.

A second objection to the principle of international relative gains concerns the possibility of distinguishing that portion of a society's economic output for which it is solely responsible from that portion that owes to it engaging in trade with other societies. As Mathias Risse and Gabriel Wollner point out: "[I]n a world that has been more or less densely interconnected for several thousand years, what people are capable of is a function of their history."[31] For example, the use of land in every country on Earth reflects the history of international trade, as crops such as sugarcane, coffee, cotton, and potatoes were spread across the world in response to market demand. The cultivation of these crops contributed in turn to the spread of new technologies, social mores, and people, including millions of Africans sold into slavery. Given our history, then, it appears to be impossible to separate the portion of a society's economic production that owes to its nontrade endowments from the

[31] Mathias Risse and Gabriel Wollner, "Critical Notice of Aaron James, *Fairness in Practice: A Social Contract for a Global Economy*," *Canadian Journal of Philosophy* 43, 3 (2013): 398.

portion that does not. Or as Risse and Wollner put the point: "[I]n an interconnected world we cannot identify any baseline of autarky that could plausibly identify what states can consider *theirs* and thus do not need to share."[32] If so, then the principle of international relative gains gets no purchase on reality, since its applicability depends on a condition that cannot be satisfied in our world.

James use of autarky as a baseline for calculating the effects of trade also poses a problem for the principle of due care. Trade harms a person, James contends, if his or her life goes worse than it would have had his or her society pursued autarky around the time of his or her birth. Christian Barry casts doubt on our ability to discern how well-off a person would be under autarky, pointing out that the challenge of doing so is far greater than predicting the effects of a policy change on the status quo.[33] It is one thing to predict the effects that a 10 percent increase on steel tariffs will have on a society, but a far harder and likely impossible task to predict the effects of completely closing a society to trade (let alone imagining what a society would be like had it never engaged in trade). Moreover, the effects that closing a society to trade will have on its members depends on the type of domestic institutions we postulate in our counter-factual, as well as the foreign policies other states adopt in response to a state closing itself off to trade:

> Were Mexico to have become closed to trade with the USA, for instance, it seems likely that the US posture on immigration from Mexico, and assistance provided to Mexico, would have been quite different. And of course, as the remuneration available through legal trade between Mexico and the USA would diminish, gains available through illicit trade could be expected to increase. Increased returns to engagement in illicit trade with the USA could well be a factor of no small consequence for Mexicans and Mexican state institutions.[34]

As Barry emphasizes, the challenge is not simply one of characterizing what life is like for members of a given society under autarky, but also of selecting nonarbitrarily among the various counterfactual scenarios that could serve as the baseline for identifying harm.

It appears that as a description of the terms under which trade is morally defensible, James' view faces significant challenges.[35] Yet it may be that we should accept some of his conclusions even if we reject his arguments for them, and in particular, his attempt to ground those conclusions in a conception of international trade that generates its own, freestanding, demands of fairness. For example, the moral justifiability of trade rules may depend on their not worsening or undermining

[32] Mathias Risse and Gabriel Wollner, "Three Images of Trade: On the Place of Trade in a Theory of Global Justice," *Moral Philosophy and Politics* 1, 2 (2014): 206.

[33] Christian Barry, "The Regulation of Harm in International Trade: A Critique of James' Collective Due Care Principle," *Canadian Journal of Philosophy* 44, 2 (2014): 257.

[34] Ibid, p. 258.

[35] For his responses to some of these challenges, see Aaron James, "Reply to Critics," *Canadian Journal of Philosophy* 44, 2 (2014): 286–304.

states' pursuit of domestic economic justice.[36] If so, then it is possible that reductions in certain trade barriers will need to be accompanied by domestic redistributive programs if they are to be morally defensible. The same may also be true for rules governing innovation, such as intellectual property law. On this approach, trade will not (and should not) be treated as morally distinctive but simply as part of a state's or society's overall economy. Principles of domestic distributive justice apply to the economy as a whole, and therefore any moral assessment of trade rules must be undertaken from a perspective that considers the distribution of all the economic goods and opportunities available, and not just those that are the product of trade.

C *Risse and Wollner on Fair Trade as Non-Exploitation*

Risse and Wollner contend that trade is morally unproblematic only if it is not exploitative, from which it follows that norms governing trade are morally unproblematic only if they do not facilitate exploitative trade.[37] Starting from a colloquial description of exploitation as one person's taking unfair advantage of another, they argue that this idea is best characterized in terms that reference both features of the transaction between the agents and the outcome or state of affairs it produces. Specifically, they define exploitation as "a transfer T or a distribution D between two parties A and B, which arise as a consequence of an interaction I, enabled by some *ex ante* feature F, violating some moral principle P such that the moral defect cannot be readily reduced to a defect of either T, D, I, or F."[38] This last clause, which distinguishes the wrong of exploitation from other types of wrongdoing, need not detain us. More important for our purposes is the fact that so defined exploitation can encompass different types of unfair advantage taking, distinguishable from one another in terms of the interaction, transfer or distribution, ex ante feature, and/or moral principle P that must be violated in order for an act to count as exploitative.

Two examples serve to illustrate this point, while also offering support for the claim that in order to be morally unproblematic trade must not be exploitative. Consider, first, exploitation as taking advantage of a wrong. Hillel Steiner maintains that a voluntary, mutually beneficial, exchange between A and B is exploitative if in virtue of a rights violation that occurred prior to the exchange B benefits less from the exchange than she would have had that rights violation not taken place.[39] While A might have been the perpetrator of the rights violation, and B the victim, neither of these conditions is necessary for the transaction between them to count as an instance of exploitation as taking advantage of a wrong. Rather, "the wrong in [this type of] exploitation is to *benefit* from an unrectified wrong, combining the

[36] Barry, "Regulation of Harm," 262.
[37] Risse and Wollner, "Three Images of Trade," 210–21.
[38] Ibid, p. 215.
[39] Hillel Steiner, "Exploitation: A Liberal Theory Amended, Defended, and Extended," in *Modern Theories of Exploitation*, ed. A. Reeve (London: Sage, 1987), pp. 132–48.

wrongness of the original violation with a subsequent transfer or distribution."[40] To illustrate, Risse and Wollner argue that some domestic workers in state S who earn lower wages as a result of foreign competition may be victims of this type of exploitation. This will be so if these foreign competitors drive down their production costs by violating people's rights; for instance, by treating their labor force in ways that violate those workers' rights to adequate health and safety, or by acquiring land in ways that unjustly deprive its rightful owners of their property rights. Workers in state S do not suffer these rights violations, and employers in state S do not perpetrate them. Nevertheless, the latter still wrong the former by taking advantage of the unjust treatment of foreign workers to pay their own workers less than they would need to pay them if those foreign workers or property owners were not being treated unjustly. Of course, employers in state S will likely respond that they can only remain in business if they pay these lower wages, since their products must compete with those produced by rights-violating foreign enterprises. The real culprits are the domestic consumers who choose to buy whichever goods are cheapest, or at least they are complicit in the exploitation of these domestic workers by domestic employers. The imposition of tariffs on the goods produced by rights-violating foreign enterprises that eliminate whatever price advantage they gain from their wrongdoing may be the best or only way to effectively address this particular injustice. While those tariffs may not eliminate or rectify the rights violations, they will prevent domestic employers and consumers from taking advantage of those rights violations to pay domestic workers less in return for their labor or the products they produce.

A second form of exploitation involves taking advantage of the vulnerable. Following Robert Goodin, Risse and Wollner maintain that "it is inappropriate to play for advantage when others are (a) not doing so, (b) unfit to do so or are no match to us, or (c) suffering a misfortune."[41] These conditions capture seemingly widespread intuitions regarding fair play or fair competition. Consider, for example, a sporting contest in which players forbear from taking advantage of an injury to their competitor. If pressed to defend their conduct, the players will likely respond that while the rules of the game grant them the right to press their advantage, it would not be fair or "sporting" of them to do so. Likewise, teams that demonstrate a clear superiority over their competitors often refrain from pressing their full advantage; for instance, by not attempting to score as often as they might, or by giving their less talented or experienced members more playing time than they would against better competition. These practices suggest that the propriety of distributing goods on a competitive basis is conditional on the quality of the competition. With respect to international trade, individuals who suffer the deprivations constitutive of multidimensional poverty may be unable to compete in any meaningful way in international markets. Even those who are not poor may be at a severe disadvantage vis-à-vis

[40] Risse and Wollner, "Three Images of Trade," 217, emphasis added.

[41] Ibid, p. 218. See Robert Goodin, "Exploiting a Situation and Exploiting a Person," in *Modern Theories of Exploitation*, ed. A. Reeve (London: Sage, 1987), p. 185.

foreign competitors if they lack access to relevant information or the education necessary to make use of it. Finally, the small size of some states' domestic economies together with their lack of political and legal expertise may leave them unable to effectively "compete" with richer states, both in the negotiation of trade rules and in their use of those rules to garner the benefits to which they are legally entitled. In such circumstances, individuals, firms, and states that choose to (fully) press their advantage over their much less able competitors wrong them by exploiting their vulnerability. As in the case of a sporting competition, the (full) benefits the more powerful accrue cannot be justified on the grounds that they were earned in a fair competition.

The charge that some element of contemporary international trade or international trade law is exploitative raises two questions. First, is it accurate? Second, if it is, then how should we respond? Consider the claim that trade in products manufactured in sweatshops is unjust, and that to the extent they permit or encourage such trade, so too are international trade agreements. The alleged injustice of sweatshops owes partly to the factory owners' violations of their workers' (moral, and possibly also legal) rights, partly to their exploitation of those workers, and partly to the fact that it enables other employers in that industry to pay their own workers lower wages, as explained above. If we employ the taking advantage of a wrong conception of exploitation, the claim that sweatshops involve exploitation requires demonstrating that sweatshop owners wrong their workers when they subject them to working conditions well outside those legally permitted in developed countries.[42] This may prove difficult if we concede that sweatshop workers are morally entitled to waive their rights to better working conditions, something they may well be willing to do in exchange for a greater income than they would otherwise be able to earn.[43] Indeed, where low labor costs account for a firm's competitive advantage, improved labor conditions may lead to fewer jobs, or be incompatible with the firm remaining in business at all.[44] If so, then it is hard to see why that firm's workers would not consent to lower labor standards, and arguably why they should not be free to do so. It follows that sweatshops do not necessarily wrong their employees by requiring them to work in conditions that deviate considerably from those required by law in developed countries. At least where the employees consent to work in these conditions, their employers do not engage in exploitation as taking advantage of a wrong, and therefore neither do employers in developed countries who are able to pay their workers a lower wage as a consequence of competition from foreign sweatshops.

[42] I use the phrase "well outside those legally permitted in developing countries" to indicate that the argument does not turn on workers in developing countries counting as exploited unless they enjoy the same or a close approximation to the wages and working conditions enjoyed by workers in developed countries.

[43] Teson, "Why Free Trade," 145.

[44] Benjamin Powell and Matt Zwolinski, "The Ethical and Economic Case Against Sweatshop Labor: A Critical Assessment," *Journal of Business Ethics* 107, 4 (2012): 456–60.

Even if the labor conditions characteristic of sweatshops do not constitute the taking advantage of a wrong, they may still be an example of employers taking advantage of the vulnerable, and so qualify as a form of exploitation. The success of such an argument depends on whether it is open to the factory owners, the alleged exploiters, to forbear from pressing their advantage against their workers as much as they do. Sometimes, and perhaps even often, this may not be the case. Again, a sweatshop owner may be unable to employ as many workers or to remain in business if he or she allows labor costs to rise. If so, then the labor conditions are dictated by the market, that is, the choices of all of the producers and consumers of the good in question, rather than by the factory owner enjoying an overwhelming advantage in negotiating the terms of employment with his or her workers. Of course, that does not mean no one is taking unfair advantage of the vulnerable employed in sweatshops. Some firms may enjoy large enough profits that they can afford to drive a less hard bargain with sweatshop workers, for instance, by requiring the factories where their products are made to meet more demanding health and safety standards, and compensating the factory owners for the additional cost. Corrupt political and legal officials may also be the primary agents of exploitation if, for example, sweatshop owners' inability to provide better working conditions while staying in business owes to the bribes these officials demand, or if they actively seek to disrupt workers' efforts to organize and advocate for better treatment (to which they may already be entitled as a matter of law).[45] Finally, it may be that many individuals living in developed countries are most guilty of exploiting vulnerable workers in developing ones. As consumers, they (we) generally choose to pay less for a good rather than buy a more expensive version of the same good that is not produced in a sweatshop. As citizens, we severely limit the number of vulnerable people we allow to immigrate, a policy that deprives both would-be immigrants and those who would remain in their country of origin of many opportunities to better their lives. In short, the root cause of much exploitation may lie not with trade or the rules that regulate it, but instead with political practices and policies in both developing and developed countries that leave many workers with no better option than to labor in sweatshop conditions.

As the foregoing arguments indicate, the claim that sweatshops exploit workers in developing countries and facilitate the exploitation of workers in developed ones is debatable. Nevertheless, suppose it is true. What follows? The answer might seem obvious: since exploitation is wrong, we should at least refrain from complicity in it, and perhaps also take steps to end it. For developed countries, this might take the form of trade barriers that serve to protect domestic workers against the wage and job losses that follow from exposure to this sort of unfair competition, while lowering the payoffs to sweatshop owners of engaging in exploitation. Yet this conclusion may be premature. Higher barriers to trade in goods produced in sweatshops will cause some

[45] Ibid, 467.

of those employed there to lose their jobs, or to work under even worse conditions and/or for even lower wages. If citizens in developed countries have a duty to alleviate poverty wherever it exists, then perhaps that duty outweighs or defeats our duty to refrain from exploiting our fellow citizens who work in an industry that competes with imports from sweatshops. That is, reducing or eliminating barriers to trade in goods produced in sweatshops may be the morally correct course of action all things considered, even if this enables the exploitation of those who work in them as well as domestic workers who compete with them. As Risse and Wollner observe, "exploitation might even be the right thing to do, the smaller evil all things considered."[46] Of course, this conclusion depends on the absence of any alternative policy or set of policies that achieves roughly the same reduction in poverty without permitting nearly the same level of exploitation. Arguably, the last several hundred years of human development provide compelling evidence that no such alternative is forthcoming. Nevertheless, actors in both developing and developed nations have duties to mitigate the harms exploitation causes, and to take measures that will reduce or eliminate it without requiring them to bear too high a moral cost. For example, workers in a developed country who lose their jobs or suffer reductions in their wages may well have a claim to some form of compensation from their fellow citizens. This could be the case if the losses they suffer are greater than what they are morally required to bear to alleviate global poverty, while that is not true of their compatriots. Even if this is not the case, these workers may bear more than their fair share of the cost of alleviating global poverty while their compatriots bear less, in which case the former have at least a prima facie claim to compensation from the latter.

Now consider a second allegedly exploitative feature of the legal regime that regulates international trade, the World Trade Organization's dispute settlement system. In addition to setting out rules governing international trade, the WTO treaty created a dispute settlement process to resolve disagreements among the signatories over the interpretation and application of those rules. This process, overseen by a Dispute Settlement Body (DSB) composed of representatives from all the members of the WTO, begins with consultations between the states who are party to a dispute. If these states fail to resolve their disagreement, the complainant state may submit the dispute for adjudication by a WTO Panel. After hearing from both sides to the dispute (and sometimes from third-party states who formally express an interest in it), the Panel members issue a report, or judgment, in favor of one or the other of the parties to the dispute. The state that loses before this panel may appeal its judgment to the WTO's Appellate Body, which may uphold, modify, or overturn the panel's report. The decisions of the WTO's Appellate Body are the final word on the question of whether a state's domestic law or policy violates its obligations under the WTO treaty. Barring a consensus against doing so, the WTO treaty

[46] Risse and Wollner, "Three Images of Trade," 221.

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requires the DSB to formally adopt any report issued by a Panel or the Appellate Body.[47]

A state that loses its case before the Appellate Body must, within a reasonable amount of time, implement those changes to its domestic law or policy necessary to bring it into conformity with the WTO treaty. If it fails to do so, and does not settle with the complainant state, the DSB authorizes the complainant state to retaliate by suspending concessions or other obligations it has to the defaulting state under the WTO agreement that equal in value the losses it has suffered as a result of the latter's violation of its treaty obligations. To be clear, the WTO does not itself enforce the Dispute Settlement Body's judgments; rather, it authorizes the victorious party in a dispute, and only that state, to enforce its rights under the WTO treaty through a limited form of "self-help."

The design of the WTO's enforcement mechanism entails that a complainant state's ability to effectively press for the treatment to which it is legally entitled largely depends on how powerful it is relative to the state denying it that treatment. Imagine a trade dispute between a relatively poor, weak, state such as Bangladesh, Haiti, or Malawi and a rich, powerful, state such as the United States and Japan, or a supra-state polity such as the European Union. The cost to poor state P of raising tariffs or imposing quotas on imports from rich state R will often be quite significant, at least for the population of P as a whole, both immediately and in terms of its effect on future economic growth. Those costs may easily outweigh any benefit P stands to gain from R complying with the WTO agreement, particularly if R prefers to bear whatever costs follow from P raising barriers to its exports. Furthermore, P may have good reason to fear that if it adopts such measures in an attempt to enforce its rights, R may retaliate by modifying its relationship with P in domains other than trade. Suppose, as is often the case, that R provides P with development aid or training programs for P's police force and equipment for its military. In such circumstances, P may rightly worry that any tariffs it imposes on imports from R will be met with a reduction in the assistance R provides it. If poor, weak, states cannot effectively enforce their legal rights under the WTO agreement against rich, powerful, states, then the latter are free to effectively renegotiate the terms on which they actually trade so as to maximize their gains. In doing so, rich powerful states exploit poor/weak ones; they play for (maximal) advantage in the market when poor states are unfit to do so or no match for them.[48]

The process for bringing a dispute to the WTO and successfully making the case that another state is acting in breach of its legal obligations also unfairly favors rich

[47] See "Understanding the WTO: Settling Disputes," available at www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[48] For a recent empirical investigation of many of these issues, see Arie Reich, "The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis," *European University Institute Working Papers* (2017), available at https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1 (last accessed December 10, 2019).

powerful states over poor weak ones. The latter often lack lawyers and diplomats who can identify when their state is a victim of another state's violation of the WTO agreement, and who possess the expertise necessary to compete with officials from better off states when presenting their state's case before a WTO panel or the Appellate Body. Efforts undertaken since its inception to address the fact that poor states are unfit to take advantage of the opportunities the WTO Dispute Settlement Understanding formally offers them have had little impact. For instance, while the WTO has determined that poor states may employ lawyers in private practice with expertise in international trade law to argue on their behalf, the cost of doing so precludes many poor states from pursuing this option. Likewise, rich states have stymied efforts to allow poor states to recover their litigation costs if they win their case before the WTO. Finally, while organizations such as the Advisory Center for WTO Law provide poor states with legal advice, most rich states have provided few if any resources to support such efforts.[49]

While impossible to deny, these moral shortcomings with the design and operation of the WTO dispute settlement system should not be exaggerated. For instance, the foregoing argument is deliberately framed in terms of a comparison between poor weak states and rich powerful ones, rather than between developing and developed states. Developing countries are not all equally poor and weak. While the economic (and military, political, and cultural) power states such as Brazil or India exercise is still inferior to that exercised by some developed countries, especially the United States, this does not appear to prevent them from making good use of the WTO dispute settlement process, or from using tariffs and other measures to enforce DSB rulings in their favor. Moreover, in the majority of the trade disputes brought before the WTO developed countries are both the complainant and the respondent. Perhaps, then, the actual workings of the WTO's dispute settlement system frequently raise no concern regarding exploitation. Of course, that may simply reflect a prudent choice by poor states not to avail themselves of a dispute settlement system that hides their exploitation behind a veneer of legality.

The WTO's enforcement mechanism suffers from a second moral defect, in addition to permitting or facilitating rich, powerful, state's exploitation of poor, weak, ones. Suppose states have a moral obligation to reduce and ultimately eliminate barriers to trade, one grounded in a fundamental moral duty to promote human welfare, or to alleviate poverty, or to respect individual rights of contract and property. If so, then a just trade agreement ought to serve this end, not only in the legal obligations it places on states to reduce or eliminate barriers to trade, but also in the design of its mechanism for enforcing those obligations. That is, in a just trade agreement enforcement ought to serve the goal of motivating states to fulfill their legal obligations under that agreement. However, the WTO's enforcement

[49] For further discussion, see Kim Van der Borght, "Justice for All in the Dispute Settlement System of the World Trade Organization?" *Georgia Journal of International and Comparative Law* 39, 3 (2011): 787–806.

mechanism serves a different goal, namely, maintaining whatever balance of benefits and burdens the parties to the dispute negotiated on their entry into the treaty, or in a subsequent round of trade negotiations.[50] It is true that WTO officials express a preference for maintaining this balance through states' conformity to the terms of the WTO agreement; that is, by fulfilling their obligations to reduce or eliminate trade barriers. Yet the WTO's enforcement mechanism does not reflect this preference; rather, it is ambivalent between a state of affairs in which two states both adhere to the WTO agreement and a state of affairs in which they each raise barriers to trade against the other, so long as those barriers impose equal costs on the two states. Appearances to the contrary, then, the WTO does not create *genuine* obligations, considerations that preclude certain sorts of legislation and policymaking. Instead, it merely attaches prices to engaging in such legislation or policymaking.[51] While this enables states to better pursue their interests in light of their relative power, it contributes to the advancement of both freer and fairer trade only when such policies coincide with what states perceive to be in their national interest. In the terms introduced in Chapter 5, the WTO provides an example of rule by law, but not the rule of law.

What sort of reforms to its enforcement mechanism might make the WTO a better vehicle for promoting free trade – and so, we are assuming, advance the realization of justice? Joost Pauwelyn suggests that enforcement become a collective undertaking, with all members of the WTO authorized to impose countermeasures designed to motivate a defaulting state to comply with its obligations.[52] This differs from the current practice both in terms of who would be authorized to enforce the law – at present, only the successful complainant state – and in terms of the costs that could be imposed on the defaulting state, which could exceed the value of the trade losses that state's noncompliance imposed on other states. Additionally, Pauwelyn maintains that complainant states (and perhaps others as well) be granted a right to reparation for any losses they have suffered as a result of a defaulting state's violation of its obligation(s) under the WTO agreement.[53] Collectively, these reforms might well deter states from engaging in prohibited forms of protectionism even in many cases where it would be worthwhile for them to so under the present regime, one that makes such illegal conduct far less costly. Furthermore, as Pauwelyn emphasizes, these reforms would contribute to a change in how states conceive of their obligations under the WTO treaty. Instead of viewing them as products of a private contract, instruments for their pursuit of national interest in light of their relative power, states would come to understand those obligations as genuine constraints on

[50] Joost Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach," *American Journal of International Law* 94, 2 (2000): 339–40.

[51] Warren F. Schwartz and Alan O. Sykes, "The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization," *Journal of Legal Studies* 31, 1 – Part 2 (January 2002): S179–S204.

[52] Pauwelyn, "Enforcement and Countermeasures," 343.

[53] Ibid, 346.

permissible conduct, a specification of their contribution to the promotion of the shared aim of global economic growth, and conduct for which the society of states can properly hold them accountable. In other words, Pauwelyn's proposed reforms would lead states to conceive of their trade relations with one another as the pursuit of the global common good in accordance with the international rule of law.

IV TRADE IN STOLEN GOODS

For trade to be just, those who participate in it must have a right to dispose of the goods they exchange, or be authorized to do so by those who do have such a right. It follows that the justice of an international trade regime depends on the norms governing the acquisition and continued possession of rights to dispose of various goods. Thomas Pogge contends that the global institutional order suffers from a serious moral defect in this respect because it tacitly endorses the principle "might makes right."[54] By and large, international practice grants those who effectively govern a state the right to determine ownership of goods in its territory, regardless of how they came to power and, with a few exceptions, regardless of how they exercise it. Pogge focuses on the implications this practice has for the extraction and sale of natural resources located within a state's territory, including oil, diamonds, and metals such as tantalum and tungsten that are used in cellphones and laptop computers. He argues that, as far as international law is concerned, a dictator enjoys the legal authority to allocate property rights in a state's natural resources even if he came to power in a coup, regularly persecutes any of his subjects who oppose his continued rule, and governs in a corrupt and arbitrary manner that deprives many citizens or residents of the state of their basic human rights.[55] If the dictator grants a firm the legal right to extract oil from a portion of the state's territory, international law treats that oil as the firm's legal property, and permits it to sell the oil in other states, where buyers likewise obtain a legal property right in the oil.

Leif Wenar argues that international law does not require states to accord domestic property rights to natural resources extracted from states ruled by tyrants.[56] From the standpoint of international law, neither recognition of Saudi Arabia as a sovereign state nor recognition of the Saudi King (or the House of Saud) as its government requires that the United States, China, India, or any other country grant those who import Saudi oil a clear title to that oil under its domestic law, one they can transfer to domestic companies who purchase and refine it, or domestic consumers who buy the resulting gasoline. The decision to do so lies within the

[54] Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 112–13.

[55] The incentives it creates to launch a coup, and to use whatever means necessary to remain in power, constitutes a further moral defect of the international legal norm that empowers those who exercise effective control over a territory to create, modify, or extinguish property rights over natural resources that lie within it. See Pogge, *World Poverty*, p. 113.

[56] Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (New York: Oxford University Press, 2016), pp. 111–13.

discretion of each sovereign state. Contemporary practice is the result of state's independently converging on "might makes right" as the basis for jurisdiction over natural resources, not the product of a collective determination, expressed in international law, that this should be the case.[57]

Furthermore, Wenar maintains that international law actually denies tyrannical governments an entitlement to exercise jurisdiction over the natural resources that lie within the territory of the state they rule.[58] Although they may exercise effective control over those resources, they lack the legal standing needed to alter existing property rights, or to create property rights in newly discovered oil, diamonds, cobalt, and so on. Wenar's defense of this claim begins with the observation that nearly every state in the world is party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural rights, both of which begin by declaring in their first article that "all peoples may, for their own ends, freely dispose of their natural wealth and resources," and conclude by asserting "the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[59] Together, these two passages evince a commitment to popular resource sovereignty: the right of the people of each country to freely control the resources of their country.[60] In virtue of their agreement to these Human Rights Conventions, states have an international legal obligation to refrain from facilitating trade in natural resources extracted from tyrannical states; that is, states ruled by governments that deny the people sovereignty over their natural resources. It follows that in granting domestic property rights to natural resources that originate in tyrannical states, states that are party to ICCPR and/or ICESCR violate international law.

Like all of the rights contained in these Human Rights Covenants, popular resource sovereignty constrains and conditions a government's exercise of political power. Since it is the people who have a right to freely dispose of their natural wealth and resources, a government may create legally valid property rights in those resources only if the people have authorized it to do so. Furthermore, in exercising the authority granted to it by the people, the government must pursue the people's enjoyment and full utilization of their natural wealth and resources. In the language of the Natural Resources Declaration adopted by the UN General Assembly in 1962, the people's right over their natural resources must be exercised "in the interest of their national development and of the well-being of the people of the state concerned."[61] However, the fact that popular resource sovereignty is but one of the rights included in these conventions indicates that they are not the only

[57] Ibid, 115–17.
[58] Ibid, 190–207.
[59] Quoted in Wenar, *Blood Oil*, p. 196.
[60] Ibid, p. 197.
[61] "Permanent sovereignty over natural resources," United Nations General Assembly Seventeenth Session, Resolution No. A/RES/1803/(XVII), December 14, 1962.

constraint on the exercise of political power. Rather, Wenar maintains that "the group rights of popular sovereignty in Article 1 are limited by the human rights of individuals in the articles that follow."[62]

Government provides an institutional mechanism whereby the people of a state can exercise their sovereignty over the natural resources that lie within the state's territory. Of course, not every government plays this role. Rather, the government of a particular state acts as an agent of the people only if the latter enjoy at least bare-bones civil liberties and basic political rights.[63] The former includes rights that protect citizens' access to information regarding the management of their resources, such as the costs involved in their extraction and the distribution of the resulting revenue, as well as rights that enable them to publicly debate their state's natural resource policies without having to fear imprisonment, torture, or death. Only where the rule of law effectively protects citizens' freedom of speech, freedom of assembly, and the freedom of the press can a government plausibly claim to be authorized to act on behalf of the governed. Moreover, the people must possess those political rights necessary to hold the government accountable for the policies it pursues: "If a majority of citizens strongly disagree with what the government is doing with the country's resources, government policy must change to reflect this within a reasonable time."[64] Importantly, Wenar's concern is not with the defense of an ideal of representation or accountability but instead with the description of a minimum threshold that must be met if a government is to have any reasonable claim to act as the agent of a state's citizens. Such a strategy seems defensible given how many resource-rich states fail to cross even that threshold, and the hardly coincidental fact that many of the world's worst injustices take place in or at the hands of those states.

On Wenar's account, international law already contains morally defensible norms governing the exercise of jurisdiction over natural resources. The problem lies in states' failure to comply with those norms. The horizontal (or primitive) structure of the international legal order rules out certain strategies for addressing this problem. There are no international police available to enforce states' legal obligations to honor popular resource sovereignty, neither is it likely that the society of states will collectively perform that task. Indeed, it is not clear what sorts of measure states are legally permitted to take to enforce other states' compliance with their legal obligation to respect popular resource sovereignty. However, Wenar argues that international law does permit certain sorts of unilateral action by states that could put an end to much of the trade in stolen natural resources. He starts with the observation, noted above, that international law does not require states to grant property rights in their domestic legal order to natural resources extracted from other states. It follows

[62] Wenar, *Blood Oil*, p. 206.
[63] Ibid, p. 228.
[64] Leif Wenar, "Beyond Blood Oil," in *Beyond Blood Oil*, Wenar et al. (Lanham, MD: Rowman & Littlefield, 2018), p. 16.

that states can uphold their legal obligation to respect popular resource sovereignty by enacting two *domestic* laws.[65] The first is a Clean Trade Act that would make it illegal for actors within the state's jurisdiction to purchase natural resources extracted from territory ruled by governments that fail to meet minimal standards of accountability to their citizens. For example, were the United States or Japan to enact such a law companies in those countries would not be legally permitted to purchase oil from states such as Saudi Arabia, Russia, or Angola, or tantalum from the Democratic Republic of Congo. Of course, countries such as China or Vietnam might continue to purchase oil from states ruled by tyrannical governments, and use some of it to manufacture goods they export to developed liberal-democratic countries such as the United States or Japan. Therefore, Wenar urges the latter states to enact a second domestic law, which he labels the Clean Hands Trust. This law would impose tariffs on the import of goods manufactured using oil purchased from tyrannical governments. All else equal the value of those tariffs would be equivalent to the value of the oil imported from such states. The money raised by the tariff would be set aside in a trust for the people whose oil had been stolen by their tyrannical government, to be handed over to them once that government had been replaced by one that satisfied the minimum standards of accountability required by the principle of popular resource sovereignty.

These tariffs will be costly for United States and Japanese citizens, of course, but then as we saw in our earlier discussion of exploitation, no one is morally entitled to benefit from another's purchase of stolen goods. Moreover, in combination with the fact that they would likely become the primary target of attacks by the revolutionary movements tyranny inevitably spawns, these tariffs might well provide China, Vietnam, and others with an incentive to reduce or end altogether their oil imports from states ruled by tyrannical governments. Without the income necessary to buy the support of a minority and the arms necessary to oppress the majority, these governments will find it exceedingly difficult to remain in power without embarking on the reforms necessary to conform to the principle of popular resource sovereignty.

Unilateral changes in domestic law constitute the first steps in advancing states' respect for popular resource sovereignty. At this stage, international law's primary contribution consists in its presentation of a clear and nearly universally agreed on statement of who enjoys jurisdiction over natural resources. Activists can invoke international law to help make the case for the adoption of domestic Clean Trade laws. Yet a convergence by an increasing number of states on roughly similar domestic Clean Trade laws might lead in turn to changes in international law that further serve the aim of maximizing compliance with popular resource sovereignty. For example, whether through legislation (that is, a new round of treaty negotiations), administrative rulemaking, or judicial interpretation multilateral trade rules might change in ways that sanction states' collective enforcement of popular

[65] Wenar, *Blood Oil*, pp. 283–91.

resource sovereignty, and that make it a morally defensible and effective means for reducing trade in stolen goods. At this point, international law and institutions would begin to play an independent role in shaping the conduct of governments and other actors.

Wenar's argument has been subject to many criticisms. Some of these reflect a misunderstanding of the position he defends. For instance, while Wenar contends that the people of a state enjoy ultimate jurisdiction and original ownership rights over the natural resources located within the state's territory, that does not entail that those resources must be owned or managed by the state. Rather, popular resource sovereignty is compatible with a range of different legal regimes governing natural resources, including transferring ownership over particular resources to private companies, or licensing private companies to manage state-owned resources. The key points are that (a) the choice of a particular type of legal regime governing natural resources must be made by a government with a reasonable claim to be acting as the agent of the people, and (b) the people always retain the right to change whatever legal regime they had previously implemented (via a sufficiently responsive government).[66]

A second set of objections take issue with one or another of the empirical claims on which Wenar rests his argument. The claim that a Clean Trade Act or Clean Hands Trust will never be adopted, or that they will not make any difference to the ability of tyrannical governments to remain in power by selling (the right to extract) stolen natural resources, are two examples.[67] A third set of objections contest the moral permissibility or obligatoriness of the means Wenar proposes for advancing respect for popular resource sovereignty. The refusal to trade with a resource-rich state ruled by a tyrannical government may well impose enormous costs on the citizens of that state, perhaps even the deaths of many thousands who would otherwise not die. If so, then we have a weighty moral reason not to enact the Clean Trade policies Wenar defends. Yet if a refusal to trade makes a state responsible for these deaths, then its participation in trade with a resource-rich state ruled by a tyrannical government must also make it responsible for all the harms that follow from that choice. Perhaps both claims rest on a problematic understanding of moral responsibility for others' suffering. But if not, the question is which policy is likely to produce more rights violations, which then points us to empirical questions regarding the likely timeline for a transition to a minimally accountable government, and the number and kind of rights violations likely to occur prior to and during that transition.[68] Consider, too, that a state's adoption of a Clean Trade Act

[66] Ibid, p. 206.

[67] See, for example, the essays by Michael Blake and Nazrin Mehdiyeva in *Beyond Blood Oil*, Leif Wenar et al. (Lanham, MD: Rowman & Littlefield, 2018).

[68] If acts constitute graver wrongs than do omissions, as some maintain, then there is some moral reasons to favor refusing to trade over trading, apart from a concern with the number and severity of the rights violations the rival trade policies will produce.

and a Clean Hands Trust will impose significant costs on that state's citizens, who may have a moral right against bearing too great a burden in order to benefit distant others. Yet the fact that foregoing the purchase of stolen goods will be costly for me is not generally a compelling moral justification for proceeding with the purchase.

A last set of objections consist of moral challenges to popular resource sovereignty. What makes a group of individuals a people with a claim to sovereignty over resources within a given territory? Why do they (and they alone?) have a right to sovereignty over the natural resources located in some territory T, and why that particular territory? To some extent these questions were taken up in Chapter 9.[69] Wenar adopts a broadly consequentialist (or, arguably, pragmatist) method to answer these questions, one that focuses on responding to or mitigating existing injustices, evaluates rival norms in terms of which is better (or less bad) rather than trying to determine what norm would be best or ideal, and takes considerations of feasibility into account from the very start.[70] While he acknowledges that the citizenry of a given state may be composed of members of distinct peoples – for instance, in the case of the United Kingdom, the English, the Scots, the Welsh, and the Northern Irish – he nevertheless argues that international law rightly limits popular resource sovereignty to the citizens of a state while according no right to independent statehood to such "peoples within a people." That is because "the state system that allocates territories to national peoples is justified by the monumentally important human goods that this system produces: peace, prosperity, and freedom – and because we have scarcely any feasible idea of how we could reallocate power to do better."[71]

Wenar likewise dismisses as unrealistic the argument that human beings own the Earth in common, and so are all entitled to a share of the value created by the extraction of natural resources from any place on the planet. Specifically, he contends that unlike popular resource sovereignty, common ownership of the world is not a widely shared moral ideal, and so any attempt to implement a global resource tax and redistribution program that rests on that ideal will be viewed as illegitimate. If principles of justice are to guide our conduct, Wenar argues, they must be responsive to the world in which we actually live. At present, there is simply too little social cohesion and trust across borders to support a global resource tax and redistribution program.

Theorists who ground principles of global justice in common ownership of the Earth may accept this conclusion, while still defending their own view as a correct account of a fully just world. The same is true for those who advance rival accounts

[69] Note that the considerations that morally justify jurisdiction over human interactions with specific natural resources, and that spell out the scope of that jurisdiction, may differ in some respects from those that morally justify jurisdiction over other domains of human conduct.

[70] "The best practical reasoning is about reaching the best future we can, thinking through the likely results of our actions and how our actions will affect the balance among the many things that have real value." Wenar, *Beyond Blood Oil*, p. 155. See also Lefkowitz, "Institutional Moral Reasoning," 391–7.

[71] Wenar, "Beyond Blood Oil," 147. See also Wenar, *Blood Oil*, p. 260.

of the people entitled to sovereignty over resources. In their eyes, Wenar may offer a compelling pragmatic argument we can act on now, but even if successful the program he proposes will only mark a moral improvement in our international practices, not the realization of a just global order. Wenar finds this position unconvincing. He readily concedes that popular resource sovereignty may not always be the morally optimal norm governing the allocation of jurisdiction over natural resources. However, he expresses a deep skepticism toward ideal theoretical accounts of global justice or resource rights that make no real effort to explain how the institutions they describe will manage the stresses imposed by actual human beings, or how we can transition from our current arrangements to the ones these theorists identify as fully just. In this regard, Wenar is representative of a growing number of political and legal philosophers who take the history and current practice of international law as the starting point for their normative theorizing, and who offer modest and empirically informed proposals for its improvement.[72]

[72] See, for instance, Buchanan, *Justice, Legitimacy, and Self-Determination*; Ratner, *Thin Justice of International Law*; Pavel, *Divided Sovereignty*; and Lefkowitz, "Institutional Moral Reasoning."

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