A Theory of Fairness in Trade

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A theory of fairness in international trade should answer at least three questions. What, at the basic level, are we to assess as fair or unfair in the trade context? What sort of fairness issue does this basic subject of assessment raise? And, What moral principles must be fulfilled if trade is to be fair in the relevant sense? In this paper, I will offer answers to these three questions which derive from a broadly Rawlsian "constructivist" methodology. My proposals are as follows.

The Subject of Fairness: The basic subject of fairness in trade is an *international social practice of market reliance*, a practice whereby countries mutually rely on common markets (in goods, services, or capital). This basic practice is to be distinguished from particular market transactions, transactional flows across borders, as well as particular trade or trade-related policies (tariffs, quotas, safeguards, subsidies, etc.) that influence transactional flows. The practice is also distinct from, but more closely related to, international rules that regulate such trade and trade-related policies, including both formal trade law (e.g. World Trade Organization (WTO) rules) and informal understandings of how the balance between market and state is to be struck (e.g.

the post-war "embedded liberalism" compromise).[1] Such rules or understandings represent substantial market reliance expectations, the terms of participation in the larger market reliance practice, but not the larger practice itself. The practice itself, and the basic subject of fairness, is the underlying social fact that countries do comply, more or less, with some system of market reliance expectations, for the sake of larger, mutually shared ends.

The Fairness Issue: Any such market reliance practice can be organized in different ways, with varying consequences for different countries and their respective classes. The collective choice of organization, through negotiated agreements or trend-setting unilateral action, is therefore subject to basic moral constraints. Chief among them are requirements of *structural equity*, which concern how a given system distributes the benefits and burdens it creates, among different countries, and among their respective classes.

Fairness Principles: The basic requirements of (socio-economic) structural equity can be expressed by the following three (lexically ordered?) principles. The first principle concerns the harms of trade, such as unemployment, wage suppression, and income volatility that diminishes lifetime savings. According to

> *Collective Due Care*: trading nations are to protect people against the harms of trade (either by temporary trade barriers or "safeguards," etc., or, under "free trade," by direct compensation or social insurance schemes). Specifically, no

[1] See John G. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," *International Organization* 38, no. 2 (1982) and Robert Howse, "From Politics to Technocracy--and Back Again: The Fate of the Multilateral Trading Regime," *The American Journal of International Law* 96, no. 1 (2002).

person's life prospects are to be worse than they would have been had his or her society of origin been a closed society.

The second and third principles concern the "gains of trade," as specified by classical trade theory. These chiefly include the national income gains due to greater allocative efficiency in the division of labor, due to economies of scale, and due to the spread of technology and ideas. According to

Domestic Relative Gains: gains to a given trading society are to be distributed equally among its affected members, unless inequality of gain is reasonably acceptable to them all (e.g. according to domestic distributional principles).

And according to

International Relative Gains: gains to trading societies, as adjusted according to the relevant endowments of each (e.g. its population size and level of development), are to be distributed equally, unless unequal gains flow (e.g. via special trade privileges) to poor countries.

Those are my main claims. A crucial feature of the account is that it is *international* in a qualified yet particularly strong sense: it provides no scope for comparing levels of gain for any two individuals of the world. The first principle does consider harm to individuals as such, whether or not they live within the trading system.

But as far as the *gains* of the system are concerned, comparisons between the relative gains or losses of individuals are only allowed (under the second principle) *within* a single society. Assuming no one is harmed, the distribution of gains across societies is evaluated (under the third principle) at the level of whole countries. This is despite the fact that we can easily imagine a further, specifically "global" or "cosmopolitan" fairness principle that directly limits the relative gains of any two individuals of the world. But why not directly compare how, say, a particular American and a particular Brazilian fare? Given globalization, are they not both part of the same global economic scheme?

In brief, my answer is "no," at least not in the sense required. In general, mere economic interdependence between people or countries is not sufficient to give rise to the distinctive issue of fairness which is chiefly at issue in trade. What does raise the distinctive issue is the special kind of *social relationship* that embeds market relations, that is, the international market reliance practice that allows and regulates economic interdependence.[2] In that case, the relation the American and the Brazilian share by way of their economic interdependence is indirect; the basic parties to the organizing social relationship are their respective countries. Individuals, as such, can lay claim to protection against the harms of the trading system, including trade-related domestic policies. But the chief egalitarian claim, concerned with *relative* gains or losses, is essentially tied to *the type of good the trade relation is intended to create*. As will become clear, because the ultimate aim of international market reliance is for countries to mutually increase national income (via productivity-enhancing specialization), I take principles of distributional fairness to properly have an international rather than "global" or "cosmopolitan" form.

2 [cite North and the institutional economics literature. My claim is analogous.]

I mention the international character of my account in order to highlight one of its central features and to suggest why it may be of interest: if my proposed three principles can be defended, this shows that the Rawlsian social contract approach I favor can make a lot from modest means. If I am right, fairness in trade generates limited but significant egalitarian requirements of distribution provided only relatively plausible assumptions—assumptions which, as we will see, are quite separable from humanitarian, human rights, or global distributive justice requirements.[3] To make my case, I first say more about the social contract framework I favor and how I take it to apply in the trade context. I then argue that, *given* this framework, my three proposed principles are more defensible than less demanding principles. The reasons for my proposed three principles will emerge from the objections to weaker alternatives.

THE SOCIAL CONTRACT FRAMEWORK

In the broadest terms, my proposed principles are intended to specify "what we owe to each other" in the trade context, in the sense of Scanlon's contractualism: the principles are those no one could reasonably reject, given our relevant generic interests in both the benefits of life in an open society and in protection against its insecurities.[4] Being primarily devised for interpersonal morality, however, Scanlon's theory does not

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[3] Furthermore, though I won't make the case here, the account also allows us to explicate other distinct but related fairness issues, including issues of "fair bargaining," "competitive fairness," "level playing fields," "equitable growth," "exploitation" and "fair wages." A social contract account of the international trading system can thus be the centerpiece of a wide-ranging account of fairness in the global economy. I am currently working on a book project which advances this general thesis. See also my "Global Economic Fairness: Internal Principles," as well as my "When International Intellectual 'Piracy' is Fair," and "How to Defend Sweatshop Labor: Fairness in the Global Economy." (Unpublished manuscripts, available by request or (in the latter two cases) from my UC Irvine departmental website.) In this paper I develop some aspects of the account also presented in my "Equality in a Realistic Utopia," and "Distributive Justice without Sovereign Rule," both in *Social Theory and Practice*. This paper adds substantial normative argument missing in those treatments.

[4] [reference]

directly tell us how to address the large-scale patterns of economic interdependence we find in the current global economy. Such patterns are beyond any individual person's control, and so largely beyond the scope of interpersonal morality. Yet they cannot be regarded merely as the workings of fate; the patterns are both created and substantially shaped by domestic and international social institutions, which include the trading system.

A central concern of Rawlsian theory is precisely of this sort: the special concern of *social* justice is the justifiability of collectively sustained social institutions and practices, in light of their large-scale distributive consequences. (If Scanlon's concern is what we each owe each other as so many individuals, the Rawlsian concern is with what a given organized collective "we" owes to all those involved.) Specifically, a central Rawlsian preoccupation is with structural equity—the concern that a governed social practice treats all those it affects equitably, given the way it distributes the benefits and burdens it creates among them. This is already a broadly egalitarian concern, in the sense that differences in treatment under the common structure are assumed to be arbitrary unless they can be justified as acceptable (not reasonably rejectable) to everyone affected. While this is not yet to place substantial limits on inequality, it does indirectly support a presumption in favor of equality of distribution. Insofar as participants in the practice can be said to have the same presumptive claim to greater rather than lesser shares of the goods their participation helps to create, according to its generally understood purpose, equality of distribution is the default: unless special reasons can be given why inequality is acceptable to all, anything short of equality would arbitrarily discriminate against those who receive lesser shares. (Non-participants would lack this special claim, having had no hand in creating the cooperatively produced goods, yet could still raise other potentially reasonable objections, for instance, against harm done or their exclusion from the practice.)

The question is then is how, if at all, any of this applies in the global economy.[5] It is tempting but premature to ask what principles would reflect a fair agreement, say, under fair circumstances specified by a suitable Rawlsian original position. Assuming people have an interest in both the benefits of life in an open society, as well as in protection against its insecurities, we might ask what system of international trade people would agree to live under not knowing facts about their actual social position, such as whether they are a low-skilled or high-skilled worker, or whether their country of origin is rich or poor. But this question is premature; it assumes too much that is properly controversial about how the original position thought experiment is best run. Why not pose the question in a different way, with different interests or levels of ignorance? Why assume an international system, instead of being open to arrangements less like the status quo? As I understand Rawlsian methodology, these question need to be answered in part by an independent characterization of the nature of the social structure at issue, in light of its basic aims and organizational form, and a specified set of relevant interests and claims. The proper methodology, in the first instance, is a constructivist blend of morally informed "constructive interpretation" of the organization and aims of the social reality in question, of substantial moral explication of the morally relevant interests at stake, and of reasoning about what organization, if any, is reasonably acceptable to each person affected, in light of those relevant interests. Then, but only then, can we consider with

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[5] [Quote Rawls's passing comments about trade in *The Law of Peoples*.]

any confidence how the original position representation of reasonable acceptability might go.[6]

(Note, however, that the issue of design need not ultimately turn on whether we represent countries or individuals behind the veil of ignorance. A country's interest in national income gains might be represented as an interest of any of its members: each person may have an interest in living in a richer rather than a poorer society. Conversely, a person's interest in economic security might be represented as a country's interest in providing security to its members. The ultimate question is what interests are relevant and how they are balanced, not their general form.)

My basic claim of social interpretation is that the global marketplace is (and for the foreseeable future will be) fundamentally organized and shaped by an international market reliance practice, for the sake of mutual national income gains. My basic moralized interpretive claim is that this practice is of the appropriate sort to trigger the egalitarian considerations of structural equity which animate Rawlsian theory. While I will also argue below from substantial moral considerations (about what people can reasonably accept), I should first say more about these interpretive/moral theses.

THE TRADE RELATION

Is trade best seen as an international market reliance practice? It is clear enough that a global economy simply would not exist to the degree that it does if countries did not routinely choose to allow market transactions and competition between their respective people and firms. It is a reflection of this fact that, despite the increasing

[6] For details, see my "Constructing Justice for Existing Practice: Rawls and the Status Quo," *Philosophy and Public Affairs*

significance of transnational relations, borders still dramatically shape trade flows, even among relatively open industrialized economies. As the point is sometimes put, there is still more trade between any two provinces of Canada and equidistant states within the United States.[7] But does the choice of market reliance reflect a truly *common* practice, as opposed to a coincidence of purely unilateral decisions? It does in the sense that the choice of reliance is made and sustained based on expectations of similar reliance by other countries, for the sake of mutually understood and shared purposes. The multilateral trading system is, for example, a historical social contract in just this sense.

To be sure, economists sometimes emphasize that the basic argument for free trade is unilateral. The value of trade lies in imports, which allow greater productive efficiency and introduce new embedded technologies. Exports simply pay for imports. So, the reasoning goes, there is no need to wait for export market access in order gain from trade: a country benefits by dropping trade barriers of its own accord. In theory, then, no general practice of *mutual* market reliance is required. As Paul Krugman puts the point, “If economists ruled the world, there would be no need for a World Trade Organization. (…) [G]lobal free trade would emerge spontaneously from the unrestricted pursuit of national interest.”[8] Here it matters how exactly the imagined world is described. If we are to imagine a true coincidence of unilateral action, this would not necessarily display the sort of mutuality needed for a common practice. But it would not necessarily raise issues of fairness, either. Perhaps we are imagining each country’s move to free trade as wholly insensitive to potential affects on others—perhaps as akin to a choice of how to manage good or bad weather. In that case, the policy choice itself

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7 [reference]

8 Paul Krugman, "What Should Trade Negotiators Negotiate About?," *Journal of Economic Literature* 35, no. 1 (1977), p. 113.

might be unfair to the "losers" within each society (assuming compensation is not arranged), but there is no unfairness in the trade relation with outsiders, such as it is. On the other hand, if a unilateral choice to free trade is taken in full awareness of the similar choices of other countries, perhaps based in a common understanding of its benefits, and this (perhaps implicitly) becomes an established arrangement which all in turn rely on, and are known to rely on, then we *do* have mutuality of the right kind. The organization and consequences of the resulting social practice can then be assessed on their own terms, according to structural equity principles.[9]

Indeed, the standard economic case for free trade itself suggests that trade is ultimately an ongoing cooperative relationship. Free trade is not, even in theory, a straightforward matter of national self-interest. Under the appropriate conditions, market barriers can be optimal (according to both "terms of trade" and "strategic trade" theory, for example). For this reason, economists instead argue that free trade is simply good political-economic practice. Since the optimal trade barrier is usually quite difficult to set in practice, the costs of regularly getting it wrong outweigh the modest benefits of occasional success. Further, it is sometimes added, self-interested optimizing in any case invites retaliation from other countries, and perhaps mutually destructive trade war. Hence it is best to forgo temporary gains for the sake of mutually beneficial cooperation

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[9] Relevant here are a range of specifically political, broadly Hobbesian considerations concerned with levels of assurance and the role of bargaining. I discuss them further in my "Distributive Justice without Sovereign Rule: the Case of Trade," *Social Theory and Practice* [reference]. I assume there is no longer a serious debate about whether the trading system and other international regimes count as broadly cooperative relationships despite the absence of a Hobbesian, assurance-providing global sovereign. Neo-realists have conceded this. As one leading neo-realist, Joseph Grieco, explains, the issue is now a matter of degree: "In general, realists have argued that cooperation is possible under anarchy, but that it is harder to achieve, more difficult to maintain, and more dependent on state power than is appreciated by the institutionalist tradition." Grieco, J. (1993). Understanding the Problem of International Cooperation: the Limits of Neoliberal Institutionalism and the Future of Realist Theory. <u>Neorealism and Neoliberalism: the Current Debate</u>. D. A. Baldwin. New York, Columbia University Press, p. 302.

over the longer haul.[10] In fact, it is precisely such reasoning that led countries to establish a system of legal reliance expectations (the General Agreement on Tariffs and Trade (GATT)) in the wake of the mutually destructive interwar years. Trade as we know it is a cooperative practice of market reliance, and so utterly unlike a world of spontaneous free trade.

If this is correct, then market reliance is a form of *participation*. At the minimum, countries participate by maintaining trade policies (whether tariffs and quotas or "behind the border" measures such as subsidies, internal taxes, or preferential rules) that allow a common market to exist; if the trade barriers are high enough, cross-border business will (aside from the occasional "black market") all but cease. Beyond the minimum, participation involves compliance with established market reliance expectations, including both treaty rules as well as informal understandings of what it takes for the common market relations to be beneficial in the intended ways.

If trade is a practice, what is its point? The answer, in short, is: national income gains. The basic, presumptively legitimate and generally understood aim of mutual market reliance, as first specified by Adam Smith and as refined by David Ricardo, is mutual augmentation of national income. As each country trades to its respective comparative advantage—specializing in what it produces best, relative to its productive options, and exchanging for the rest from abroad—each country does better overall than

[10] As Douglas Irwin explains in his history of the free trade debate, "The analysis of strategic trade policy, like the terms of trade argument, illustrated the possible unilateral advantages of deviating from free trade to exploit one's trading partners… But the real implication…is not so much that…trade interventions can be potentially beneficial. Rather, these theories reinforce the notion that trade is a form of economic interdependence. If each country ignored others and pursued policies that were apparently to its unilateral advantage, most countries would likely be worse off in the end. Cooperative agreements between countries, in which all agree to forgo the use of such policies, could potentially make each of them better off." Douglas A. Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton: Princeton Universty Press, 1996), p. 216.

it could in a condition of isolation. Economies of scale and the great benefits of the spread of technology and ideas further amplify national income gains, by reducing production costs and increasing productivity. The resulting gains in turn contribute (indirectly, and in conjunction with many other factors) to economic growth.[11]

Welfare economists sometimes misleadingly suggest that the aim of trade is to promote mutually beneficial transactions. While this is perhaps one possible normative justification of trade, it is not its basic presumptively legitimate and assumed aim. As both Smith and Ricardo understood it, the aim of trade is not welfare benefits or exchange per se, but rather to allow countries to further refine their respective divisions of labor, in order to allocate their resources more productively and thereby increase national (average or aggregate) income. Exchange is merely a means to such specialization: the possibility of exchanging for what was previously produced allows ever further refinement, ever greater overall production, and ever great national-level income gains. National-level income gains may or may not translate into welfare, for countries overall or for individuals. As for countries overall, whether national income gains lead to overall welfare depends on how the gains are distributed. A net welfare loss might result if all the gains go to a few people, while enough "losers" suffer dearly. As for individuals, trade may or may not benefit a person, if only because trade simply changes "relative prices." Whether one is better off overall will depend on what is in one's overall consumption basket. Even if some prices fall, the price of what one needs most may go up to a degree not covered by savings elsewhere, leaving one a net loser.

If all this is right, the bare existence of the market reliance relationship suffices by itself to generate a collective responsibility of fairness in the Rawlsian sense outlined

[11] [cite growth literature]

above. Each country involved is obligated to offer, negotiate toward, and abide by the terms required for a structurally equitable practice. The benefits and burdens that trade creates, across countries and within their respective classes, must be distributed in a way that no one can reasonably complain of. In particular, given the nature of the trade relation, levels of *relative* loss or gain will bear on what market reliance practice is fair. If countries really are jointly creating goods that would not otherwise exist—goods that would not exist under universal autarky—then each has a presumptive claim to greater rather than lesser shares. Perhaps special reasons for inequality of shares can be given, as particular cases require. The crucial point is that such special reasons *have* to be available if the shared practice is to be regarded as a reasonably acceptable, structurally equitable practice.

It is significant that this basic form of argument requires no reference to moral principles independent of those justified specifically for the trade relation, in the manner just suggested. Human rights and humanitarian principles presumably do bear on what trade policies are fair. They generate still *further* demands, but they are not the only and perhaps not the most central issues of fairness in trade. Requirements of socio-economic structural equity arise without any assumption of such further principles. Even if we reject them across the board, we can still raise fairness questions specifically about the benefits and burdens the trade relation creates, and the various ways they are or would be distributed among countries and their classes under different feasible arrangements. Simply by comparing relevant distributions, we can make a judgment of what overall scheme of institutions is, in fairness, required. Structural equity can thus generate requirements of socio-economic distribution in its own right.

I turn to these requirements momentarily. I should first pause to further delineate the scope of structural equity concerns. For one thing, the structure of a practice of mutual market reliance should be distinguished from the political procedures by which specific laws or expectations are set. Such procedures can of course be fair or unfair in their own right, requiring, for its own sake, that negotiations be transparent, that all affected parties have voice in setting the negotiation agenda, that technical assistance be available when it is needed. But the fairness of any governance practices also depends on how far they facilitate substantial fairness in what is being negotiated, the *underlying* organization of the practice itself.

But what does this underlying organization encompass? While it most clearly includes the multilateral trading system and established international economic law, it also plausibly encompasses bi-lateral and regional trade agreements, and even less-well regulated capital markets, international lending institutions and practices, and the monetary reserve system. Along with the benefits and burdens of goods and services trade, the scope of structural equity principles will then include any number of benefits and burdens created specifically by capital market reliance, including its affects on growth, standards of living, development, employment, and perhaps much more. (If simplicity is wanted, we can limit our attention to the multilateral system of goods and services trade and treat further aspects of the underlying practice as secondary issues of scope.)

COMPENSATING THE "LOSERS"

I now turn to consider reasons why the three principles of structural equity proposed above are more defensible (as reasonably acceptable) than weaker, less demanding alternative principles. My own view is that *no* weaker principles are equally defensible, but here I will confine my discussion to four general types of alternatives: opportunity principles, utilitarianism, Pareto efficiency, and libertarianism. I develop my argument by considering two basic fairness issues, issues of harm and issues of relative gain.

Although the standard economic case for free trade is concerned with national income gains, it is usually assumed that something must be said about how the gains of trade are distributed. A standard suggestion is that, insofar as a society cares about distribution, it can of course choose to compensate the "losers" from trade with some part of the "winners" gains (e.g., via a tax and transfer scheme, or domestically funded social insurance institutions). As the point is often put, the mere *possibility* of providing such compensation implies that free trade is "better for the nation" that market protection.[12] Whatever we say about efficiency or welfare, this is not very plausible as a view about what is fair. Freer trade could be fair only when compensation is *actually provided*.[13] Otherwise, some people will in fact be made worse off, and there is no general reason to think mere aggregate or average gains should fall out in a way that makes this seem fair. The injury to some might be quite significant, while the gains to any one person are small and simply distributed across a large number of people. For example: workers in an import-oriented industry might face unemployment and destitution, while millions of

[12] According to the Hicks-Kaldor compensation criterion, only a *possible* Pareto improvement is required. [As a point about the possibilities of consumption, see Krugman and Obstfeld, p. 68-71]

[13] [A few—but only a few—economists emphasize this as a point about the gains of trade, e.g. Samuelson 1966 and 1950. Krugman and Obstfeld, p. 70. Cite Driskill's critique of "good for the nation."]

consumers see small savings on slightly cheaper goods. If nothing else, the losers can reasonably insist that their losses be mitigated by any number of feasible compensatory schemes. The complaint is especially strong if the disaggregated cost of compensation amounts to a small or moderate part of each winner's gains.

This objection is forceful but incomplete. Not everyone who suffers a loss as a result of trade would seem to have a claim of fairness to compensation. Consider the oligarch whose monopoly is undermined by foreign competition, or the rich owner, manager, or shareholder in threatened import-oriented industry firms. These people may lose as a result of freer trade but remain rich and secure. But who then is a "loser" of the right sort, and on what grounds? I will suggest three relevant grounds: reasons of harm to lifetime prospects, of acceptable risk, and of burden sharing. The first two reflect the principle of (Collective) Due Care, the second the principle of Relative National Gains.

According to Due Care, the trade relationship is structurally equitable only if it arranges compensation for the harms of trade. Specifically, no person's life prospects are to be worse than they would have been had his or her society of origin been a closed to trade. Although the well-off and stable oligarch, owner, manager, or shareholder suffers economic loss, such people are normally net beneficiaries of life in society. Other people are on balance worse off. Worse off with respect to what benchmark? While I assume it will rarely be coherent (or relevant) to ask how a person would have fared in the absence of any society whatsoever, in many real-world cases the comparable question about a person's society is all too apt. Many developing country (e.g. cotton or sugar) farmers are arguably net losers for their exposure to lavish rich country agribusiness subsidies, in the sense that they would have been better off had their society never opened its borders.

Some are cast into destitution when they otherwise would have continued at subsistence levels. Many do not reap gains they would have seen had domestic markets been open to them and closed to the outside.

To be sure, it is presumably also true that some such people would have been even worse off overall had their country never opened its borders. A long history of cumulative gains might have buoyed general prospects of the society and class they were born into. I suggest the relevant benchmark factors out gains reaped before a person is born. In order to assess the affects of trade on a person's life prospects, we should compare the situation in which that person's society (perhaps gradually) chooses autarky roughly around the person's birthday. (To avoid "non-identity problem" worries, we consider someone born in that person's social class, whether or not it is the numerically same individual.) If the person's expected life prospects would have been better under autarky, then he or she is made worse off by life in an open society.

While the unfairness here is exacerbated by the fact the people harmed are often very poor, it does not depend on conditions of absolute deprivation. Low-skilled rich-country workers (who are rich by global standards) can equally count as worse off as a result of their country's choice to free trade. As trade reallocates resources to high-skilled, export-oriented industries, low-skilled, uneducated workers commonly find themselves unemployed. They are not readily retrained and reemployed in the industry to which their jobs have moved. They face a difficult and perhaps extended period without stable income, not to mention income volatility that hinders long-term savings and prospects for eventual retirement. Although such workers could in principle see compensating benefits from an open society, these benefits often do not flow their way to a sufficient degree. (Consider, for example, that the US has from 1980-2008 distributed its massive income gains, which are in part due to trade, away from the bottom and lower-middle of the income distribution.)

Due Care is consistent with perfectly free trade so long as special compensatory arrangements are made. In developed countries, feasible arrangements include direct payments and/or social insurance, in the form of unemployment and wage insurance, pensions, education subsidies, job training and job placement, employment-stimulating public investment, and so on. In developing countries, where institutional schemes can be difficult to establish and maintain, appropriate measures include public investment, government purchase of goods and services, and temporary (e.g. revenue-generating) trade barriers, infant industry protection, and so forth. Developing countries often cannot pay for such measures by themselves (from their own gains of trade or otherwise). A crucial implication of Due Care is that the responsibility to fund and establish compensatory measures does not stop at a given country's borders. The international practice of market reliance generates *collective* responsibilities, for all countries involved. When any country cannot afford the necessary compensatory schemes, their trading partners are obligated to fund the measures needed for the shared market reliance practice to be fair to all. (The appropriate slogan is not "trade not aid" or "trade as aid" but "aid as fair trade.")

Even if *some* level of social protection is thus required for fairness, this is not to say that levels of benefit will be very generous relative to the status quo. One could argue that, because trade is so beneficial, existing rich country schemes are more than sufficient to provide the modest level of compensation required. We could in principle cut back. As a partial reply, it is plausible to add a risk premium in the application of Due Care. Just as someone who wins $1000 by betting his house in roulette is not clearly better off—his modest gain doesn't justify the high risk of significant loss—a social insurance scheme will not prevent net loss to a person unless the level of benefit is sufficient to justify exposure to significant risks of disruption, instability, and impoverishment. One will not "break even" unless one sees a good measure of gain.

There are weaker, less demanding principles than Due Care. According to opportunity principles, the fairness of the trading system can be assessed in terms of the opportunities available to countries (e.g. within the trading system) and/or their respective market actors (within market relations). The relevant opportunities can be characterized in different ways, depending on the opportunity theory in question. They might include only the absence of formal discrimination in established rules; or rough equality in market access in what rules are established; or even requirements of "fair opportunity" which include any technological or infrastructural development needed for effective (legal or market) opportunities to be available to all. The common feature of all such views is that there is no basis in fairness either for direct outcome assessment or for regulation (e.g. through compensation schemes) of what market outcomes arise.

My objection to all such views is that they do not count the harms of trade. It is not permissible to adopt a practice of market reliance, for the sake of its general benefits, without compensating those who will be foreseeably harmed, unless the parties likely to be harmed have an adequate opportunity to avoid the harmful practice. But people rarely have adequate opportunities to avoid the harms of trade, and so can reasonably complain when compensatory arrangements are not made. Few can be reasonably expected to leave their country (to where? another trading society?), and it is not as though the people most vulnerable to global market forces are simply not doing enough to gain from market relations. Developing country farmers, for example, are often doing as well as they reasonably can for themselves, given their limited options. Like domestic institutions, but unlike ordinary games, the international system of trade is not "voluntary" (i.e., reasonably avoidable) in a sense that makes an opportunity principle appropriate.

One might suggest that any *country* can always avoid exposing its people to outside market forces by simply erecting trade barriers. In that case, one might claim, the country alone bears responsibility for compensating its losers when chooses free trade instead. So long as relevant opportunities for integration are provided, the *international system* is not unfair, whatever outcomes result. But countries already in the system of trade, and subject to its market reliance expectations, cannot usually be reasonably asked to leave. The cost of leaving is often too high. If people are harmed because their country abides by expectations of freed trade, and the country is a participant in the practice in good standing, then all the countries involved remain collectively responsible to see to it that compensatory arrangements are set up.[14]

A second principle weaker than Due Care is utilitarianism (or any maximizing consequentialist principle, here understood as a fairness requirement). Unlike opportunity views, utilitarianism agrees that harms to individuals matter. The familiar problem is that they matter only because of their relation to aggregate welfare. It follows for utilitarianism that it is fair to severely harm producers by reduced trade barriers, so long as sufficiently many consumers see modest or small gains. As suggested above, this

[14] [discuss exclusion]

does not in many cases seem fair.[15] Those severely harmed can reasonably expect to have their losses mitigated, especially if this merely cuts moderately into consumer's levels of gain—and even if welfare is thereby diminished overall. Or to take a starker case: utilitarianism would in theory allow high poverty-causing trade barriers against most of the developing world if exclusive free trade with a few populous developing countries (such as India and China) could maximize poverty reduction and welfare overall. But this is hardly fairness in trade: it is not fair to substantially worsen the condition of poor people in one part of the world for the sake of gains to poor people elsewhere, even if there is a net reduction in poverty or increase in welfare.

Due Care is less demanding than Pareto efficiency, which we may regard as a fairness principle: a change in trade policy is fair only if it makes someone better off without making anyone worse off (a "Pareto improvement"). This has the counterintuitive implication that the rich and stable oligarch, owner, manager, or shareholder who suffers a loss would have to be paid off. But Due Care *does* allow trade policy to make such people worse off, so long as they remain net beneficiaries of life in an open society, as measured by their overall life prospects.

On the other hand, my second proposed principle, Relative Domestic Gains, demands more than Pareto efficiency. Pareto efficiency is indifferent to distribution. So long as no one is made worse off as a result of trade, it allows one or few people to take the lion share of the national gains. This seems unfair if only because background differences in wealth usually make a large difference to one's vulnerability to foreign market forces. The affluent will have a much easier time managing disruptions (in employment or in savings) than the middle and especially the lower classes. If the less

15 [Say something about acceptable aggregation]

well off bear the burden of a society's overall enrichment, it is not fair for the affluent to enjoy all or most of the gains.

This provides further reason, beyond the suggested risk premium, why fair social insurance schemes would be generous. Indeed, this is arguably the central reason of fairness for social protections. Even if we find few actual cases in which an idea of "harm" is appropriate—perhaps because the rate and depth of integration renders the idea moot—we still have to reckon with the way the benefits and burdens of social cooperation are being distributed. The fact that the relatively less well off bear the chief burden of a society's enjoying the gains of trade gives them an especially weighty claim to greater shares. Here the relevant "losers" are specified in terms of the relative hardships that relatively poor people face as compared to relatively rich people within the same society. So, for example, because income volatility is more likely to diminish the displaced worker's ability to save and ultimately retire, wage insurance, beyond mere unemployment insurance, is arguably only fair. (One is then guaranteed one's previous wage level, in one's next job, as opposed to mere post-employment pay for a period of time.)

THE RELATIVE GAINS OF TRADE

The Relative National Gains principle in fact requires more than fair burden sharing. Among those affected within a given society, gains are to be distributed equally, unless inequality admits of special justification, as reasonably acceptable to all of them. A weaker principle would require that special hardships be compensated, yet place no limit or need of justification upon inequality in levels of gain. The question is, then, Why should inequality of gain require special justification? If everyone is made substantially better off, who could reasonably complain?

One possible answer looks to the nature of the goods created in the trade relationship. From a domestic point of view, the gains of trade chiefly result from a national-level choice of policy. People contribute by doing what they would do anyway, except insofar as freer trade creates new incentives. Market actors refine what they produce and sell, perhaps buying and selling with different people and on different terms than before. In each case, they promote their personal prospects. Aside from those who suffer special hardships, no general class of market actors makes any special contribution to the gains of trade for society overall, at least none which gives them any proprietary claim to the gains they see. And if so, then everyone who has had a hand in the social created augmentation of wealth has the same presumptive claim to greater rather than lesser shares. The default distribution, which recognizes everyone's claim equally, is then equality of gains. Unless further reasons for a difference in treatment can be given, the trade practice would unfairly discriminate between the different claimants.

Libertarianism might object that the benefits of voluntary market exchanges are one's property as a matter of natural right, and that an individual's gains from trade are no exception. In good Rawlsian form, I would not grant this view of property: one's moral property rights are to what one gets in a fair scheme of cooperation. If holdings have to be modified through taxation for the sake of structural fairness, then one has no right against this. Moreover, the gains of international trade do in any case have an exceptional character. A change in trade policy is not an intervention into any given transaction, but rather a way of changing who transacts with whom and on what terms.

Insofar as living standards rise, no one needs to have voluntarily or even consciously chosen it through market exchange. One gains anyway. Distribution of the gains is thus not a case of taking what someone has made with his own bare hands and giving it to someone else. The more closely analogous situation is that in which a government deposits money into one's bank account and reserves a right of fairness to give notice and take some of it back.

Rawls's difference principle, as applied to gains, represents a further specification of Relative National Gains: inequality of gain would be justified only insofar as it is the greatest possible benefit to the society's least advantaged. If the gains of trade are part and parcel of Rawls's "primary social goods," which include income and wealth, then the application is straightforward. The difference principle might also be thought to apply even if we assume that no principles govern domestic distribution *other* than distribution of the gains of trade. But I will not pursue this thought further here. I will simply assume that Relative National Gains needs to be further specified in some such way.

What is more important for present purposes is that the domestic distribution of the gains of trade seems relevant to what is fair in the *international* system. For a country's inegalitarian policies can affect the relative gains of other countries and their members. For example, suppose (as I'll suggest below) that developing countries can in fairness ask for special privileges in the trading system (e.g. freedom from intellectual property or investment rules) on grounds of poverty, despite significant costs to rich countries. This argument will be considerably weakened if the affluent in those developing countries gain to a degree which is not necessary to maximize prospects for the worst off. Even if we suppose that everyone in a developing country is made better off, the level of relative gain will matter. Rich countries can reasonably expect limitations on inequality of gain, so that gains flow as much as possible to relatively poor people. It won't be fair to ask rich countries, including their own worst off, to pay for unnecessary gains to relatively rich people.

How then are gains across trading societies to be assessed? According to International Relative Gains, the default is again equality of gain, with two important exceptions. First, gains are to be adjusted according to relevant endowments such as a country's population size, level of development, and any other factor not created by the trade relation which predictably changes how much a country gains from global market integration. (I have no general account of how adjusted gains are to be specified. I do assume this is possible to a reasonable approximation.) Put intuitively, the idea is that, in comparing a large and small country, we cannot simply sum up the total gain from trade and divide it equally. The aim of trade is precisely to *improve* upon endowments roughly as given (through specialization and exchange), not to redistribute the benefits of those endowments as such. This is fair as long as the resulting practice of market reliance and the improvements it creates are fairly distributed. In domestic society, beneficial personal endowments are by and large a product of the very system of cooperation whose justification is in question. In our politically decentralized and partially integrated world, by contrast, there *is* a meaningful difference between what the trade relation creates and the social cooperation that is there anyway.[16]

The second exception International Relative Gains allows is that inequality of gain is fair if greater benefits flow to absolutely poor people (for instance, because developing countries are exempted from trade law's default norm of non-discrimination,

[16] [Say something about "arbitrary from a moral point of view" in light of *The Law of Peoples.*]

or from specific intellectual property, investment, or competition rules). The principle thus reflects a limited form of "priority for the worse off," as applied to levels of gain among trading partners. The idea, in general, is that benefits matter more, from a fairness point of view, the worse off those people are in absolute terms.[17] But the appeal is not to general humanitarian concerns with absolute deprivation. The concern is specifically with *fairness in the trade relation*. Thus the principle does not take into account absolutely poor people outside the trade relationship. Among trading countries, the principle does not consider forms of benefit other than the gains of trade which might flow to poor people. Poverty is a relevant fairness consideration, but only because it *modifies* the prior and independent claim trading countries have to the fruit of their shared practice.

A principle weaker than International Relative Gains would hold that countries have no claim concerning relative gains, on the grounds that they are already owned. Even if individuals do not have natural libertarian property rights to the gains of market exchanges, a similar claim might be made at the country level: countries have sovereign rights of property to whatever gains are reaped within their borders. I take it this view is simply mistaken about what moral rights of sovereignty entail. For one thing, to sign a trade agreement such as the WTO treaty is to modify one's sovereign powers and to take on obligations of fairness. Moreover, the (endowment-adjusted) gains of trade are the joint product of an international social practice, and so not in any moral sense "owned" before they are fairly distributed. Provided each country participates in good faith, each has the same presumptive claim to greater rather than lesser shares of the fruit of the joint

[17] [Say something about the scale of urgency, and how its interpretation (threshold, or smooth function) bears on which developing countries have special claims. Also connect the issue with acceptable aggregation]

venture. It matters little where the fruit is picked. If you and I are neighbors and cooperatively grow apple trees along our common property line, it makes no difference if most of the apples happen to fall on your side. I retain the same presumptive claim to them. To be sure, because you are sovereign over your property, I cannot enter your yard if you withdrawal permission in order to exclude me from collecting the apples. But this is not to say that the apples aren't mine as much as they are yours, in the sense that we have an equal claim of fairness to our joint creation. Similarly with countries: a sovereign government has no proprietary claim to the jointly produced gains of trade. It may be legally able to prevent other countries from recovering the gains (e.g. subsidies might be unfair but legal within the WTO, and so unenforceable there). But this is not to say the resulting distribution and trade practice is fair. On the contrary, such measures would be a form of cheating.

Thus far I have been considering single principles weaker or less demanding than those I propose. In closing, it is worth mentioning a second, hybrid approach. A hybrid approach weaker than Relative International Gains would be a modified opportunity principle. On this approach, fairness is understood in terms of equality of opportunity and not outcomes (as above), yet an exception is made for special privileges, and perhaps special compensation, for poor countries. Certain outcomes for poor countries bear on whether the trading system is fair, but not in a way which implies that equality of gain is the default distribution. Now, if the exceptions are made only for poor countries, this would still not account for the harms of trade to low-skilled workers in rich countries. A more fundamental problem, however, is that this position ignores developing countries' basic claims of fairness as participant in the market reliance practice. Countries do contribute to different degrees, as the endowment-adjustment acknowledges. But developing countries are indeed contributors to the common reliance practice. The doctrine of comparative advantage entails precisely that all countries—even those with an absolute advantage in nothing—can contribute to mutually beneficial division of labor. Insofar as no country has proprietary claim to the intended (endowment-adjusted) gains, each has a presumptive claim to a greater rather than a lesser share of the joint activity. It is thus not the case that conditions of poverty justify a shift from opportunities to outcomes in exceptional cases. Outcomes are what is chiefly at issue in the first instance: they reflect directly on whether the common market reliance practice treats everyone it affects in an equitable way. The fact that so many contributors are poor simply justifies special treatment, in the form of greater gains.

This point is especially important given that developing countries have historically advocated for "special and differential treatment" provisions on relevantly similar grounds. Special treatment is said to be provisionally required if developing countries are to ultimately enjoy status equality of a sort which originally motivated trade law's default non-discrimination norm.[18] But this view misconstrues the basic socio-economic fairness issue, which is not equality of status but equality of distribution. More important, it deemphasizes or ignores the role of developing countries as active contributors to the mutually beneficial relationship.

CONCLUSION: FURTHER PRINCIPLES

[18] See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger Publishers, 1975) on the history of this dialectic. I agree with his view that the stated focus on status equality misrepresents the ultimately instrumental justification for the non-discrimination norm. I disagree that this implies a rejection or skepticism about whether fairness has any purchase within the multilateral system.

In conclusion, then, fairness in trade generates limited but significant requirements of socio-economic distribution from modest (or as Rawls would put it) "weak and widely shared" premises. The basic fairness argument need not assume moral principles other than those which arise for the trade relationship, and because of the kind of relationship it is.

I should perhaps emphasize that this conclusion is quite consistent with the importance of poverty, human rights or other moral considerations for trade law and policy. The fairness of the trading system certainly depends on how it handles a range of "trade related" moral issues as well. I do mean to suggest that the prominence of such issues should not lead us to overlook equally if not more central issues of socio-economic structural equity.

It might be objected that I have myself failed to appreciate the force of such issues, as true structural equity must have a fully "global" or "cosmopolitan" form, which is less sensitive to contingent and perhaps passing features of the global order. Nothing I have argued precludes the possibility of justifying such principles when a truly "global" social and economic order has in fact emerged. I have only briefly suggested why we are not now there, without addressing important but vexing questions about how much and in what ways our world would have to change. My claim has been that egalitarian argument need not wait: the fairness case for significant egalitarian principles of socio-economic distribution can be made for the politically decentralized and partially integrated world we have today.