Clean Trade

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ABSTRACT

The resource curse afflicts many countries that export valuable natural resources like oil, gas and diamonds. Such countries are more prone to authoritarian governments, civil conflict, and economic dysfunction. The article argues that the resource curse in the "worst of the worst"-governed countries results from a failure to enforce property rights: the property rights of each country's people in that country's natural resources. This right is a foundational principle of the modern state system. Yet it is violated when authoritarians and civil warriors sell off a territory's resources in circumstances where the people could not possibly authorize those sales. Firms that buy resources from violent or severely repressive regimes are therefore receiving stolen goods, and passing these stolen goods on to consumers. Using a widely accepted metric, the article shows that at least one in every eight barrels of oil currently entering the United States has been stolen from its country of origin.

This article describes three property rights enforcement mechanisms that use existing domestic institutions to discourage resource deals with the worst regimes. The first mechanism is litigation against corporations that transport stolen resources into resource-importing jurisdictions. The second mechanism is national legislation in resource-importing countries to prohibit imports from severely resource-cursed countries. The third mechanism is an "anti-theft" trade policy that deters trade partners from buying stolen resources from the worst regimes. The agenda incorporating these mechanisms can draw support from a range of business interests and pressure groups. And these mechanisms can complement existing initiatives to fight the resource curse, for example initiatives regarding transparency and certification of resource sales.

The article argues that authoritarianism, civil conflict, and economic dysfunction in resource-cursed countries often result from a failure to enforce the established entitlements of the people of those countries. This violation of the principles of trade can be redressed by altering law and policy within resource-importing countries.

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The main argument of this paper can be grasped by reading sections 1-14, omitting the "Question" sections along the way. That comes to around 11,500 words excluding footnotes. The "Question" sections, as well as the Appendices, are supplied for readers who want to follow up points of special interest.

This article is based on "Property Rights and the Resource Curse," *Philosophy & Public Affairs* (2008). Updates since that article include:

- Increased emphasis on self-determination as the grounding for the principle of national ownership of natural resources (sections **A2-A8**);

- A proposal for extending the Clean Trade framework to address the problem of odious debt (**A14**);

- An initial exploration of the hypothesis that greater environmental damage and greenhouse gas emissions are follow-ons to the resource curses (**A1**);

- Situating the Clean Trade initiatives among other types of initiatives (transparency, export certification) directed at the resource curse (**A9-A13**).

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Consumers buy stolen goods every day. Consumers may buy stolen goods when they buy gasoline and magazines, clothing and cosmetics, cell phones and laptops, perfume and jewelry. The raw materials used to make many of these goods have been taken—sometimes by stealth, sometimes by force—from some of the most violated people in the world. These raw materials flow through the system of global commerce under cover of a rule in the international system that is little more than a cloak for larceny.

The plainest criticism of global commerce today is not that it violates some abstract distributive standard, but that it violates property rights. The international commercial system breaks the first rule of capitalism in transporting stolen goods, and does so on an enormous scale. The priority in reforming global commerce is not to replace "free trade" with "fair trade." The priority is to create trade where now there is theft.

Ending the global traffic in stolen goods will require no new theories or novel international agencies. The principles of lawful trade are well understood, and global commerce has already created powerful institutions to enforce property rights. These property rights are themselves fundamental in the international system. What is required is to use the existing institutions to bring all international resource sales into the system of enforced market rules. This article sets out a "clean trade" framework for doing this.

1. The Resource Curses

To understand how stolen goods reach consumers we can trace their raw materials back to the countries where the thefts take place. Social scientists have noticed a peculiar phenomenon in some less developed countries, which is a symptom of the violation of property rights that concerns us. They have called this the resource curse: many countries rich with natural resources are full of oppressed people, or poor people, or both. For many less developed countries, natural resources have become an obstacle to prosperity instead of its foundation.

The resource curse can afflict countries that derive a large portion of their national income from exporting high-value "extractive" resources such as oil, natural gas, gems and metals. These countries are in fact subject to three overlapping resource "curses." They are more prone to authoritarian governance, they are at a higher risk for civil wars and coup attempts, and they exhibit greater economic dysfunction.[1] Several causal pathways explain the correlations between natural resources and these pathologies in political economy.

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[1] It is also possible that environmental damage and greater greenhouse gas emissions are follow-on effects of these three resource curses. This hypothesis is explored below in section **A1: Environmental Harm as a Resource Curse and Resource Threat**.

First, resources correlate with authoritarianism.[2] Authoritarian regimes can greatly increase their power by exporting natural resources. Oil, gas, and minerals fetch high bounties: whoever controls their sale often receives billions of dollars per year. A strongman or junta that seizes this revenue stream can use the money to pay for extra security forces, spies, and weapons to put down domestic challenges to their rule. The money from resource sales can also free authoritarians from raising revenues through taxation, and so release them from financial accountability to the citizenry.[3] Authoritarians flush with resource money can also use these funds as sources of patronage, bribing local leaders and buying off nascent resistance movements.[4]

The second resource curse is civil conflict: civil war and coup attempts.[5] Many rebel groups have sustained their expensive armies by seizing territory and selling off its resources. Other military leaders have sold off rights to future exploitation of territory they hope to capture.[6] The presence of hydrocarbons and minerals in a country increases the risk of civil war, and these resources have played a major role in sustaining some of the longest-running and most ferocious conflicts in recent history. As for coup attempts, they become more likely in countries that contain one major revenue source (like

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[2] Wantchekon surveyed 141 countries over a forty-year period and found that a 1 per cent increase in natural resource dependence can increase the likelihood of authoritarian government by nearly 8 per cent. Leonard Wantchekon, "Why do Resource Dependent Countries have Authoritarian Governments?" *Journal of African Finance and Economic Development* 5.2 (2002): 57-77.

[3] As in Turkmenistan, where large energy export revenues enable the authoritarian regime to keep national tax rates very low. See generally Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley, Calif.: University of California Press, 1997), pp. 58-64.

[4] See the literature on Libya cited in Michael L. Ross, "Does Oil Hinder Democracy?" *World Politics* 53.3 (2001): 325-61, at pp. 333-34. See also Nathan Jensen and Leonard Wantchekon, "Resource Wealth and Political Regimes in Africa," *Comparative Political Studies* 37 (2004): 816-41; Daron Acemoglu, James Robinson, and Thierry Verdier, "Kleptocracy and Divide-and-Rule: A Model of Personal Rule," MIT Department of Economics Working Paper No. 03-39 (2003).

[5] On resources and civil conflict see M. Doyle and N. Sambanis, "International Peacebuilding: A Theoretical and Quantitative Analysis," *American Political Science Review* 94.4 (2000): 779–801; Michael L. Ross, "A Closer Look at Oil, Diamonds, and Civil War," *Annual Review of Political Science* 9 (2006): 265-300. See especially the line of debate between Collier & Hoeffler and Fearon: Paul Collier and Anke Hoeffler, "On Economic Causes of Civil War," *Oxford Economic Papers* 50 (1998): 563-73, and "Greed and Grievance in Civil War," *Oxford Economic Papers* 56 (2004): 563-95; Paul Collier, Anke Hoeffler and Dominic Rohner, "Beyond Greed and Grievance: Feasibility and Civil War," *Oxford Economic Papers* 61 (2009): 1-27; James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review* 97 (2003): 75-90; James Fearon, "Primary Commodity Exports and Civil War," *Journal of Conflict Resolution* 49 (2005): 483-507.

[6] For example, Pol Pot supported the Khmer Rouge army by capturing a strip of Cambodian territory rich in rubies and sapphires; and Sassou of Congo-Brazzaville sold future drilling rights to a French oil company to support his private militia. See Michael L. Ross, "The Natural Resource Curse: How Wealth Can Make You Poor," in *Natural Resources and Violent Conflict: Options and Actions,* ed. Ian Bannon and Paul Collier (World Bank, 2003), pp. 1-37; and Ross, "Booty Futures," working paper (2005). www.polisci.ucla.edu/faculty/ross/ bootyfutures.pdf.

offshore oil) that will enrich whoever controls the national government.[7] The contribution of extractable resources to civil conflict has been affirmed by academics, nongovernmental organizations, and UN Security Council resolutions.[8]

Civil conflict is one reason that resource-rich countries are subject to the third resource curse: economic dysfunction.[9] Collier and Hoeffler estimate that it takes twenty-one years for a country to catch up to the GDP it would have had without a civil war.[10] Even without civil conflict, resource-dependent economies are more vulnerable to growth-retarding economic shocks, adverse exchange-rate effects, and corruption.[11] The fact that these resources can be extracted either by small groups of foreign experts (e.g., with oil) or unskilled domestic laborers (e.g., with alluvial diamonds) gives the regimes that control the resource revenues little incentive to invest in the health or education of the people. The more a country relies on exporting minerals, the worse its standard of living tends to be.[12] Resource dependence is correlated, for example, with higher rates of child malnutrition, lower healthcare and education budgets, higher illiteracy rates, higher poverty rates, higher income inequality between the populace and the political elite, and lower life expectancy.[13]

Around 3.5 billion people live in countries (about 50 of them) where extractive commodities play an important role in the economy. This is a very large group potentially subject to the resource curse. Of course abundant resources are neither necessary nor sufficient for authoritarian repression, civil conflict or low growth. For example, Eritrea

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[7] Philippe Le Billon, “The Political Ecology of War: Natural Resources and Armed Conflicts,” *Political Geography* 20 (2001): 561-84; Paul Collier and Anke Hoeffler, “Coup Traps: Why does Africa have so many Coups d’Etat?” (Centre for the Study of African Economies, 2005).

[8] See, for example, Oxfam, “Africa at the Crossroads,” Oxfam Briefing Paper 19 (2002); Global Witness, *The Sinews of War: Eliminating the Trade in Conflict Resources* and *“Faced with a Gun, What Can You Do?”: War and the Militarisation of Mining in Eastern Congo* (London: Global Witness, 2006; 2009); UN Security Council Resolutions 1625 (2005) and 1653 (2006).

[9] On resources and growth see Jeffrey Sachs and Andrew Warner, “Natural Resource Abundance and Economic Growth,” NBER Working Paper no. 5398 (1995); Sachs and Warner, “The Curse of Natural Resources,” *European Economic Review* 45 (2001): 827-38; Richard Auty, “Introduction and Overview” in *Resource Abundance and Economic Development*, ed. Richard Auty (Oxford: Oxford University Press, 2001), pp. 3–16.

[10] Paul Collier and Anke Hoeffler, “Civil War,” Working paper (2005) (users.ox.ac.uk/~econpco/research/pdfs/Civil-War.pdf), p. 24.

[11] Macartan Humphreys, Jeffrey Sachs, Joseph Stiglitz, “Introduction” to their edited volume *Escaping the Resource Curse* (New York: Columbia University Press, 2007): 1-20.

[12] Michael L. Ross, *Extractive Sectors and the Poor* (New York: Oxfam America, 2001), p. 8.

[13] Ross, *Extractive Sectors and the Poor*; Thorvaldur Gylfason, “Natural Resources, Education, and Economic Development,” *European Economic Review* 45.6 (2001): 847-59; Ricky Lam and Leonard Wantchekon, “Political Dutch Disease,” (2003) www.nyu.edu/gsas/dept/politics/faculty/wantchekon/research/lr-04-10.pdf .

has a repressive government but few easily saleable resources, while oil-rich Norway is decent and stable. Social scientists are still debating how to predict exactly where the resource curse will strike.[14] What is so dramatic about the resource curse is how, when it hits, the wealth of a country bypasses its citizens and in fact contributes to their suffering.[15]

Nigeria, Africa's largest oil exporter, has a population of 149 million (larger than Britain, France and Holland combined). Between 1965 and 2000 the Nigerian government received very large revenues (around $300 billion) from oil sales. Yet during this period the percentage of Nigerians living in extreme poverty ($1 per day) increased from 36 percent to almost 70 percent—from 19 million to 90 million people. All of the oil revenue contributed nothing to the average standard of living, and indeed this period saw a decline in living standards. Moreover inequality in Nigeria simultaneously skyrocketed. In 1970 the total income of those in the top 2 percent of the distribution was equal to the total income of those in the bottom 17 percent. By 2000 the top 2 percent made as much as the bottom 55 percent.[16] Meanwhile corruption was everywhere evident in the Nigerian government, most strikingly at the top. For instance, in just four years in power General Sani Abacha and his family embezzled around $3 billion from the state.[17]

The exceptionally repressive junta in **Burma** remains in power partly by selling large amounts of the country's natural gas (about 10 billion m^3 per year) to its neighbors (especially Thailand) every year and using these revenues to buy weapons from China and India. The regime is being protected from UN sanctions by China partly in exchange for access to Burma's large energy reserves.[18] The junta has kept Nobel Prize-winner Aung San Suu Kyi under house arrest for 14 of the 20 years since her party won the last credible election.

In the 1980s the corrupt government of **Sierra Leone** embarked on disastrous economic policies and lost control over the armed gangs that were overseeing the exploitation of the country's rich diamond fields. In the 1990s insurgents recruited child

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[14] Andrew Rosser, "The Political Economy of the Resource Curse: A Literature Survey," IDS Working Paper 268 (2006).

[15] An excellent overview of the resource curses related to oil dependence is in Terry Lynn Karl, "Oil-Led Development: Social, Political and Economic Consequences," *CDDRL Working Papers* 80 (January 2007).

[16] Xavier Sala-i-Martin and Arvind Subramanian, "Addressing the Natural Resource Curse: An Illustration from Nigeria," IMF Working Paper WP/03/139 (2003). The oil revenue figure is in 1995 dollars. The $1 per day figure is the World Bank 1993 PPP standard for extreme poverty.

[17] Transparency International, "National Integrity Systems Country Study Report Nigeria" (2004), p. 13 (www. transparency.org/content/download/1685/8494/file/ nigeria.pdf).

[18] Stein Tønnesson and Åshild Kolås, Energy Security in Asia: China, India, Oil and Peace (Oslo: International Peace Research Institute, 2006), pp. 66-92; Global Witness, "Natural Resources in Conflict: Liberia," www.globalwitness.org/pages/en/liberia.html.

soldiers to scare much of the population away from the diamond regions with a brutal campaign of shootings and machete amputations, and enslaved many of the remaining locals to work in the pits. With the money they received from selling these diamonds (so-called "Blood Diamonds") to international corporations like De Beers the insurgents bought enough weapons nearly to topple the government. The government was only able to defeat the rebels by trading diamond mining futures for the services of a South African mercenary force. The decade-long civil war in Sierra Leone cost around 50,000 lives, displaced one third of the population, and saw up to half of all women subjected to sexual violence. Sierra Leone now ranks 177th out of 177 countries on the UN Human Development Index.[19]

During the vicious civil war in **Angola** resource wealth funded large arms purchases on both sides. The rebel UNITA movement sold off the country's diamonds to fund their army, while the government used large oil revenues to pay forces to resist the rebels.[20] The government remained astonishingly corrupt, but eventually prevailed. By the late 1990s, three-quarters of Angolans were living on less than a dollar a day, life expectancy was 45 years, and over three million civilians had been displaced.[21] The UN reported in 2005 that almost half of Angola's children were severely malnourished, and less than half of adults could read and write.[22]

Resource-driven civil conflict in the **Democratic Republic of Congo** has caused more than 5.4 million deaths since 1998.[23] This resource curse is ongoing: right now more than a thousand people die every day in the chaos caused by militias fighting over minerals like tin, tantalum, and tungsten that are used to make cell phones, laptops and game consoles. These militiamen are raping women with bayonets and clubs as a tactic of war, and the rape epidemic is claiming growing numbers of men as well.[24]

Equatorial Guinea deserves special attention, as it is a particularly dramatic case of a country currently stricken by the resource curse. Equatorial Guinea is in central Africa, bordered by Gabon and Cameroon, and dominated since 1979 by the strongman Teodoro Obiang. Obiang is the kind of ruler who has not shied from having himself

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[19] United Nations Development Program, *Human Development Report 2007/2008*, p. 232. (hdr.undp.org/en/media/hdr_20072008_en_indicator_tables.pdf).

[20] Philippe le Billon, "Angola's Political Economy of War: The Role of Oil and Diamonds," *African Affairs* 100 (2001): 55-80.

[21] Global Witness, *The Sinews of War*, p. 17.

[22] United Nations World Food Program, "Angola: Bleak Future for Angola's Children," Press Release September, 19 2005.

[23] International Rescue Committee, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), p. 16.

[24] "Rape Epidemic Raises Trauma of Congo War," *New York Times*, October 7, 2007; "New Symbol of Unhealed Congo: Male Rape Victims" *New York Times*, August 4, 2009.

proclaimed "the country's God.. in permanent contact with the Almighty" on state-controlled radio, or from having his guards urinate on political prisoners, slice their ears, and smear their bodies with grease to attract stinging ants.[25] In the 1990s large deposits of oil were discovered in the Bay of Guinea. This discovery, at a time when Western countries were searching for sources of oil outside of the Middle East, brought the country from obscurity to the attention of international markets. In a very short time Equatorial Guinea quickly became the third-largest oil exporter in sub-Saharan Africa.

Because of the huge influx of oil money, Equatorial Guinea now has one of the highest *average* incomes in the world: higher than the UK, Germany, Japan and France[26] Yet almost all the income is at the top – the people have yet to partake in prosperity. As the US Department of Energy reports:[27]

> From 2002 to 2006 the country experienced an average real annual GDP growth of 15.8 percent… Despite the rapid growth in real GDP, allegations abound over how the Equatoguinean government has misappropriated its oil revenues. While the government has made some infrastructure improvements to bolster the oil industry, the average Equatoguinean has yet to experience a higher standard of living from the oil revenues.

A recent study by Global Witness states:[28]

> The country exports 420,000 barrels of oil per day, mainly to the U.S. However, Equatorial Guinea is a country that has systematically mismanaged public assets, coupled with its serious human rights abuses and total lack of political freedom. With a population of less than 500,000, the country is buoyed with export earnings from oil of over $7 billion per year. Despite these enormous windfalls, 60% of Equatorial Guinea's population lives on less than $1 a day and over half its people cannot access potable water.

Equatorial Guinea's economy is now 130 times larger than it was in the mid 1990s, yet raw sewage runs through the streets of the country's capital, three-quarters of the country's people are malnourished, and life expectancy decreased between 2000 and 2004.[29] During the oil boom infant and child mortality actually increased from 103 deaths

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[25] "Equatorial Guinea's 'God'," BBC News, 26 July 2003; U.S. State Department, "Equatorial Guinea Country Report on Human Rights Practices (1998)."

[26] CIA, *World Factbook 2009*, "Rank Order – GDP – per capita (PPP)."

[27] www.eia.doe.gov/emeu/cabs/Equatorial_Guinea/Background.html.

[28] Global Witness, *Oil Revenue Transparency: A Strategic Component of U.S. Energy Security and Anti-Corruption Policy* (2007), p. 16.

[29] "The Fortunes of Kings, Queens, and Dictators," *Forbes*, May 5, 2006; "With Friends Like These…," *Washington Post*, April 18, 2006, A18; Global Witness, "New U.S. Envoy to Equatorial Guinea Must Hold Government Accountable for Corruption and Human Rights Abuses"; World Bank, *.

per thousand in 1990 (a rate not seen in the United States since the 19th century) to 124 per thousand in 2007.[30]

Forbes recently ranked Obiang as richer than Queen Elizabeth II, with an estimated personal wealth of $600 million. Obiang sells two-thirds of Equatorial Guinea's oil to U.S. corporations like ExxonMobil and Hess, and has recently spent 55 million of these petro-dollars adding a sixth private jet to his fleet. The prospect of capturing this kind of wealth from offshore oil sales has attracted coup attempts, which have so far failed.[31] And there is little doubt that the oil money has fueled significant corruption. Transparency International's latest Corruptions Perceptions Index ranks the country as 171st out of the 180 countries surveyed.[32]

Instead of allowing the people to control the country's remarkable oil windfall, Obiang has used this new wealth to consolidate his personal power. The Freedom House report gives a fuller idea of what life is like in Equatorial Guinea at present:[33]

> Citizens of Equatorial Guinea cannot change their government democratically, and the country has never held a credible election. [Obiang] holds broad powers and limits public participation in the policy-making process. The 100 members of the unicameral House of People's Representatives are elected to five-year terms but wield little power, and 99 sets belong to the ruling pro-presidential coalition…
>
> Although the constitution guarantees press freedom, the 1992 press law authorizes government censorship. A few private newspapers and underground pamphlets are published irregularly, and they face financial and political pressure. Libel remains a criminal offense, and all journalists are required to register with the government. The state holds a monopoly on broadcast media except for RTV-Asonga, a private radio and television outlet owned by the president's son, Teodorín Obiang…The only internet service provider is state affiliated, and the government reportedly monitors internet communications.
>
> Freedoms of assembly and association are severely restricted, and official authorization for political gatherings is mandatory. There are no effective human rights organizations in the country, and the few international nongovernmental organizations are prohibited from promoting or defending human rights.

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[30] Word Bank, "World Development Indicators," April 2009.

[31] The *Economist* journalist Adam Roberts gives a full treatment to a 2004 coup attempt involving a group of international businessmen and mercenaries (including Margaret Thatcher's son Mark Thatcher) in *The Wonga Coup: Guns, Thugs and a Ruthless Determination to Create Mayhem in an Oil-Rich Corner of Africa* (London: PublicAffairs, 2006).

[32] Transparency International, *Corruption Perceptions Index 2008*. www.transparency.org/policy_research/surveys_indices/cpi/2008.

[33] Freedom House, *Freedom in the World 2009*.

> The judiciary is not independent, and security forces generally act with impunity. Civil cases rarely go to trial, and military tribunals handle national security cases… Prison conditions, especially in the notorious Black Beach prison, are extremely harsh. The authorities have been accused of widespread human rights abuses, including torture, detention of political opponents, and extrajudicial killings. The UN Human Rights Council's Working Group on Arbitrary Detention cited the country in a 2007 report for holding detainees in secret, denying them access to lawyers, and jailing them for long periods without charge.

Obiang's tempestuous playboy son and likely heir, Teodorín, is by all accounts at least as determined as his father to control the country's oil revenues for his personal use.[34] Given their situation, the people of Equatorial Guinea may well feel cursed by their country's resource wealth.

2. Our Contribution to the Resource Curses

The repression of the citizens of Equatorial Guinea, and the denial to them of the revenues from the country's oil deposits, may strike outsiders as a cause for sympathy. The situation in Equatorial Guinea appears truly miserable, the oppression of the people seems unjust, and something should be done about it. One might think of an aid program to help the Equatorial Guineans, or of asking Western leaders to put pressure on Obiang to share more of the oil revenues with his people. These kinds of proposals may not spark much optimism: repressive governments often capture aid money, and rich dictators can resist a good deal of foreign pressure. However, the sense remains that something should be done to help these Africans in their dire conditions.

This natural course of thinking about the situation in Equatorial Guinea overlooks a morally significant fact. Outsiders to Equatorial Guinea are already doing a great deal to its citizens: outsiders are making their plight worse. The resource curse is only half about resources. The dictator Obiang could not after all subdue his political opponents by dousing them in crude oil. The other half of the equation is the foreign money that flows into the dictator's bank accounts when he transfers the country's oil abroad. It is this money that increases Obiang's ability to buy weapons and pay security forces, to control the channels of patronage, and to disrupt possible challenges to his rule. The money that outsiders pay for the resources of Equatorial Guinea funds the subjection of its people.

The contribution of external funds to internal repression is clear enough when pointed out, and reflecting on it may cause more discomfort. We do not like to think of ourselves as contributing to severe political repression and poverty, even if only

[34] "Playboy Waits for his African Throne," *Sunday Times*, September 3, 2006 (www.timesonline.co.uk/tol/news/world/article626511.ece). Human Rights Watch claims that Teodorín Obiang spent almost $44 million on mansions and high-end cars in the USA and South Africa between 2004 and 2006, while the total educational budget of Equatorial Guinea in 2005 was $43 million. Human Rights Watch, "Equatorial Guinea: Account for Oil Wealth" (2009) www.hrw.org/en/news/2009/07/09/equatorial-guinea-account-oil-wealth.

indirectly. The thought that what we pay to fuel our cars might end up being spent on Obiang's torture chambers or personal jets is not at all welcome. Yet, one might think, this is the way it often is in our contemporary world. In a globalized market economy we pay for all sorts of goods. We typically do not know—indeed we often cannot know—where these goods originate or where the money we use to purchase them goes. Some of the money we pay at the pump may go to support tyrants, but that seems just a part of modern life. If the Equatorial Guineans have a political problem in their country that is very unfortunate. But it is in the end their problem, and we should try to help them (if at all) through private charity or through the political influence of our government.

This way of looking at the contribution that outsiders make to the situation in Equatorial Guinea again fails to connect the facts. Indeed it is particularly inadequate from a market perspective. The resource curse is not a curse that falls on poor countries because they have abundant resources. Natural resources are by definition always valuable. In a functioning market the discovery of new natural resources will always open new economic opportunities for the owners of those resources. The "curse" is caused by a defect in the rules that allocate control over these resources. The fault is not in nature, but in human institutions, here specifically markets.

The misdirection of attention from the institutional to the natural is a familiar one in human history. It is a cousin of the error that was made, for instance, in the days when it was said that dark skin dooms men to be lazy, or that women are cursed by their weak minds. The tension within the phrase "resource curse" should alert us that the misdirection of attention from the institutional to the natural is happening here. Only institutions can turn what should be a national asset into a collective liability.

3. The Ownership of Natural Resources

The resource curse results from a failure of institutions: specifically, a failure to enforce property rights. This defect in the system of global commerce allows authoritarians and insurgents to capture for themselves the money that consumers around the world spend on everyday goods. The authoritarians and insurgents have no right to this money. The natural resources of a country belong, after all, to its people. The blessing of resources turns into a curse when tyrants and rebels are allowed to sell off a country's resources while crushing popular resistance, and to use the proceeds in ways that make the people worse off.

The principle that the resources of a country belong to the people is part of the modern understanding of the source of political authority: it is the citizens of the country, not the government, who have the ultimate right to control the laws governing their lives and their territory. In international law this basic doctrine is expressed in the language of

"self-determination." For example, Article 1 of both of the historic human rights treaties begins with these words:[35]

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources…

Similarly, Article 21 of the African Charter on Human and Peoples' Rights states:

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

The principle of national ownership is also enshrined in many national constitutions. For instance, the (American-approved) Iraqi constitution of 2005 proclaims that "Oil and gas are the property of the Iraqi people in all the regions and provinces."[36]

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[35] International Covenant on Civil and Political Rights, Article 1. The first article of the International Covenant on Economic, Social, and Cultural Rights is identical. Of the 192 UN member states, 151 (including the United States and all of the other G8 countries) have ratified one or both of these treaties. The non-ratifiers are mostly small countries like Palau.

[36] *The Constitution of Iraq*, Article 108. George W. Bush agreed with the Iraqi constitution on this point: "The oil belongs to the Iraqi people. It's their asset." ("President's Statement to the Press," June 12, 2006; see also his pre-invasion address to the American people: "Remarks by the President in Address to the Nation" March 17, 2003). A variety of Bush administration figures echoed this assertion, including Colin Powell when he was US Secretary of State (edition.cnn.com/2003/WORLD/meast/01/23/ iraq.powell/) and Commerce Secretary Don Evans (georgewbush-whitehouse.archives.gov/ask/20031022. html). Tony Blair asserted the more general fact: "Iraq's natural resources remain the property of the people of Iraq." (georgewbush-whitehouse.archives.gov/news/releases/ 2003/03/20030316-3.html). Indeed leaders with vastly different political orientations pay respect to the principle of national ownership:

"The question that we should be asking today is not whether our oil will continue to be ours. I have said it before, and I will reiterate again, this oil belongs and will continue to belong to all Mexicans," Felipe Calderon (news.bbc.co.uk/1/hi/7304412.stm)

"The oil belongs to 190 million Brazilians" Lula da Silva (www.bloomberg.com/apps/news?pid= 20601109& refer=home&sid=aYwwX0iri0CY)

"The oil belongs to the Venezuelan people." Hugo Chavez (www.energybulletin.net/node/4656)

"Oil belongs to the people." Evo Morales (www.ctvnewsonline.com/archive/2008/11/23/ctv_news ?ctvnews=fgsferfadn)

"The oil belongs to the people of Azerbaijan." Abulfaz Elchibey (home.swipnet.se/~w-10652/elchibey.html)

"This oil belongs to the Libyans." Muammar Gaddafi (www.worldbulletin.net/news_ detail.php?id=31318)

"The oil belongs to the people." Ayatollah Khamenei (news.bbc.co.uk/1/hi/business/1912795.stm)

Further examples from national constitutions as well as UN declarations and resolutions are easily multiplied.[37]

The idea that the natural resources of a country belong to the people of that country is so intuitive that most will need no more proof than its statement. The American people have final say over America's resources, the Canadian people have ultimate control over Canada's resources, and so on. The oil, for example, off of the U.S. Gulf Coast belongs to the American people. If it were found that Cuba had drilled a long diagonal pipeline through the Gulf of Mexico and was now siphoning American oil, the American people would immediately (and perhaps literally) be up in arms. The oil within the territory of the United States is American oil, and foreigners must not take it without permission.

Similarly, national ownership explains our rejection of private usurpation of a country's resources. In the years leading up to the Reagan administration companies such as Shell discovered large oil deposits off the coasts of Louisiana and Florida. One can imagine the response had President Reagan secretly sold this oil to Shell, then put the profits from these sales into his private bank account and ordered the FBI to detect and squash any dissent. America's natural resources must not be disposed of in ways that wholly bypass the assent of the American people. Yet selling resources without the people's assent is just what Obiang is doing today.[38]

As one would expect of a legal principle that has been ratified by many nations, the principle of national ownership accommodates widely different economic systems. For example, in some countries (such as Mexico) legislation has given control of all oil to a national oil company; in other countries (like the United States) private ownership is widespread. Widespread private ownership of resources is possible through the operation of validly enacted laws that transfer resources from national to private control. For instance, legal private ownership of oil can come about through a law that vests permanent title to sub-soil oil in whoever legally acquires the land above that oil. Or private ownership might come about through the rather different law dominant in the United States, which is that extracted oil belongs to whoever can first reduce it to physical possession (this is "grabbers-keepers": one may extract all the oil in a deposit that stretches under both one's own and another's land). Laws such as these can result in most or even all of a nation's resources coming to be privately owned.

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[37] See e.g., Angolan Law N. 13/78 (1989): "All deposits of liquid and gaseous hydrocarbons which exist underground or on the continental shelf within the national territory… belong to the Angolan People."; UN General Assembly Resolution 1803 (XVII) (1962) "Permanent Sovereignty over Natural Resources"; and the "Declaration on the Right to Development" adopted by the United Nations in 1986. The national ownership principle is examined in more detail in **A2 –A3** below.

[38] What the Reagan administration actually did in 1982 was to institute a series of public auctions for drilling leases in American coastal waters, putting the revenues from these auctions into the public purse. The wisdom of Reagan's auction policy was fiercely debated in Congress, but all sides of this debate assumed that whatever policy was adopted for the oil would have to be open to public discussion and scrutiny.

Moreover, the principle of national ownership is permissive in that citizens need not be involved in, or even aware of, the management of natural resources that remain publicly owned. Like shareholders of a corporation, most citizens will not be interested in tracking the administration of their assets. National ownership only requires that citizens be able to find out what those in power are doing with the country's resources, and that citizens be able to influence these decisions collectively if they so choose. To take the analogy: there is nothing unusual about shareholders who *do not* know about or try to influence how the company's assets are managed. There would be something seriously wrong, however, if shareholders *could not* find out about or influence how the company's assets are managed.

The people of a country—all its citizens—are the ultimate source of legitimate authority in that country. It is the citizens, and not the rulers, who should have final say over the laws that govern their lives and their land. Historically this core doctrine of the modern international system, self-determination, was central to the struggles against colonial rule from the American and French revolutions onwards. And self-determination has as one part the principle that citizens "may, for their own ends, freely dispose of their natural wealth and resources." This principle of national ownership is a flexible and permissive standard that forbids only flagrant attempts to control resources without citizens' assent. The principle features prominently in treaties fundamental to modern international law, and indeed flows from a central premise of the modern state system. Yet this principle of national ownership is now violated daily, under an archaic provision in the international system that invites the seizure of natural resources by violence and threat.[39]

4. The Right to Sell Natural Resources

The natural resources of a country belong to the citizens of that country, and no one may sell off that property without some sort of authorization. A thief who steals your watch from your nightstand cannot legally sell your watch to anyone else, for neither you nor anything else in the law has empowered the thief to sell your watch. The thief may have taken *possession* of your watch and then transferred possession to someone else, but no valid transfer of the title to your watch has taken place. The watch is still your property, and the thief and his transferee have merely handled stolen goods.

Who besides the citizens then has this "resource right": the right legitimately to sell off the resources of the territory so that they are permanently beyond the people's control? Here we uncover the customary rule in the system of international trade that certainly gets the answer wrong. In current international practice all that is necessary for a group to acquire the legal right to sell off a territory's resources is the power to inflict violence on the territory's people. Whoever can maintain coercive control over a country's population (or in the case of civil warriors, over part of a population) is

[39] For more detail on peoples and their resources see sections **A2-A4** below.

recognized internationally as legally authorized to sell off that country's resources. According to this customary rule, *might makes right*: specifically, might vests the legal right to transfer property. This rule violates the most basic principle of the market:[40]

> A group that overpowers the guards and takes control of a warehouse may be able to give some of the merchandise to others, accepting money in exchange. But the fence who pays them becomes merely the possessor, not the owner, of the loot. Contrast this with a group that overpowers an elected government and takes control of a country. Such a group, too, can give away some of the country's natural resources, accepting money in exchange. In this case, however, the purchaser acquires not merely possession, but all the rights and liberties of ownership, which are supposed to be — and actually *are* — protected and enforced by all other states' courts and police forces.

The practice that equates the capacity for violence with the right to sell others' property makes nonsense of ownership. Might cannot vest property rights. This customary rule also contributes to the resource curse. As we have seen, the legal right to sell the resources of a territory can be extremely valuable. The rule that recognizes this right in whoever can prevail through force of arms generates systematic incentives toward the curses of tyranny, violence, and poverty. Authoritarians who gain the resource right will use the money from resource sales to free themselves from public accountability through repression and bribery. Coup plotters will look for ways to grab the resource right from the current regime and then become authoritarians in their turn. Rebels who can seize control of resource-rich territory will gain the funds they need to start or escalate a civil war. And the people, whose resources are being sold off, will become not the beneficiaries of this wealth but the victim of those who use their own wealth to repress them.

The persistence of this anti-market *might makes right* rule, which flies so strongly in the face of common sense and which has such disastrous consequences in many countries, calls for explanation. Some have noticed that the convention is convenient for rich countries, which get stable access to natural resources regardless of who takes power in poor countries.[41] While this seems plausible, it is also plausible to see this aspect of international practice as a holdover from an earlier era of expansive sovereignty and colonial rule. In this Westphalian era whatever regime could maintain coercive control over a territory thereby gained international recognition of the legitimacy of almost any actions they took within that territory, including abusing the people and selling the resources for personal gain. For hundreds of years, the rule in international relations was that might did make right. Whoever could gain and maintain coercive control over a population and its land was recognized as having nearly total discretion over that territory's "internal affairs."

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[40] Thomas Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor," *Leiden Journal of International Law* 18.4 (2005): 717-45, at p. 737. Pogge uses the term "resource privilege," but as he notes this is actually a Hohfeldian power. Here I use the term "resource right."

[41] Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 4-6.

The old rules of expansive internal sovereignty help to explain the persistence of the *might makes right* rule for resource sales. Under these old rules any sufficiently coercive group could use its power to arrogate to itself the right to sell off the territory's wealth. Yet the old rules can play no role in justifying current international practice. For the old Westphalian rules are no longer valid, having been decisively overturned by a double revolution in international affairs.

The first revolution in international affairs was a fundamental relocation of the source of legitimate political power. In the new era the people have ultimate authority over the regime, instead of the regime having ultimate authority over the people. The citizens of the country gained the ultimate right to control the laws that govern their lives and their land; the government is no longer their master but is now their agent. The triumph of this principle of self-determination, in which the struggle of colonies for independence and the victory over apartheid were key moments, is discussed more fully in **A5-A6** below.

The second revolution was human rights. The human rights revolution that began with the *Universal Declaration of Human Rights* in 1948 displaced the Westphalian rule that coercive control over a people vested near-absolute control over their fates. The thrust of human rights doctrine is to insist that there are certain things that regimes must not do to citizens (e.g., kill or arrest them arbitrarily, enforce their enslavement), and other things that rulers must do for them (protect their property, provide them with fair trials). No one claiming authority in a territory can now assert that their abuse or neglect of the people is only a matter of "internal affairs." Human rights qualify the authority of those who hold power, and securing human rights is now a condition for legitimate rule.[42] Every nation on earth has ratified a major human rights treaty, signaling the legal death of the old Westphalian settlement.

The customary *might makes right* rule that results in the resource curse is a remnant of the pre-modern Westphalian world. The contrast between this anachronism and the modern understanding of legitimacy is vivid. It makes just as little sense that a capacity for violent domination should give a regime authority over citizens' resources than that a capacity for violent domination should give a regime legitimate authority over citizens' persons. Once the old idea of unlimited state authority is undermined, both ideas fall together. Indeed there need not be a "resource rights" revolution to follow the human rights revolution, because as we have seen a people's right to control their resources is already affirmed in the fundamental human rights treaties. A people's right to its resources *is* a human right. And this human right proclaimed in primary documents of international law.[43]

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[42] See Jack Donnelly, *International Human Rights* (Boulder, Colorado.: Westview Press), pp. 26-28; Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2003), pp. 233-88.

[43] There is more on the mutually supportive relation between the doctrines of self-determination and of human rights in **A7: Self-Determination and Human Rights**.

The most salient reform of international commerce must be to remove the *might makes right* rule that vests the right to sell resources in whoever can control a population by force. Unlike the national ownership of resources, this *might makes right* rule has no treaty basis in modern international law. It persists by custom because powerful global actors have strong interests in maintaining the status quo. Removing the *might makes right* rule from international practice is essential for bringing all trade in natural resources within the scope of enforced market rules.

We can be sure that the mere seizure of power should not vest any regime with an internationally recognized resource right. What then is necessary for a regime legitimately to claim this right to sell a territory's resources?[44] In answering this question we will focus exclusively on the resource right. We will not be concerned here with the separate questions of whether some regime has or lacks authority to perform other state functions: to issue currency, to defend the territory from invasion, to negotiate arms-control treaties and so on. This is the point of the end of the old Westphalian settlement: sovereignty no longer comes all in a piece. We are concerned specifically with what is needed for some group that has coercive control over territory legitimately to sell the resources of that territory to foreigners. Whatever else is true about a regime, if it asserts an entitlement to sell off a country's natural wealth it must appeal to some credible rationale to validate this right.

5. The Principles of Ownership and Sale

Oil is big business; in fact, oil is the biggest business. Oil is by far the most valuable resource traded across borders. 95% of the world's motorized transportation runs on oil, and oil can account for over half the value of all global primary commodity transactions.[45] Any action to deny the resource right to regimes in resource-cursed countries will disrupt some of the current flow of oil. Such action must therefore be able to withstand the tremendous commercial and so political pressures to bring ever more oil to market.[46] Four of the top five, and seven of the top 10, largest privately-traded corporations in the world are oil companies. The companies are very powerful transnational actors, and they are not charities. Their priorities are to locate as much oil as they can, extract as much as they can, and send as much as they can on to consumers.

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[44] In this article the term "regime" refers to groups within a territory that have coercive power over a significant proportion of that territory's population. The term applies both to office-holders of national governments and to rebel groups.

[45] The percentage of trade figure is from WTO, *International Trade Statistics 2007*, *.

[46] These commercial pressures will grow more intense as global demand for oil builds. The world currently uses about 85 million barrels a day. The International Energy Agency projects that demand will grow by between one or two percentage points a year, so global demand for oil could pass 106 million barrels a day by 2030. International Energy Agency, *World Energy Outlook 2008*, "Executive Summary," p. 38.

Any action aimed at restraining oil companies and the rich governments that support them will have to be grounded in deep principles that cannot easily be dismissed or defined away. These principles will need natural political allies, who will come to their defense when their enforcement comes under attack. When one adds that these principles must also be enforced for international sales of other extractable resources such as natural gas, diamonds, copper, and tin the demand that they be resilient only intensifies.

Such principles already exist, and in fact are the principles of the global market system. They are the principles of ownership and sale. Large corporations and Western governments can hardly disavow the principles of ownership and sale. Corporations depend on these principles for their existence as both buyers and sellers; and the governments of the United States and other rich countries have championed the spread of market principles across the globe. Yet international resource corporations defy these basic market principles in a substantial portion of their dealings. We can show this first with a common-sense argument, and then also in some detail within legal doctrine.

The natural resources of a country belong to the people of that country. The property rights of a people are violated, as any owner's rights would be, whenever someone gains control of this property through theft, deception, force, or extreme manipulation. The oppressed citizens of Equatorial Guinea could not possibly be authorizing the dictator Obiang to sell off their oil. These citizens cannot find out what sales Obiang is making, and they are either unable to protest his sales or are too fearful to try. In no case can the citizens of Equatorial Guinea be said to be acquiescing to Obiang's deals. Obiang takes control of the oil because he can, without assent from the people. The capacity to threaten a people does not confer the right to sell off their resources, nor does the capacity to deceive or overbear. The foreigners who transport this oil overseas knowing that it has been taken illegitimately actively further the violation of the people's entitlements. Obiang cannot rightly sell the country's oil, so the corporations that sign contracts with him do not have title to what they steam away in the holds of their ships. These international resource corporations are trading in stolen goods.

The force of this argument flows directly from the principles of ownership and sale. To make the argument part of a realistic proposal for reform of international commerce it must be made legally precise. There are likely several ways to do this.[47] In the next sections I show that there is a feasible legal framework built around the most resilient principles in all of commercial law, which can be used to bring actions against international resource corporations for trading in stolen goods.

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[47] See, for example, the private law strategies developed to limit the damage of borrowing by corrupt regimes in Lee C. Buchheit, G. Mitu Gulati, and Robert B. Thompson, "The Dilemma of Odious Debts," *Duke Law Journal* 56.5 (2007): 1201-61; and Omri Ben-Shahar and Mitu Gulati, "Partially Odious Debts?" *Duke Law School Faculty Scholarship Series*, Paper 87 (2007).

6. Passing Title: The Law of Property and Contract

The principles of property and contract define the legal structure of the market, and have deep roots in the law. In English-speaking countries property and contract are grounded in the common law and in equity; and both civil law and common law jurisdictions have inherited a fund of principles from Roman law. The principles of property and contract have statutory codification in domestic laws (e.g., the United States Uniform Commercial Code, made law in all fifty states) and treaty basis in international law (e.g., the Convention on Contracts for the International Sales of Goods). These principles determine the legality of the bulk of commodity transfers both within and across national borders. No principles are more basic to the system of global trade.

A fundamental principle governing the sale of property states that in order to complete a valid sale a vendor must have the right to sell. The thief has no title to the watch he has stolen from your nightstand, and so cannot pass title to the watch to any buyer however willing. This principle is expressed in the ancient Roman maxim *nemo dat quod non habet* (no one can give what they do not have). Commercial law in general follows the intuitive rule that to make a valid sale a vendor must either be the owner or have the owner's authorization.

A thief, who gains possession by stealth, can never pass good title. In legal parlance a thief's title is "void," and therefore the title of anyone who receives property from a thief is also void. However, commercial law allows certain exceptions to the *nemo dat* rule, and in building a legal framework we must track these exceptions.[48] The law treats differently vendors who gain possession of a good not through stealth, but rather through deception, duress, or undue influence. Such a vendor's title is not "void" but "voidable." The owner may repossess the good by voiding the vendor's claim to it before the good is sold. Yet a vendor may pass good title to a third party if he does so before his voidable title is voided.[49]

This legal exception to the common sense rule may be surprising, since it seems to reward criminals by allowing them to pass better title than they have. But any developed commercial order must find some way to balance the interests of innocent owners against those of innocent purchasers. When the goods of an innocent owner have reached the hands of an innocent purchaser, and the money from the sale cannot be extracted from the culpable vendor (because he is insolvent or otherwise judgment-

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[48] Here I summarize the U.S. Uniform Commercial Code, which is (because of the position of the United States in global trade) one dominant model. Commercial law in other developed countries has slightly different patterns, but not in ways that will affect the outcome of the argument here. There is also some variation in the law between American states, although not much—it is obviously more efficient to have uniform rules for interstate commerce. The model for all state codes is the US Uniform Commercial Code, which is described here.

[49] The vendor may be vulnerable to any number of civil and criminal penalties, including penalties for fraud or robbery.

proof), then either the owner or the purchaser will have to lose out.[50] The commercial rules separating void and voidable title divide up the situations in which innocent owners and innocent purchasers will prevail.[51]

However in order for an innocent purchaser to gain valid title through any transaction he must actually *be* innocent. Only a *good faith* (“*bona fide*”) *purchaser* can gain title from a vendor with voidable title. A good faith purchaser is one who buys without notice of circumstances that would make a person of ordinary prudence inquire whether the vendor’s title to the goods being sold was valid.[52] An executive who buys a Rolex from the sales counter at Saks Fifth Avenue is a good faith purchaser. He gains good title to the watch, even if somehow it turns out that Saks received the watch from the Rolex Corporation through deception, duress, or undue influence. But an executive who buys a Rolex on the street from an unshaven man carrying several watches inside his coat cannot be a good faith purchaser. This executive should suspect that the unshaven man may not have good title to the watch. This executive is a *bad faith* (“*mala fide*”) *purchaser*, and the law will not favor him. If the true owner of the Rolex appears, a court will order the executive to hand over the watch (or its market value) to that owner.[53]

In order for a purchaser to act in good faith, it must be reasonable for him to believe that he is dealing with a genuine vendor—one with neither void nor voidable title. It must be reasonable, that is for the purchaser to believe either that the vendor is the owner of the good, or that the owner has authorized the vendor while free from deception, duress, or undue influence. A purchaser who buys in bad faith cannot gain valid title to the good, and the owner may recover the good (or its value) through a lawsuit.

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[50] On the history of legal treatment of these kinds of situations from the Code of Hammurabi through Talmudic law and Roman imperial law to the present day see Saul Levmore, “Variety and Uniformity in the Treatment of the Good Faith Purchaser,” *Journal of Legal Studies* 16.1 (1987): 43-65.

[51] These rules also give both parties an incentive to avoid dealings with shady characters: owners have the incentive to avoid robbers and fraudsters, and purchasers have the incentive to avoid thieves.

[52] The US Uniform Commercial Code and most state codes are moving from an “honesty in fact” standard that turns on the purchaser’s actual beliefs to a “reasonable man” standard (“the observance of reasonable commercial standards of fair dealing”). Either standard is useful for our purposes. Other legal systems such as those in England and France have an exception to the good faith requirement for goods sold at an open market (“market-overt”). This exception would also not affect the outcome of the argument here.

[53] The executive is, in this situation, free to try his luck by taking legal action against the street merchant for violating an implicit warranty of title.

7. Standards for Disqualifying Regimes as Resource Merchants

The law described governs the sale of all goods within the United States, and is commonly used for trade across international borders as well. It is applied to sales of wheat and steel as well as watches, and to contracts between New York and New Delhi as much as between New York and Nebraska. The principles underlying these laws are the basis for the domestic US commercial code and they fit within the dominant global commercial code that sits on top of national commercial laws. These are the rules of the US market, and with a few variations they are also the rules of the global market.

These legal rules are the right form to make our case. The challenge is to bring these rules to bear on resource sales so that the results are robust. Regimes such as Obiang's in Equatorial Guinea very much want to transfer their countries' resources, and large corporations like ExxonMobil very much want to receive these resources. Both will argue strenuously that the rules of the market allow the transfer to take place. Obiang will insist that the people have consented to his selling off the nation's resources. The oil companies will portray themselves as good faith purchasers who could not reasonably be expected to know of deceptive or coercive relations between Obiang's regime and the people. The corporations will assert that even if such events were occurring nothing could have put them on notice that they might be receiving goods without valid title. For our legal framework to stand up to such vigorous and well-funded challenges, its application to cases like this must be solid.

There are several ways to apply the rules of commercial law to trade with resource-cursed countries. To establish feasibility I will set out one. Here I will argue that even under empirical assumptions favorable to the international resource corporations, and even on a quite permissive interpretation of the legal rules, it can be shown that these corporations are handling billions of dollars worth of stolen resources every year.

To prove this we will need theory on two levels. First, we will need an account of the absolutely *minimal conditions* that must obtain in a country for it to be possible for the people to authorize resource sales. Second, we will need an account of *authoritative notice* that indicates when these minimal conditions do not obtain. Authoritative notice that a country has not achieved the minimal conditions will establish publicly that the regime cannot possibly be authorized to sell the country's natural resources. When such authoritative notice has been given, no corporation can buy from the regime in good faith and so no legitimate transfer of these resources can go through—no matter how strongly desired by the regime or the corporations.

This section sets out theory on the first level: that of minimal conditions. We require an account of conditions that must exist in a country for it to be possible for a people to authorize a regime to sell off its resources. When these conditions are not met, regimes that claim to be selling resources with the people's authorization cannot be doing so.

The account of minimal conditions is simple to derive, since it follows directly from the concept of valid consent. To gain the authorization to sell, a regime must claim

some sort of valid consent from the citizens. A regime may claim that the people *asked* the regime to sell off its resources, or that the people *agreed* that the regime should do so. At last resort a regime may assert that the people signaled their *acquiescence* to the sale of the country's resources by remaining silent as the sales occurred.[54] This final assertion—that the people tacitly consented to resource sales by remaining silent—is the claim that authoritarians and civil warriors are most likely to make.

However, for it to be possible for a people to perform any act of authorization, including the act of authorizing by remaining silent, three minimal conditions must obtain. For an owner to be able to authorize sales, the owner must at least:

(1) be able to find out about the sales;

(2) be able to stop the sales without incurring severe costs; and

(3) not be subject to extreme manipulation by the seller.

If these minimal conditions do not obtain, an owner cannot authorize any sale of property.[55]

Since we are looking to build the sturdiest legal framework, we will apply permissive interpretations of these conditions to our case of a people and its resources. That is, we will interpret these conditions so that they are quite favorable to the authoritarians, the civil warriors, and the resource corporations:

(1) An owner who cannot know about sales or their terms cannot authorize those sales. Citizens who cannot find out about resources sales cannot approve these sales even tacitly. At the very least, citizens should be able to obtain reliable general information about which resources the regime is selling for how much, and who is getting the proceeds.

(2) In order to acquiesce to resource sales an owner must have the ability and opportunity to stop these sales without incurring severe costs.[56] Any regime claiming that

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[54] "Consent is called tacit when it is given by remaining silent and inactive… But, tacit consent is nonetheless given or expressed. Silence after a call for objections can be just as much an expression of consent as shouting 'aye' after a call of ayes and nayes." A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), p. 80.

[55] Each of these is a condition that must obtain for citizens to authorize—even tacitly—the sale of its resources. These conditions map onto the principles of property and contract embedded in commercial law. Any regime that gains control of natural resources through stealth, deception, duress or undue influence must violate one or more of the conditions above. A regime that gains control over resources through stealth or deception will violate condition 1. A regime that gains control over resources through duress will violate condition 2. A regime that acquires control over resources through undue influence will violate condition 3.

[56] An analogy from Simmons: a chairman could not claim even tacit consent from his board members if he finished his proposal by saying: "Anyone with an objection to my proposal will kindly so indicate by lopping off their arm at the elbow." Simmons, *Moral Principles*, p. 81.

it has the authority of the people to sell must put some effective mechanisms in place through which it acknowledges that the citizens can dissent to the sales. Citizens must also be able peacefully to express their dissent inside or outside of these formal mechanisms without fearing exile, imprisonment, torture, or death.

(3) To be authorizing, the acquiescence of an owner must be to some minimal extent independent of the will of the seller. Owners who are hypnotized, brainwashed, or subject to extraordinary psychological manipulation do not validate the sale of their resources even if they remain silent as their resources are sold. North Korea has some oil, but the comprehensively dominated people of North Korea could not now give tacit assent to the current regime selling their oil abroad, even if the regime were inclined to do this.

In concrete political terms these three conditions require that citizens have at least minimal civil liberties and bare-bones political rights. There must be at least some absolutely minimal press freedom if citizens are to have access to information about what the regime is doing. The regime must not be so deeply corrupt that it is nearly impossible for the people to find out what happens to the revenues from resource sales. Citizens must be able to pass information about resource sales to each other without fear of surveillance and arrest. The regime must put some effective political mechanisms in place through which the people can express their unhappiness about resource management: at least a non-elected consultative legislature that advises the regime, or at the very least occasions on which individuals or civic groups can present petitions. There must also be a minimally adequate rule of law, ensuring that citizens who wish to protest resource sales publicly and peacefully may do so without fear of cruel judicial punishment, disappearance, serious injury, or death.

If these minimal conditions do not obtain in a country, then the silence of the people when a regime sells its resources cannot signal the people's consent. Absent these conditions, the people's silence is just silence. A regime in a country like Equatorial Guinea where these conditions are not met cannot claim authorization to sell the country's natural resources. Outsiders who are on notice that these conditions do not obtain within a country cannot purchase resources from any regime in that country in good faith.[57]

This is the principled argument for showing that outsiders cannot receive valid title to natural resources from regimes in countries where the minimal conditions are not met. What could put outsiders on notice that these conditions are not met within some country is the subject to which we now turn.

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[57] International recognition of the state controlled by the regime cannot confer on the regime the right to transfer resources without the people's authorization, any more than international recognition can confer on a regime the right to violate (other) human rights. If international recognition could confer the resource right, then the ultimate right to control the resources of a territory would be vested not in the citizens of the country but rather in the recognizing states. (More discussion of this final point is in **A8: The Resource Right and International Recognition.**)

8. Question: Sources of Authoritative Notice

The account of minimal conditions for valid consent came easily, as these conditions derive directly from the concept of valid consent. The difficult doctrine to generate is that of authoritative notice. Here we need indicators that publicly establish that the minimal conditions do or do not obtain within some country. Authoritative notice that the minimal conditions do not obtain will signal to all outsiders that the people cannot possibly consent to resources being sold from the country. Authoritative notice will thereby signal to all outsiders that they cannot deal in good faith with any regime in that country, and so that they cannot legitimately take possession of its natural resources. A very large question for any proposal to reform the resource privilege is what that source of authoritative notice could be.

As Pogge says, we cannot rely on institutions within the poor country itself to provide authoritative notice that the minimal conditions have not been met. For if the minimal conditions are not met, the domestic institutions that might be used (such as the judiciary) will likely themselves be controlled by the regime. There must be some source for authoritative notice outside of the country, and this source must have some degree of political independence from the powerful actors who want the resource transfers to go through.[58]

Pogge's suggestion is that notice be given by an international panel composed of reputable, independent jurists. Such a panel would investigate whether the minimal conditions had been met within suspect countries, and Pogge's hope is that this panel would have sufficient standing that its rulings would carry weight in the international community. The panel's judgment that a certain country did not fulfill the minimal conditions would put all international actors on notice that natural resource transfers from that country must be illicit. Ideally the panel should be permanently established: Pogge says the United Nations might be a natural home for it.

Shafter also opts for a panel model in the parallel context of the international borrowing privilege and "odious debt."[59] Shafter is not as sanguine as Pogge about the United Nations: he worries even about the Security Council that, "Not all of the permanent or rotating Security Council members place equal priority on the goal of democracy promotion."[60] Shafter's alternative suggestion is for the panel to be embedded

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[58] Pogge, *World Poverty*, p. 155-58.

[59] Jonathan Shafter, "The Due Diligence Model: A New Approach to the Problem of Odious Debt," *Ethics and International Affairs* 21.1 (2007): 49-67.

[60] Shafter, p. 64. But see Seema Jayachandran and Michael Kremer "Odious Debt," *American Economic Review* 96.1 (2006): 81-92, discussed more thoroughly in **A14** below.

in a self-standing international organization, with a membership composed of "diplomatic political appointees from member states [like the OECD states] to the organization."[61]

Both Pogge's and Shafter's proposals run significant risks of institutional capture. Wherever the panel is located, if the member states that supply the panel's members are mostly rich countries then the panel may be captured by commercial interests (perhaps working through the ministries of the rich countries) that want resource transfers to go through regardless of whether the countries in question actually do meet the minimal conditions.

The political pressure on an international panel is clearly one area of concern—a concern about the "input" to the panel's decisions. Another concern is enforcement: what would happen to an international panel's "output." A panel ruling that some country does not meet the minimal conditions of legitimacy could feed into the institutions of resource-importing countries through two routes: through their political institutions or through their judiciaries. Shafter looks to the political route.[62] The panel he posits would have enough standing among importing-country governments that these governments would enforce against their own corporations the panel's negative rulings that the regimes in some places were not to be dealt with.

Shafter's proposal faces real difficulties, most obviously with compliance by the United States (although compliance by China and other fast-growth developing countries is also a large concern). The more independent an international panel is (the purer its "input"), the less likely it is that the US government will agree to be bound by its rulings. Both the US executive and legislative branches have proved robustly suspicious of international panels that the US does not control.[63] And this suspicion, it must be admitted, is also widespread within the American citizenry. Yet without American support for its judgments, the effective authority of any international panel's decisions will be limited. The governments of resource-hungry countries are unlikely to enforce the decisions of an international panel that the minimal conditions in some country have not been met if doing so will limit their own resource imports but not (because of continuing US trade with that country) ease the resource curses in that country.

It might be thought that the output of the international panel could better feed into the judicial systems of resource-importing countries. On this judicial route, the negative judgments of the panel would be decisive in importing-country courts in actions charging that some party had illegitimately received extractive resources from a resource-cursed country.

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[61] Shafter, "The Due Diligence Model," p. 59.

[62] Pogge leaves this question open, mentioning both the political and judicial branches of rich countries' governments. Pogge, *World Poverty*, pp. 164-65.

[63] The major exceptions to this generalization are the WTO dispute resolution panels (which are part of an organization that the US government regards as operating broadly in the national interest) and the UN Security Council (where the US has veto power).

The difficulties of going this judicial route are also evident from the American case. The US judicial branch has been at least as reluctant as the executive and legislative branches to accept the standing of international panels as conclusive for their own judgments. Although one could imagine a day when it might be otherwise, it would presently require an American judge of considerable professional courage to rule that the decision of some international panel was decisive in allowing an action to proceed, for example, against ExxonMobil for its oil contracts in central Africa.

Until a credible proposal for an international panel has been put forward we should be alive to other solutions. The alternative suggestion for solving the problems of notice and enforcement is that we find independent sources of evidence that can be used to ground judgments by domestic courts. Here it will be domestic courts themselves that rule that there is public and conclusive evidence that the minimal conditions within some country are not met, and so that no regime within that country can legally sell off its resources. For example, an American judge will rule that the political conditions in Equatorial Guinea are so bad that Obiang cannot legitimately sell the country's oil, and that no American corporation could possibly gain good title to the oil by dealing with him.

The advantage of this direct judicial solution is that it immediately resolves the question of the authority of the judgments. Unlike an international panel, the rulings of domestic courts immediately bind all actors that operate within their court's jurisdiction. The concern for this suggestion is that that domestic courts may not seem to be up to the task that that is assigned to them. Domestic judges and juries cannot be presumed to be experts in political science or foreign affairs. For courts to rule that the minimal conditions are not met in some country, their decisions must be supported by independent and weighty evidence that bears directly on the minimal conditions. Yet where could such evidence be found?

The evidence required would need, to as high a degree possible, two features. First, domestic courts will be helped by *bright-line* standards: by standards that clearly state that the minimal conditions for legitimate sales have or have not been met. Second, courts will look for standards that are of sufficient *status* to secure what will after all be very dramatic judicial decisions. To be of sufficient status, the standards should be recognized by domestic and international agencies at the highest levels. In the ideal case, an American court ruling against an American oil company would be able to rely on standards that the American government had officially and publicly endorsed.

This ideal might seem a distant hope, again especially in the American case. However the ideal can be realized—even in the American case—when property is used as the grounding value for the reform. There currently exist public, bright-line ratings that indicate for every country in the world whether the minimal conditions for resource sales have been met. Moreover, these ratings have sufficient status to ground secure judgments by American courts. In fact, American courts could tomorrow be presented with evidence that is clear enough and decisive enough to support a ruling that all parties bound by American law may not legitimately purchase natural resources from regimes like Obiang's in Equatorial Guinea.

9. The Freedom House Ratings

To rule that an international resource corporation has received stolen resources from a foreign regime American courts will, as we have seen, need public, bright-line standards that establish that the minimal political conditions for resource sales are unfulfilled in the regime's country.

The U.S. government has authorized just such standards. The U.S. government has authorized for official use an independent report that gives bright-line ratings of the political conditions in every country in the world. And these ratings measure exactly the factors that determine whether the citizens of a country could possibly consent to their resources being sold off.

In 2002 the Bush administration established the Millennium Challenge Corporation (MCC) as an agency for distributing development aid to poor countries. President Bush required that the MCC choose countries to receive aid based on "a set of clear and concrete and objective criteria" on political conditions that would be applied "rigorously and fairly."[64] For the criteria concerning civil liberties and political rights, the U.S. government selected the ratings of Freedom House.

Freedom House is an independent NGO established in 1941 by Eleanor Roosevelt and Republican presidential candidate Wendell Wilkie. Today the organization is prominent in Washington, and its Board of Trustees is filled with well-known figures of the American establishment. It has a regional headquarters in Europe and field offices in several developing countries.

Since 1972 the organization has published *Freedom in the World*, an annual evaluation of political conditions in countries around the world. The survey uses indicators drawn from the *Universal Declaration of Human Rights* to rate each country in two broad categories: civil liberties and political rights. The Freedom House ratings are widely cited by journalists, academics, and nongovernmental agencies; "most scholars of comparative politics consider the Freedom House index to be the best measure available."[65] The U.S. government has used the Freedom House ratings not only for the MCA, but also, for example, for setting official targets for the performance of the State Department.[66]

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[64] Speech of George W. Bush, March 14, 2002 (www.whitehouse.gov/infocus/developingnations/millennium.html).

[65] Cynthia McClintock and James Lebovic, "Correlates of Levels of Democracy in Latin America During the 1990s," *Latin American Politics & Society* 48.2 (2006): 29-59, 31.

[66] Department of State and U.S. Agency for International Development, "FY 2007 Joint Performance Summary, Strategic Goal 7: Democracy and Human Rights" (2007).

The Freedom House report assigns each country a rating from 1 (best) to 7 (worst) on civil liberties and on political rights. The index on civil liberties measures to what degree citizens are free from arbitrary political coercion, violence or manipulation. The report describes countries with the worst two scores on civil liberties in this way:[67]

> **Rating of 6**: People in countries and territories with a rating of 6 experience severely restricted rights of expression and association, and there are almost always political prisoners and other manifestations of political terror. These countries may be characterized by a few partial rights, such as some religious and social freedoms, some highly restricted private business activity, and relatively free private discussion.
>
> **Rating of 7**: States and territories with a rating of 7 have virtually no freedom. An overwhelming and justified fear of repression characterizes these societies.

Among the countries rated ‘6’ on civil liberties in the 2009 Freedom House report are Iran, Syria, and Zimbabwe. Among the countries with a rating of ‘7’ are Burma, North Korea, Somalia, and Sudan.

The Freedom House index of political rights measures how much the people’s informed and unforced choices control what those with power in the country do. The descriptions of countries that receive the worst scores on political rights are as follows:

> **Rating of 6**: Countries and territories with political rights rated 6 have systems ruled by military juntas, one-party dictatorships, religious hierarchies, or autocrats. These regimes may allow only a minimal manifestation of political rights, such as some degree of representation or autonomy for minorities. A few states are traditional monarchies that mitigate their relative lack of political rights through the use of consultation with their subjects, tolerance of political discussion, and acceptance of public petitions.
>
> **Rating of 7**: For countries and territories with a rating of 7, political rights are absent or virtually nonexistent as a result of the extremely oppressive nature of the regime or severe oppression in combination with civil war. States and territories in this group may also be marked by extreme violence or warlord rule that dominates political power in the absence of an authoritative, functioning central government.

Among the countries rated ‘6’ on political rights in the 2009 report are Angola, Iran, and Rwanda. Among the countries rated ‘7’ are Burma, Equatorial Guinea, North Korea, Sudan, and Zimbabwe.

In order to build the strongest legal cases we make the least controversial assumptions, focusing on the countries where it is certain that the minimal conditions are not met. We can say with confidence that a Freedom House rating of ‘7’ for either civil liberties or political rights should be conclusive for establishing that the people of that country are not in conditions under which they could possibly authorize resource sales. Therefore no regime within a ‘7’ country can legitimately sell resources from that

[67] Freedom House, *Freedom in the World 2008*.

country, and any corporation that receives resources from such a regime is legally liable for possessing stolen goods.

The Freedom House ratings are secure criteria, based on a scale that the U.S. government has declared to be useful as an official, objective, and reliable standard. The Freedom House ratings provide evidence that is clear enough and decisive enough to support rulings that parties bound by American law may not legitimately purchase natural resources from regimes in certain countries, or from anyone in a chain of transactions stretching back to those regimes. These ratings can underpin rulings that would significantly curtail America's contribution to the resource curse.

10. Litigation of International Transfer of Extractive Resources

The U.S. government has declared that the citizens of each country ultimately control the resources of their country. The U.S. government has also stated that the citizens of some countries could not possibly be authorizing the sale of their resources. Therefore, by the U.S. government's own standards, American corporations are buying resources from regimes that could not possibly have the right to sell them. Any consistent pro-market government must allow legal action against these resource corporations to proceed.

The framework set out above is robust enough to support several different strategies in litigation. For example, actions against resource corporations could be taken within civil law (for a tort to property) or criminal law (for the crime of receiving stolen goods) or both.[68] Which strategies will be most effective will depend on the details of specific statutes and transactions. It is true that strong cases may require lawyers to overcome the resistance of the *might makes right* rule that still lingers in transnational law.[69] The prospects are good, however, that strong civil or criminal cases can be

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[68] Citizens from a resource-cursed country can have the standing to bring civil suits in U.S. courts: a government in exile would be ideal; an opposition movement or even a group of concerned citizens could also be granted standing. Upon finding for the plaintiffs in a civil case, a court should place the money reclaimed into in a Clean Hands Trust for the people of the country, as described below.

[69] For example, the Westphalian "act of state" doctrine requires courts not to review acts of a foreign government. The status of this doctrine has declined in U.S. law, especially in property cases; Anne-Marie Burley [Slaughter], "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine," *Columbia Law Review* 97 (1992): 1907-96, at pp. 1928-41.

To take another example, a working assumption in private international law is the "choice of law" provision which says that a despot and an oil company could choose to apply the law of the despot's own country (as interpreted by the despot's chosen courts) to decide whether the despot has title to goods within the country. This assumption can be defeated on grounds of public policy, but it does need to be defeated for a case to proceed. See Charles Wild, *Conflict of Laws* rev. ed. (London: Old Bailey, 2003), pp. 24-5, 145. In any case, for obvious reasons resource corporations are unlikely to agree to allow the despot's law and courts to govern an actual contract.

brought.[70] Winning the first case would change every corporation's incentives for dealing with the worst regimes. Cases requiring the United States to follow its own principles in enforcing property rights are waiting to be made.

11. Question: Political Bias of the Ratings

So far this article has set out an argument to establish that international resource corporations are receiving stolen goods, and from this has developed a legal framework based around an analysis of valid consent and a specific source of authoritative notice. The argument could be developed along other paths—a parallel framework could draw, for example, on alternative sources of notice.[71] To show the feasibility of the framework proposed here, I will continue to flesh out the current framework by responding to objections. These responses will then lead to further policy proposals for enforcing property rights in the system of international trade.

Legal action within the Clean Trade framework will face opposition, not least from those whose business deals will be threatened. For example, any proposal to use the Freedom House ratings to invalidate a major oil contract between a US oil company and Libya ('7' on civil liberties, '7' on political rights) will meet with well-financed resistance.

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[70] See Open Society Institute, *Legal Remedies for the Resource Curse* (2005), which discusses the Alien Tort Claims actions, unfair business practice laws, civil RICO statutes and other bases for civil actions. For recent developments on ATCA cases, see the Business and Human Rights page on the topic (www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/ AlienTortClaimsActUSA). See also the ongoing suit based on state tort law against ExxonMobil on behalf of Indonesian villagers. (www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatory action/LawsuitsSelectedcases/ExxonMobillawsuitreAceh). These types of civil actions will be strengthened by being brought within the property rights approach outlined here.

In the criminal law, the National Stolen Property Act (18 USC 2314) criminalizes importation of goods when the defendant acts "knowing the same to have been stolen, converted, or taken by fraud" (see United States v. Schultz, 178 F. Supp. 2d 445, 449 [S.D.N.Y. 2002]); and the Federal statute concerning receipt of stolen goods (18 USC 662) has explicit extraterritorial jurisdiction (see Congressional Research Service, "Extraterritorial Application of American Criminal Law," 94-166 A [2006]).

[71] International resource corporations such as the oil majors in fact have extremely good information about the conditions in the countries they are buying from and the regimes they deal with. Obtaining detailed and reliable information is a business necessity for corporations that deal in the most repressive and chaotic countries in the world. These corporations pay significant sums for country reportage, and the information they receive often rivals that of state intelligence agencies such as the CIA. If some regime is deceptively or forcefully keeping resource revenues for itself, the corporations that are signing contracts with that regime know this. And indeed general information about the political conditions in every country is regularly published by government ministries (like the US Departments of State and Energy) that want to help domestic businesses to make their investment decisions. Either corporate intelligence or ministerial publications could be useful in litigation to establish that some country does not meet the minimal conditions, and so that a corporation could not buy from a regime in that country in good faith.

Some might object that the Freedom House ratings are inappropriate for judicial use because they are politically biased. Freedom House proclaims its independence from governmental institutions in its promotional materials, and highlights the bipartisan character of its Board of Trustees. Yet there is no doubt that the organization is politically conservative in the American sense, and academic studies have shown that its survey tends to rate Marxist-Leninist regimes lower than do similar academic surveys.[72]

For our purposes, however, this kind of political bias is irrelevant. All American courts need to know about the Freedom House ratings is that they are widely respected and officially used by the US government for evaluating the political conditions in other countries. This is enough for courts to rely on the ratings as authoritative as to whether US companies can approach certain regimes in good faith. These facts give the ratings the status required, and courts need not reach further questions about possible political bias.

12. Question: Political Pressure to Change the Ratings

One central concern about the Clean Trade approach to reforming the resource privilege is that Freedom House would come under pressure to change its ratings. If successful legal actions were brought against large multinational corporations, a great deal of money would turn on how different countries fared on the Freedom House scales. The difference between a country being rated '6' rather than '7' could mean the difference to deals worth hundreds of millions of dollars. Freedom House does have friends in high places, and should their ratings start to block big resource contracts one would suspect that these friends would start requesting that certain countries have their ratings raised. This concern is, again, one of institutional capture.

One way that the Clean Trade framework protects Freedom House from capture is to generate counter-pressures for the organization to raise its scores. Power is normally required to balance power, and the full implementation of the property rights approach (discussed below in Clean Trade Import Policies) will generate just such counter-pressures. This balance of forces can create open space for the staff of Freedom House to continue to act in accordance with the organization's self-image as an independent evaluator of political conditions.

Moreover, there is another reason to be optimistic here. One thing we know for certain is that the *current* (2009) Freedom House survey is not warped by commercial and political pressures of the type just mentioned. Neither the present administration nor large American corporations have realized that the Freedom House scores call the legitimacy of extractive resource sales into question. This can be confirmed by the fact that several countries (e.g., Libya, Equatorial Guinea) with whose regimes American

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[72] K.A. Bollen and P. Paxton, "Subjective Measures of Liberal Democracy," *Comparative Political Studies* 33 (2000): 58-86.

companies have signed large contracts are currently rated '7'. Given that the present ratings are not distorted by the relevant pressures, and that everyone would know that pressure will be applied on Freedom House to revise its ratings, much of the organization's reputational credibility will turn on its proving publicly that revisions of the ratings are justified. The Freedom House ratings now have a long track record, so it is known how much the scores can be expected to change year on year and how much the index overall can be expected to track similar indices. Academics and non-governmental organizations will scrutinize and criticize each new annual survey, increasing the organization's motivation to resist surreptitious suasion.

Furthermore, pressure on Freedom House to raise its ratings may for two reasons not in fact be as strong as initially feared. First, what every corporation resists most is state action that puts it *in particular* at a competitive disadvantage. Yet the court rulings described above would restrict the activities of all American corporations equally, and so will meet with less resistance. New rules that applies to all firms, especially if credibly enforced, can be accepted fairly quickly as defining the framework of business practice.

Second, international resource corporations might in fact welcome the property-based reforms, since these promise to improve the business environment in which these firms operate. What resource corporations want above all in resource-rich countries is the predictability of the rule of law and the enforcement of property rights. Capricious dictators and the threat of civil conflict greatly increase their business risks. By requiring minimally decent governance as the condition of any resource transfers, the property-based legal actions will incentivize regimes in resource-cursed countries to improve the rule of law of their countries in ways that will increase the expected profitability of resource contracts for the international corporations. These firms may see the property-based reforms as means to solve some of their own collective action problems and so reduce risks.[73]

It will also be useful here that ratings of a number of indices that rate political conditions strongly reinforce one another. Courts can be presented not only with the Freedom House ratings, but with concurrent ratings from, for example, the Bertelsmann Transformation Index, the Transparency International Corruption Perceptions Index, and the World Bank's Worldwide Governance Indicators.[74] Discursive country reports from ministries like the State Department and the Energy Department describe the same sets of facts. There is in fact no controversy among any of these indices and reports that the political conditions in Equatorial Guinea, for example, are abysmal. The agenda for replace the *might makes right* rule can make good use of this consensus by presenting

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[73] "Governance issues, the transparency of operations, and political stability matter in every oil-producing country… [Reforms] don't just produce benefits for the citizens, but they create a more stable investment climate." Richard Karp of the American Petroleum Institute in Esther Pan, "The Pernicious Effects of Oil," Council on Foreign Relations (2005), www.cfr.org/publication/8996/pernicious_effects_of_oil.html.

[74] See www.bertelsmann-transformation-index.de/16.0.html?&L=1, www.transparency.org/policy_research/surveys_indices/cpi, info.worldbank.org/governance/wgi/index.asp.

these indices as weighty, independent sources of information about the political conditions in foreign countries in front of domestic courts.[75]

13. Clean Trade Legislation

A principled objection to the proposal so far might be that US courts should not be meddling in the affairs of other countries by judging the political acceptability of their governments. This objection is a familiar one: even if regular multi-party elections are appropriate for the United States it is wrong to impose standards of governance on other countries where different traditions may be embedded. To do so is insensitive at best, and at the extreme suggests a form of imperialism.

However compelling this objection might be in other contexts, it has no application here. US courts working within the framework above would not be meddling in the affairs of other countries. To the contrary, they would be penalizing international corporations for meddling in other countries—specifically those countries in which American money is likely to empower repressive regimes, incentivize civil wars and coups, and damage the economy. The courts would be penalizing corporations that become complicit in the plunder of other countries' resources.

Nor can the regimes in resource-cursed countries complain about the standards that the American courts would use in their rulings. The rulings will be based on the basic principles of self-determination and human rights that all states have endorsed. No controversial ideal of democratic governance is applied. Rather, the courts will evaluate with the best evidence available to them whether the regime is, as it claims it is, selling resources with the people's authorization. And recall that courts will focus only on this specific claim by the regime, without inquiring whether the regime may legitimately enforce domestic laws, defend territorial borders, participate in international organizations, or exercise any other sovereign power. A court ruling against a resource sale would not delegitimize a government; it would only penalize a corporation for buying resources from a regime that was judged not to have the right to sell them.

This leads to a more general rejection of the objection of "meddling." For many in the developing world, hearing Americans and Europeans talk about promoting popular sovereignty brings on a case of nerves, as this has in the past been followed by the sound of bombers or bureaucrats rushing toward their capital cities. The Clean Trade initiatives have nothing to do with those apprehensions. To take the United States as the example: These initiatives are aimed at reforming American laws and policies, enforced on American soil, in violation of America's own principles as judged by the American government's own standards. All of the needed reforms will take place within America's

[75] The congruence of the various indices also means that compelling evidence can now be presented to courts even in countries where no index is in official use. The legal framework of the proposal here can thus be translated, for example, into European courts as well.

borders, so as to make America's rules match American ideals. Not a single soldier or penny of aid is needed for these reforms; whether these will be needed for other purposes are entirely separate issues.

The most direct means for the United States to enforce its own principles will be through legislation: a Clean Trade Act. A Clean Trade Act would bar the importation of natural resources from any disqualified country into any US jurisdiction. The criterion for disqualification would be the same as in the litigation described above: a '7' on one of the Freedom House scales (or a composite index can be used if preferred).

The details of such legislation will be important, yet it is the principle that is most vital. The United States must not allow foreign injustice to be enforced within its own territory. It must not allow its own police and courts to enforce "property rights" over resources that have been stolen from the citizens of other countries. Doing so is equivalent to the American government deciding to execute a refugee so as to carry out an unjust foreign death sentence, or equivalent to allowing a foreign slave owner to use American courts to regain control over his foreign-bought fugitive slave. And, generalizing away from the American case, the same is true for all countries that affirm the principles of self-determination and human rights. All countries should pass a Clean Trade Act to enforce their own principles within their own borders.

The political pressure to pass such legislation could come from many sources: from politically committed citizens, from security advisors concerned about the stability of states led by repressive resource-funded regimes, and so on. Litigation against resource corporations as described above will increase the pressure for Clean Trade legislation substantially, as corporations will want to free themselves from such litigation while reinforcing a "level playing field" for all companies bringing resources into the country of litigation. A Clean Trade Act can implement a fair, rules-based framework for legitimate resource importation. Countries passing such a Act can ensure that all resources entering their territory are accompanied by what is, by their own principles, valid title.

Once the legislative strategy has been successful within a country like the United States, the resource corporations based in that country will then agitate not to lose competitive advantage with respect to corporations based elsewhere. This is where the third stage of the agenda for reform would begin. Here the United States (for example) would use its trade policy to discourage the corporations of other countries from receiving stolen resources from disqualified regimes, or from anyone in a chain of transactions that stretches back to such a regime.

14. Clean Trade Import Policies

So far this article has argued that governments should block corporations within their jurisdictions from purchasing natural resources from severely repressive regimes. The U.S. government has already shown that it agrees with this argument to some extent.

For example, since 1997 the U.S. government has barred American energy companies from trading with the Sudanese regime in Khartoum, in part because of this regime's grim record on human rights. The Clean Trade approach here would only add that American energy companies should be barred from trading with the Sudanese government specifically because this regime is violating the human rights that are the citizens' property rights over resources.

However, imagine that this Clean Trade approach were widely adopted. Imagine that the United States, the United Kingdom, France and all other Western countries were to stop their corporations from buying resources from repressive governments and civil warriors. Would not other countries that are less fussy about the niceties of rights just step in and purchase these resources instead? Say that both U.S. and European oil companies were barred from signing contracts for Sudanese oil. Wouldn't the Chinese just buy the oil from President Bashir of Sudan anyways, despite his indictment by the International Criminal Court for war crimes and crimes against humanity? Would the proposal here really make any difference to the resource curses?[76]

Moreover after the Chinese-Sudanese sale inevitably went through, could Western consumers keep themselves from being tainted with this stolen Sudanese oil while their countries maintained trade relations with China? This Sudanese oil would after all percolate through the Chinese economy, and so become a factor in producing many of the goods (it will be hard to know which ones) that Western consumers end up purchasing. Even if American oil companies stop receiving stolen goods, won't American shoppers still end up dirtying their hands when they buy Chinese imports?

This is an important challenge. Here I set out one feasible response, which again turns on enforcing property rights. Western governments can set up mechanisms that will both secure the rights of resource-cursed peoples and keep their own citizens from receiving stolen goods second-hand. Moreover, these mechanisms can attract support from powerful domestic interests as well as from citizens across the political spectrum.

Sudan rates a Freedom House '7' on both civil liberties and political rights. So let us imagine that American oil companies continue to be barred from buying Sudanese oil. Say that China now buys $3 billion worth of oil from the regime in Khartoum. The correct response on a property rights approach is for the U.S. government immediately to announce a Clean Hands Trust for the People of Sudan. This trust is a bank account that the government will fill until it contains $3 billion. The money to fill the trust will be raised from tariffs on Chinese imports as they enter the United States. The money in this Clean Hands Trust will be held for the people of Sudan until the minimal conditions in

[76] Sudan's civil conflict, which has flared up repeatedly since the 1980s, pits the Muslim Arab regime in Khartoum against the Christian and animist African tribes. Since the beginning of serious oil production in 1999 the regime has received about $500 million a year from petroleum sales, and has spent much of this money on arms that human rights groups say have been used to attack civilians in the south and the west (Darfur). China is a major investor in the Sudanese oil industry, and China currently meets 7 percent of its total energy demand with oil from Sudan. "Hu's Trip to Sudan Tests China-Africa Ties," *Christian Science Monitor*, February 2, 2007.

that country are met. At that point, the money in the trust will be turned over to the Sudanese people.

The Clean Hands Trust will protect the American people from becoming tainted with the oil that China buys illegally from the Bashir. The tariffs extract from Chinese imports the value of the oil taken from Sudan, and the trust holds this money in reserve until it can be given back to the Sudanese people. With the tariffs in place American consumers can buy Chinese goods with clean hands, because the tariffs subtract the value of that element of the goods' manufacture that comes from the oil sold illegitimately by the Khartoum regime.[77]

The trust-and-tariff mechanism protects property rights by retaining the value of the stolen property for the owners of that property: the citizens of Sudan. The tariffs here are different from other tariffs: they are "anti-theft tariffs" designed to enforce property rights. The trust-and-tariff mechanism is no more a restraint on free trade than a court order to return stolen property, and no more a restraint on free trade than a prison term for a thief. [78] China, having violated market rules by passing stolen goods, has no standing to complain when these violations are rectified.[79]

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[77] Trade economics says that the tariffs may have to collect total revenues greater than $3 billion in order to ensure that it is the Chinese (and not American consumers) who end up contributing $3 billion to the trust. Still, when the anti-theft tariffs are in place shoppers in the U.S. will have to pay slightly higher prices for some Chinese imports. This is the cost of engaging in legitimate trade: consumers must always pay higher prices when they buy legal merchandise. Shoppers will always have to pay more, for example, to buy a watch from a department store than they would to buy the same watch from a black market dealer on the street.

[78] The trust-and-tariff policy can be seen as an enforcement mechanism for Nozick's third basic principle for the legitimacy of capitalist holdings: the principle of rectification of injustice. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 152-53.

[79] Chinese export of commodities produced with Sudanese oil would not be trade, but rather to that extent the passing of stolen goods. Since the anti-theft tariffs are aimed at the illegal component of these exports these tariffs are not restrictions on trade, but mechanisms to enforce property rights. Therefore the World Trade Organization should not allow China to impose trade restrictions in retaliation for the anti-theft tariffs.

Compatibility with WTO rules is a large topic, but there is every reason to believe that the trust-and-tariff mechanism would be judged compatible. The US can claim under GATT Article XX that prohibiting importation of stolen resources is needed to protect the "public morals" of its own citizens. The fact that the US will use the Freedom House scales across the board to disqualify exporting regimes—including some of its traditional trade partners—will strengthen the argument that the policy is not disguised protectionism, as will the keeping of trade duties in the Clean Hands Trusts to be returned to the affected peoples.

Indeed there is already a precedent in the WTO system for giving special treatment to extractive resources—the waiver granted by the WTO to the Kimberley Process in 2003 (renewed 2008) against disputes arising from its operations. This precedent for "blood diamonds" should be extended to include a waiver for "blood oil" and other resources as well.

This trust-and-tariff mechanism will generate strong incentives for a variety of domestic economic interests to support the Clean Trade approach. The instant that China contracts for the Sudanese oil, American manufacturers will lobby the U.S. government to set up a Clean Hands Trust. Many American companies (in apparel, electronics, machinery) will want these tariffs to protect them against Chinese competition in their sector. The American banking industry will also support the Clean Hands Trust, as American banks will hold the tariff proceeds in trust until these are returned to the Sudanese.[80] Both the manufacturing and banking industries will also welcome the opportunity publicly to support measures aimed at helping oppressed people overseas. Moreover once the tariffs and the trust are in place, both manufacturing and banking interests will want these to continue. These industries will therefore provide the political counter-balance (mentioned above) to the pressure from the international resource corporations to raise the Freedom House ratings for Sudan, for these industries will not want the scores raised.

The Chinese will have much less of an incentive to buy more oil from Bashir, knowing that if they buy $2 billion more oil then the U.S. will impose tariffs worth $2 billion more on their goods. The Sudanese people, for their part, will know that there is a great deal of money waiting to be turned over to them if they can replace the regime that is looting their resources with a minimally decent, unified government. The trust gives the Sudanese people an extra incentive to unite in installing a government that will represent the people, while drying up the revenues that support and arm Bashir's regime in Khartoum.[81]

With one modification the trust-and-tariff policy can be implemented in any country. Any government that prohibits its corporations from receiving Sudanese oil may set up a Clean Hands Trust once the Chinese buy from Bashir. Each government that sets up such a trust must then continually update its public report of how much money it is holding in its trust, and all governments must stop filling their trusts once the combined global total in all of the trusts equals the amount of the Chinese contract ($3 billion). This gives the "clean" countries a competitive incentive to announce and fill their trusts as quickly as possible, while limiting the amount the Chinese will be penalized to the amount of the original property rights violation.

The trust-and-tariff proposal should also attract popular support in developed countries across the political spectrum. Free market advocates will support the trusts and

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[80] American banks must transfer the funds from the trust to the Sudanese, plus interest. They may claim a reasonable fee for their trusteeship.

[81] The money held in trust for the Sudanese people should be repatriated once the country meets the minimal conditions set out above. As responsible trustees the rich countries that hold the money in trust should not hand this money over to a poor-country government if they reasonably believe that this will enable the government to plunge the country back below the minimal conditions. Here we must rely on rich governments responsibly carrying out their fiduciary duties as trustees, which duties as it happens line up with these governments' interests in allowing their resource corporations to gain access to the resource-rich country.

tariffs because these mechanisms strengthen the global market order by enforcing property rights. Protectionists will back the tariffs because they protect domestic manufacturing and so keep jobs from going overseas. Those who prioritize national security will see in the proposal an opportunity to strengthen failed states where terrorism can incubate,[82] and also to lessen the power of potentially hostile "petrocrats." Environmentalists should also support the Clean Trade approach, as there are reasons to believe that its implementation can be expected to limit greenhouse gas emissions and environmental damage in resource-dependent countries.[83] Finally, humanitarians will rightly see the proposal as bettering the opportunities of some of the most impoverished and oppressed people in the world. The policy is not only incentive-compatible for many powerful interests, it should also be broadly appealing across the political spectrum from right to left.

15. Question: Economic Sanctions have an Uneven Record of Success

The idea of isolating repressive regimes by stopping trade with them may raise concerns that the approach proposed too closely resembles traditional economic sanctions, which have an uneven record of success. It may be asked whether this sort of strategy isn't just what the West tried with Iraq under Saddam Hussein, and whether we really want to run the whole world like the United Nation's Iraqi sanctions regime, with or without its dubious Oil-For-Food program.

The current proposal differs from traditional sanctions in several ways. First, it has a different justification and institutionalization than did sanctions like the UN restrictions imposed on Iraq. The justification here is not to contain a potential enemy, but rather to prevent the looting of the property of a whole people (although achieving the latter goal may also further the former). Moreover, unlike the UN sanctions, the Clean Hands Trusts would not be centrally administered, but would be maintained separately by the participating national governments.

Second, the biggest difference between the current proposal and previous international sanctions is that the current proposal creates a better alignment of incentives and so is more likely to work. The problem with previous sanctions is that the sanctions have not been universally observed. Oppressive regimes have sold their countries' resources to their traditional patrons and to other repressive regimes, thereby escaping much of the pressure that the sanctions attempted to apply. By contrast, the Clean Trade approach here gives all potential buyers incentives not to trade with an oppressive

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[82] White House, *The National Security Strategy Of The United States Of America* (September, 2002), p. 1, "America is now threatened less by conquering states than we are by failing ones." See Stephen Krasner and Carlos Pascual, "Addressing State Failure," *Foreign Affairs* July/Aug. 2005. Collier also notes that 95% of the global production of hard drugs comes from conflict countries; Paul Collier, *The Bottom Billion* (Oxford: Oxford University Press, 2007), p. 31.

[83] See section **A1** below.

regime. Those who do trade (e.g., China with Sudan) will face exactly proportionate trade penalties. Unlike traditional sanctions, trade penalties here *track* the looted natural resources, so no one receiving these resources will remain unpenalized.

The current proposal will make life much more difficult for dictators. A dictator who has difficulties selling off his country's resources will have a much harder time maintaining himself in power, especially if it is widely known inside and outside of the country that an alternative, minimally-decent government would be able to sell these resources freely. Moreover the fact that potential dictators know that they will have a harder time keeping power should they get it will itself reduce the incentives for potential dictators to attempt to take power in resource-rich countries in the first place. Further sanction measures, such as denial of shipping insurance to companies transporting stolen oil, can ratchet these pressures even tighter.

16. Question: The Policies will Hurt the Poor in Resource-Rich Countries

"Even when trade sanctions bite, they can hurt not only the sanctioned regime, but also the people subject to the regime."[84] The trust-and-tariff policy may appear to be better than traditional sanctions at preventing money from flowing into countries where the minimal conditions for resource sales do not obtain. However, some may see this as a disadvantage. One thing that the citizens of such countries need, it might be said, is money coming into the country—yet the current proposal seals off the country from external funds. The approach may appear to double the trouble for these countries' citizens—they will not only be tyrannized, they will be more destitute as well.

Since the approach here is based on enforcement of property rights, it might appear that the response to this objection should be to concede it and to say that unfortunately life in a global market can be tough. The rules of ownership simply do not allow illegitimate transfers of property, come what may. Respecting property rights is not magic: it cannot in itself bring about all good things. Anyone concerned about the poverty of people in a country with a disqualified regime must find some other legitimate way to help them (through aid channeled by NGOs, for example.).

However we can be more positive than this hard-line response allows. For the objection has lost track of the context of the discussion: the resource curse. Citizens do not tend to benefit from resource revenues when the local regime is bad enough off to be disqualified by the criteria above, resource revenues are the curse of the common people. In resource-cursed countries these revenues strengthen authoritarian rulers, incentivize coups, and heighten the dangers of civil war. Further, this money does not tend to improve citizens' standard of living. When the resource curse strikes, the money that flows into the country from resource transfers does not benefit ordinary people but rather makes their situation more desperate.

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[84] Jayachandran and Kremer, "Odious Debt," p. 82.

This is apparent in the cases we have seen. Life was bad enough for people in Equatorial Guinea in the 1980s when they were poor and oppressed by a megalomaniacal despot. Now that Obiang can sell off their oil, the people are poor and oppressed by a megalomaniacal despot who has hundreds of millions more dollars to cement his personal hold on power. Sudan is similar. The most impoverished Sudanese used to have a hard enough time resisting the Khartoum regime's military offensives. After oil money began to flow into the country, these poorest Sudanese became much worse off, as the regime began to use its new millions to pay for more soldiers and the latest weaponry to kill them and chase them off their traditional lands.

The Clean Trade framework will stop this harmful foreign money from coming into the country. It will deprive authoritarian rulers and civil warriors of funds that they would use to inflict further misery on the country's people. Moreover the Clean Hands Trusts will give citizens extra incentives to replace their tyrants and warlords with minimally decent, unified governments. Implementing the approach will also discourage future dictators, coup-plotters, and civil warriors from attempting to gain power by stealing resources. Even if in the short run some poor people may lose out when they no can no longer catch, as it were, the scraps that fall from a dictator's table, in the long run the great majority of poor people will be better off when their entitlements to their resources are enforced. That is perhaps the most we can ask of any realistic proposal.

There is one last point in favor of the Clean Trade approach. If the only way for ExxonMobil or China legally to get oil out of Equatorial Guinea is for there to be minimally decent governance in Equatorial Guinea, then there will be minimally decent governance in Equatorial Guinea, at least if there is any way at all for outsiders to help achieve this. Clean Trade reverses the incentives of resource corporations and governments like China's so that these powerful actors will be strongly motivated to secure the basic rights of citizens in poor countries, instead of being strongly motivated to remain complicit in the violation of those rights.

17. Question: The Policies will Hurt the Poor in Trade Partner Countries

An objection to the Clean Trade import policies might be generated by concern not for the poor of exporting countries like Sudan, but for the poor of importing countries like China. China's economic growth over the past 30 years has lifted enormous (indeed unparalleled) numbers of people out of severe poverty, and it might be feared that cutting off access to oil from countries like Sudan will reduce China's growth and so prevent some increments of future poverty alleviation.

These effects on China's growth are possible, but once the principle of national ownership is accepted the objection is drained of its force. It may always be possible to increase the welfare of some group (or even to increase welfare overall) by stealing resources and redistributing them. However if resources are to be stolen for the sake of alleviating severe poverty in China, the impoverished Sudanese people are unlikely to be the most acceptable targets of this theft. Many other groups globally have larger surpluses

of resources which could be stolen for the sake of alleviating poverty in China. And in fact the principle of ownership makes the point moot: no group's property should be stolen for the sake of increased growth. Entitlements over resources, like entitlements over labor, are the moral basis of the market order, and securing these entitlements is a matter of principle.

18. Question: The Happy Subjects

An international resource corporation hoping to defend a large contract with a regime in a country disqualified by the Freedom House standards might make the following claim. The people of the country are happy for their rulers to benefit from the sale of natural resources. Outsiders might see this as unfair or corrupt, but in fact the citizens are willing to accept a certain amount of aggrandizement of their leaders. This is part of "the deal"—the President gets a lot, the people get little, but the people enjoy hearing of the prestige and the grand lifestyle of their leader.

Within any given country, these claims might conceivably be true. It could conceivably be true that most citizens in a country are happy to have their resources sold out from under them, and happy for the money from these sales to be used in ways likely to make them worse off. However even happy subjects cannot authorize resources sales absent the conditions necessary for valid consent. Moreover, given the indications of oppression, corruption and chaos within the country, corporations will not be able to offer any evidence in court that the citizens indeed want these resources to be sold. When conditions in a country are bad enough to rate a Freedom House '7', whatever facts could be offered to attempt to show that citizens are happily supporting the state will in fact bolster the thesis that they are too frightened or dominated to do otherwise (consider again North Korea, or Burma). Here it is the corporations that will lack bright-line criteria based on authoritative standards to support their claims of "happy subjects."

19. Question: The Incompetent People

Just because peoples can act does not mean that peoples are always capable of acting. A regime in a resource-rich country might try to pry itself loose from the strictures of the framework above by declaring its people incompetent.

A regime might argue as follows. "We in the regime cannot be expected to gain the people's consent for resource sales, because the citizens here are not competent to consent. The citizens of this country are too simple-minded (or too divided by ethnic antagonisms, or too exhausted by the demands of daily survival) to come to a collective decision about the territory's resources. Since the citizens are not capable of deciding, we cannot possibly act according to the people's *wishes*. We can, however, sell the people's property in a way that furthers the people's *interests*." Just as a trustee manages a child's estate in its interests until it reaches the age of competence, so (the regime claims) it will

manage the people's resources until (and in order to bring it about that) the citizens are competent to make their own choices.[85]

Within private law the form of this argument is perfectly respectable. The regime is setting itself up to be the selling agent for an incompetent principal. The law commonly recognizes such relationships in cases of owners who are underage, comatose, or absent. The law also recognizes that the categories of agency relationships are never closed, and that necessity can be adequate grounds to establish that a principal-agent relation exists. Moreover these legal rules seem sensible. We intuitively want to leave open the possibility that in certain circumstances some political authority could be set up within a desperate or a fractured country to manage the country's resources for the people's good.

However, both legally and intuitively, any regime that wishes to become the selling agent of an incompetent people must maintain very high standards of publicity and probity. First, such a regime must publicly declare that it regards the people of the country to be incompetent to make decisions concerning the country's resources, and declare that in this respect at least it intends to govern without the people's consent. For these public declarations to ground a credible claim of agency, it must also be plausible that the regime is not itself responsible for the people's incompetence—that the regime is not itself keeping the population uneducated or divided or impoverished. Outsiders who have reason to suspect that the regime is perpetuating the poor conditions in the country cannot in good faith deal with the regime on the declared basis that the regime is acting in the people's interests.

Assuming that a regime could make a plausible declaration that the citizens of the country are not competent to make collective decisions, it would afterwards be obligated to demonstrate absolute probity in its conduct. A regime that sets itself up as the guardian of an incompetent people is jumping out of the frying pan of property law into the fire of the law of agency. The law of agency is clear and uncompromising. Agents of incompetent principals are bound by the strongest and strictest duties in all of equity, and these duties leave no room for the diversion of revenues that is typical of regimes in resource-rich countries.

Agency law states that any agent must fulfill rigorous fiduciary duties. An agent's primary fiduciary duty is to manage the principal's affairs for the principal's benefit, *not* for any benefit to the agent.[86] The main rule is that an agent must not profit from their fiduciary position. This rule includes all profits from transactions made in the principal's name, and also profits that come about because of opportunities indirectly afforded by the

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[85] In philosophical terms, the regime here moves from an assertion of having the people's tacit consent to an assertion of having the people's hypothetical consent.

[86] See American Law Institute, *Restatement (Second) of Agency* (1958), §39: 130. For an agency law approach to the borrowing of corrupt regimes analogous to the approach here see Buchheit, Gulati and Thompson, "Dilemma of Odious Debts," pp. 1238-46.

agent's position. All of these profits must be held in trust for the principal.[87] The same is true of any bribes or secret commissions, which must also be held in trust. An agent is in fact bound by a duty not to be in any situation where their personal interests and fiduciary duties conflict. The agent's liabilities here are strict. The agent may not offer the defense either that they did not intend to breach their duties, or that their dealings somehow left the principal better off.

A president who is receiving hundreds of millions of dollars from oil sales while most of his people live on a dollar a day cannot be the legitimate agent of an incompetent principal. In order to fulfill the fiduciary duties of agency, this president would have to come up to the standards of propriety common in developed countries, in which it would be outrageous for any official to profit personally from the sale of the country's resources. Any regime is welcome to declare itself the agent of an incompetent people if it plausibly can. Yet no regime that is diverting money from resource sales can be such an agent, and no corporation which should have reasonable suspicions about such a regime can sign contracts with it in good faith.[88]

20. Conclusion

The old Westphalian settlement among the great powers legitimized two rules in international law that now look morally corrupt. First, under this settlement a regime could gain the right to rule people and territory through sheer coercive force. Second, within the Westphalian system state officials could legally abuse their own citizens for almost any reason under the cover of "internal affairs." A double revolution in international law in the twentieth century swept away both of these anomalies. The first revolution was the universal acceptance of a doctrine of self-determination. This doctrine says that it is the citizens of a country, not any regime, that has final authority over the law for the people and the land. The second revolution was the establishment of human rights. The doctrine of human rights insists that governments must secure the most fundamental entitlements of all persons to control their own lives.

The right of each people to its natural resources stands at the junction of these two revolutionary doctrines. No regime, within a country or outside it, can now gain the right to control a country's resources through force. The *might makes right* rule that grants the resource right to any sufficiently violent regime is one of the last remnants of the Westphalian rules in international practice. This is a major flaw in the international legal system. A people's right to its resources, like its right to its territory, should not vest in whoever can sufficiently terrorize the population.

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[87] A competent principal may consent to an agent keeping any profits that the agent reports, but since the regime is alleging that the people is incompetent it cannot keep profits on this basis. The agent of an incompetent principal may at most receive a reasonable fee.

[88] See American Law Institute, *Restatement (Second) of Agency* (1958), §165: 389-92; *Restatement (Third) of Agency* (2006), §2.03d.

The right of all peoples to their resources is a human right proclaimed by the nations of the world. Yet the nations of the world do not enforce this right. As we have seen, for example, US corporations are now buying resources from regimes that the US government says cannot possibly have the right to sell them.

Pulling the *might makes right* provision into the light reveals both its inherent injustice and why so much injustice flows from it. As in neighborhoods where property rules are regularly breached by protection rackets and robbery, the failure to enforce property rights in poor countries creates misery for those whose rights are violated. This is the resource curse. At the other end of these transactions, consumers dirty their hands every day by purchasing goods that are not only stolen, but that have often been stolen from impoverished people using weapons paid for with money gained from previous sales of stolen goods.

Because of this major flaw in global markets, consumers currently cannot help sending money to tyrants and brutal rebels when they make their daily purchases. This article has suggested that this damaging flow of money can be stopped by enforcing property rules against the middlemen who channel consumer spending into resource-cursed countries: against the international resource corporations, and against the foreign governments that deal with the worst regimes. The citizens of affluent countries can abolish the disastrous *might makes right* rule by using their own institutions to enforce the basic principles of legal trade.

Peoples have rights, and there are things no person or group may do to them (without violating their rights).[89] Trafficking in a country's valuable natural resources without the people's consent certainly crosses that line. The priority in reforming global trade must be to enforce the rights that define the modern international order. The first step in improving the prospects of poor people is to enforce the rights they already have.

A1: Environmental Harm as a Resource Curse and Resource Threat [1st draft]

An intriguing question for research is whether environmental damage is a resource curse to be added to the list of other curses: authoritarian governance, civil conflict, and economic dysfunction. That is, are countries that are more dependent on extractable resources more prone to domestic environmental damage? A second intriguing question is whether resource dependence leads not to a domestic resource curse, but rather to a global *resource threat*. Are countries that are more dependent on extractable resources contributing more to climate change through the release of greenhouse gasses (GHGs)? Taking the possibility of domestic damage and climate change together, we might also ask the combined question of whether resource dependence correlates with *environmental harm*.

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[89] See Nozick, *Anarchy, State, and Utopia*, p. ix.

I don't have the numbers to show correlations for either an environmental resource curse or a resource threat. I do have numbers suggestive of a resource threat from one specific source, gas flaring and leakage. Moreover, the designers of Yale's Environmental Performance Index claim to have found correlations between indicators of particular environmental harms and indicators of the other resource curses. Here I will sketch out the rationale for a research program that would pursue these topics systematically: reasons to suspect the existence of an environmental resource curse and threat, and reasons to suspect that environmental harm in resource-dependent countries may intensify in the future.

High-value extractive resources such as oil, gas, gems and metals are composed of molecules that either are themselves, or are typically embedded in the earth near molecules that are, environmental hazards. Extracting these molecules from the ground often requires significant disruptions to the local ecosystem, and significant potential for both immediate and long-term release of the hazardous substances. Getting extractive infrastructure to the resource source engenders primary and secondary environmental risks, and such risks can be even greater during transportation of the resources away from source.

The first section below will survey the potential for environmental harm that accompanies natural resource extraction. The second section will discuss why this potential for harm can be expected to be greater in countries that suffer the other resource curses of authoritarianism, civil conflict and economic dysfunction—that is, why environmental harms may be sequelae of the other curses. The third section will speculate that the potential for environmental harms can be expected to increase from now on. These are very large topics, and these discussions are meant as preliminary not comprehensive.

Environmental Risks of Extraction

A. Extractive infrastructure

The extraction of resources such as oil, gas, and minerals in the volumes needed to make exploitation economically feasible typically requires the deployment of extensive hard infrastructure: roads, rail links, pipelines, ports, and so on. The insertion of infrastructure often generates significant environmental risks.

Preparation for extraction can cause environmental damage.[90] Rivers may be dredged to accommodate larger-hulled ships and to provide sand to be used in

[90] Even before preparation, exploration for resources can be potentially damaging. For example, seismic sensing for petroleum (sub-surface explosions and "thumper trucks") and exploratory drilling can disrupt fragile ecosystems. David Waskow and Carol Welch, "The Environmental, Social, and Human Rights Impacts of Oil Development," Revenue Watch & Open Society Institute, *Covering Oil* (2005), p. 103

construction. Dredging can mix toxic sediments into the surrounding water which degrade water potability and kill or poison marine life. Dredge waste left on river banks can be immediately destructive and can leach toxins back into the water over time.[91]

The construction of roads, railways, dams, access channels and pipelines can cause environmental shocks. At times the shock comes from the sheer surface area of the inserted infrastructure: roads and pipelines can appreciably reduce wetlands or areas available for grazing and farming, and can also block migration patterns. The infrastructure can also block or open water flows. A road that blocks water flows can cause flooding on one side and drying on the other, endangering forests and fisheries on both sides. Creation of a new access channel can release salt water into fresh water systems on which fish or humans depend.[92] Dams can ruin marine habitats on the wetter or the drier sides, and lower groundwater tables.

Road construction brings secondary environmental risks, especially when it penetrates heavily forested areas such as the Amazon basin. These roads are often the first means of access to these areas by motorized transportation, meaning they bring with them settlers and consequent deforestation and poaching. Roads that are heavy enough grade to bring extractive equipment in are also suitable for driving loaded timber trucks out, which has meant that the initiation of petroleum or mineral extraction in a region has also initiated large-scale logging. One study estimated that 1000-6000 acres are deforested for every kilometer of road constructed within a forested area.[93] Bolivia's Cuiaba gas pipeline built by Shell and Enron in the 1990's cut through the world's largest intact dry tropical forest, the home of approximately 90 species on the list of the Convention on International Trade in Endangered Species. Local communities complained that loggers, hunters, and cattle grazers soon followed.[94]

B. Extractive processes and their effects

Mineral mining in particular can have visually dramatic impacts on the earth. An open-pit diamond mine, such as the Argyle mine in north-west Australia, can become a mile wide and a mile deep. In Appalachia coal seams are revealed by blasting off 1000 feet of summit in "mountaintop removal mining." However not all of the environmental impacts of resource extraction leave dramatic marks.

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[91] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (2009), p. 29.

[92] Amnesty, p. 19.

[93] Amy Rosenfeld, Debra Gordon, Marianne Guerin-McManus, "Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics," in Ian Bowles and Glenn Prickett, eds., *Footprints in the Jungle* (Oxford, OUP: 2001), p. 57.

[94] www.amazonwatch.org/amazon/BO/cuiaba/index.php?page_number=4

Mining is an energy-intensive industry: in mining-intensive countries such as South Africa, Zimbabwe and Botswana mining uses more than 25% of total electricity.[95] In Australia the mining sector consumes more energy than the entire commercial sector, and more than air, rail, and water transport (portions of which are also mining-related) combined.[96] The generation of this energy contributes to GHG emissions. Mining is also typically quite water-intensive, especially during the processing of minerals on-site. Water exploitation can draw down groundwater tables, depleting wetlands, lakes and wells.[97]

The processes of removing the rock overburden to expose minerals, and of drilling to reach petroleum, brings new and often hazardous compounds into contact with the surface environment. Moreover toxic substances such as cyanide (used in mineral refining) and lubricants (used on drill bits) are typically deployed during extractive procedures. The contaminated by-products of extraction are often dumped into a "tailings pond," which can leak into surface or ground water and poison the wildlife that come to it. These toxic lakes can also burst their containment: in 2000 a dam rupture at a Romanian goldmine released up to 120 tons of cyanide into a nearby river, and a breach in eastern Kentucky sent 300 million gallons of coal sludge downhill deluging a village and killing all the fish in local waters. An even more widespread hazard of extraction is "acid mine drainage," caused by water runoff from waste rock and tailings piles that contains high concentrations of iron, copper, zinc, and sulphates.[98]

Oil extraction brings up large quantities of "produced water" (up to 90% of total fluids), which holds in suspension heavy metals such as lead, chromium and mercury as well as organic carcinogens and toxicants such as benzene and toluene.[99] The Ecuadorian litigants in the current lawsuit against Texaco allege that the firm disposed of 18 billion gallons of produced water during the 1970s and 80s by dumping it into rivers or unlined pits in the Oriente region, along with 16 million gallons of oil.[100] Oil platforms are also potential sources of pollution:[101]

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[95] Pak Sum Low, *Climate Change in Africa* (Cambridge: Cambridge University Press, 2005), p. 139.

[96] K. Donaldson, *Energy Statistics – Australian Energy 2004* (Canberra: Australian Bureau of Agricultural and Resource Economics, 2005), p. 43.

[97] Montana State University Bozeman, "Ecosystem Restoration," ecorestoration.montana.edu/mineland/guide/problem/impacts/water.htm

[98] Ibid.

[99] Waskow and Welch, p. 103.

[100] Peter Maass, *Crude World* (New York: Knopf, 2009), p. 84.

[101] Waskow and Welch, p. 107.

> An oil platform uses nearly 400,000 gallons of sea water daily as drilling fluids in the extraction process, and, following its use, this oil-tainted water is discharged back into the ocean. One of the apparent impacts of offshore discharges has been mercury pollution; eating contaminated fish is increasingly regarded as a substantial cause of human exposure to mercury. A study found that mercury levels in the mud and sediments beneath oil platforms in the Gulf of Mexico were 12 times higher than acceptable levels under US Environmental Protection Agency standards.

Mining and drilling can release large quantities of dust and gas into the atmosphere. Mining particulates can include heavy metals such as lead and arsenic, which can degrade both air and water quality. Even non-toxic dust can create water turbidity, which can damage the aquatic food chain. Gas release into the atmosphere will be discussed below. Offshore oil drilling can shift petroleum into the seas through well blowouts and leakage. Rigs near sensitive marine areas can damage reproductive cycles of fish, shellfish, and trees.

C. Transportation from source

Major tanker spills are the most publicized but not the largest oil pollution incidents. The *Exxon Valdez* spill in Prince William Sound, for instance, was more than an order of magnitude smaller than the largest non-tanker spills into the Persian Gulf (deliberate release) and into the Gulf of Mexico (well blowout).[102]

Moreover in many areas large spill events are less damaging than the ongoing aggregation of smaller spills, releases and leakages. The 70,000 square kilometer Niger Delta is home to over 30 million people and is said to be one of the most important wetland and marine ecosystems in the world.[103] A recent survey has estimated that up to 13 million barrels of oil have entered the delta since exploitation began in the 1960s, which is the equivalent of one *Exxon Valdez* spill in each year for the past 50 years.[104]

Oil and gas pipelines—whether underground, underwater, or (typically in poor countries) exposed—are subject to corrosion and so breaks. In areas of conflict and discontent (such as the Niger Delta) sabotage of pipelines can cause significant pollution, as can illegal tapping into pipelines to steal the oil or gas. Some Nigerians are said to be breaching pipelines so as to be able to file claims for cleanup or compensation.[105] The Trans-Ecuadorian Oil Pipeline System was built alongside a main highway, meaning that

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[102] www.articlesbase.com/environment-articles/10-major-oil-spills-in-history-1142674.html.

[103] See, e.g., www.worldwildlife.org/wildworld/profiles/terrestrial/at/at1401_full.html.

[104] Nigerian Federal Ministry of Environment et. al., *Niger Delta Natural Resource Damage Assessment and Restoration Project: Phase 1 – Scoping Report* (2006), p. 1. The figure includes oil from processed water and gas flares, as well as oil discharges from tanker washing and used oil dumping.

[105] Amnesty, p. 15.

even traffic accidents can cause significant spills.[106] In all countries transportation by road tankers can also create spills. Transportation of petroleum or minerals by motorized vehicles also contributes to GHG emissions.

Oil spillage can destroy fisheries and breeding grounds for shellfish like oysters, Along with the damage that oil can do to fishing equipment like nets, spills can thus significantly reduce protein supplies for nearby communities. Oil can pollute water sources used for washing and drinking, and also ruin crops and degrade soil quality (with oil fires not infrequently spreading crop and soil damage). Oil is also directly hazardous to humans and non-human animals, its drops and vapors causing rashes, lesions, nausea, dizziness, headaches, and exhaustion.[107]

Environmental Risks and the Non-Environmental Curses

With proper safeguards all of the above environmental risks can be reduced or eliminated, or the damage reversed. There is no necessity for resource extraction to lead to environmental harm. In the United States, for example, 50% fewer stream miles are adversely affected by acid mine drainage than 30 years ago, mostly because of stricter standards on mines being imposed by the federal government.[108] Over the same period the Trans-Alaska pipeline has operated with no reported corrosion-related spills.[109] The key factor is the quality of regulatory systems in the largest sense: systems for planning, standard-setting, monitoring, policing and legal enforcement, transparency and emergency response. In sum, the avoidance of environmental risks from extraction turns on specific dimensions of governance.

There are reasons to suspect that a country's dependence on extractive industries reduces the effectiveness of its governance along the dimensions important to control environmental risk. The political and economic "curses" of resource dependence may weaken the institutions needed to reduce environmental risks, and may create extra threats to those institutions as well. This section explores these possibilities.

Extractive infrastructure such as oil platforms, gas liquefaction plants, and mining equipment often represents a large and inflexible inward investment. The company making such an investment, whether privately or nationally owned, will have a stronger-than-usual incentive to influence or capture the agencies that oversee and protect their investments. This has been seen even in the United States in the past decade, as in the nearly half-billion dollar settlement forced onto several oil majors by the Justice

[106] Maass, pp. 82-3.

[107] Amnesty, pp. 29, 35.

[108] Montana State.

[109] Amnesty, pp. 59-60.

Department for underpayment of royalties meant to be collected by the Department of the Interior; and in the recent scandals in that Department's Mineral Management Service that oversaw royalty-in-kind payments from oil companies and contracts for drilling on federal property.[110]

In less developed countries regulatory authorities may be even less able or inclined to exercise oversight over extractive corporations bringing large investments into the country. In the most extreme cases oversight may be minimal or absent. Nigeria is such a case. A 2006 UNDP Human Development report on Nigeria stated, "The oil companies, particularly Shell Petroleum, have operated for over 30 years without appreciable control or environmental regulation to guide their activities."[111] A recent Amnesty International report on Shell's history in Nigeria since commercial production began in 1958 found that the relevant Nigerian ministries:[112]

- Rarely pressured Shell to replace corroded pipelines, which are responsible for 50% of spills;
- Had almost no role in enforcing regulations meant to prevent spills and certify spill remediation;
- Exercised little oversight over Shell's claims that certain spills were caused not by bad infrastructure or operation, but by sabotage (for which the company is not liable);
- Were at times barred by statute from enforcing oil company compliance with regulations regarding permits, licensing, and hazardous waste handling, or from conducting environmental audits.
- Had few mechanisms in place to monitor drinking water quality or food safety around extraction zones, and often lacked basic equipment (vehicles, laboratories) for performing monitoring activities;
- Lacked adequate consultation procedures with communities potentially affected by petroleum extraction, and lacked independent procedures to investigate grievances.

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[110] See Project on Government Oversight, "Fact Sheet: Federal Oil Litigation," (2002) www.pogo.org/pogo-files/alerts/natural-resources/nr-ogrl-20020102.html; CBS News, "Sex For Oil Scandal At Interior Department," Sept. 10, 2008 www.cbsnews.com/stories/2008/09/10/national/main4436263.shtml. As one Florida senator colorfully remarked of the latter scandal, "The government employees who oversee off-shore oil drilling are literally and figuratively in bed with big oil."

[111] UNDP, *Niger Delta Human Development Report* (2006), p. 81.

[112] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (2009).

In some cases the relevant Nigerian ministries have been partners in and financial beneficiaries of the oil company's extractive activities. In other cases they have been left under-resourced to perform their oversight functions.[113]

Consider now countries in which the resource curses of authoritarianism, civil conflict and economic dysfunction are most severe. These are countries in which environmental harm seems most likely to occur as a follow-on curse or threat. Karl's classic description of the rentier state shows a government depending primarily on resource revenues for budget support, instead of facing the institutional discipline of taxing the populace which would require becoming more responsive to popular demands.[114]

> Rentier states, a category that includes petro-states and extends beyond them, suffer from diminished state capacity. When states do not have to depend on domestic taxation to finance development, governments are not forced to formulate their goals and objectives under the scrutiny of citizens who pay the bills. At the same time they are permitted to distribute funds to regions and sectors on an ad hoc basis. Excessive centralization, remoteness from local conditions, and lack of accountability stem from this financial independence.

Subsequent work by Karl and others explains a progressive "hollowing-out" of a resource-dependent state, as an initial phase of national infrastructural investment deteriorates into a period where the state survives through a combination of patronage and repression, finally lapsing into a predatory phase where the regime races to seize revenue through maximal resource exploitation within an increasingly unstable environment of rent-seeking on all social levels.[115]

In such situations the risks of increased domestic environmental damage and GHG emissions appear especially high. Resource-funded authoritarians have little incentive to be responsive to the complaints of those citizens aversely affected by pollution and ecosystem disruption. And petrocrats are also notoriously resistant to pressure from the international community to improve their environmental or human rights policies. In resource-cursed countries inequality and repression characteristically fuel a sense of popular grievance, making theft from and sabotage of resource infrastructure (such as pipelines) more likely. Civil conflict, if it breaks out, can bring the extractive infrastructure into the line of fire.

Anecdotal evidence of environmental harms as sequelae to the other resource curses is ready to hand. Obiang of Equatorial Guinea reportedly approved a deal with a

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[113] The Amnesty report covers conditions in Nigeria up to early 2009. The implications of the pending Petroleum Industry Bill for environmental regulation in Nigeria remain uncertain.

[114] Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro States* (Cambridge: CUP, 1997), p. 190.

[115] Karl, "Oil-Led Development"; Mary Kaldor, Terry Lynn Karl, Yahia Said, "Introduction" to *Oil Wars: Organized Violence in a Global Era* (London: Pluto, 2007), pp. 1-39.

British firm to store 10 million drums of toxic waste on an inhabited island where porous rock would have threatened the rich fisheries of the surrounding Gulf of Guinea.[116] The oil infrastructure of Nigeria has been targeted by militants since the Biafran war in the late 1960's; today more oil spillage is caused by vandalism and sabotage than by oil production operations.[117] Saddam Hussein ordered the creation of the history's largest oil spill of at least 8 million barrels during the first Gulf War (apparently in an effort to deter landing by the US Marines from the Gulf), as well as the ignition of 700 wells in Kuwait that burned a massive amount of oil, perhaps 150 million barrels. (For comparison, total world consumption is around 85 million barrels per day.) Soot from the Kuwaiti well fires was found in precipitation from the Himalayas to Turkey.[118]

Systematic evidence of such phenomena is less readily available. Here I present two pieces of evidence to support a link between poor governance along dimensions characteristic of the resource curses and increased risk of environmental harm. The first comes from the Yale-Columbia Environmental Performance Index (EPI), which ranks countries in terms of their environmental performance based on data in categories such as "Water Quality," "Effective Conservation," "Pesticide Regulation," and "Emissions per Capita."[119]

The authors of the EPI compared their country ratings to a subset of ratings from the World Bank's Worldwide Governance Indicators (WGI).[120] For the WGI's indicators of "Corruption," "Government Effectiveness," and "Voice and Accountability" they found the following:

> Environmental performance appears to be correlated with corruption. Countries with high levels of corruption tend to have low levels of environmental performance, whereas countries with low levels of corruption perform better on the EPI. This relationship is true particularly for the marine protected areas and greenhouse gas emissions per GDP indicators. Countries with low levels of corruption also correlated with lower performance on the greenhouse gas emissions per capita and water quality indicators.
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> A slight positive relationship exists between government effectiveness and EPI performance. Particularly, government effectiveness positively correlates with performance on the greenhouse gas emissions per capita, health ozone, growing stock, and

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[116] New York Times, "Waste Dumpers Turning to West Africa," July 17, 1988. www.nytimes. com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all

[117] UNDP, p. *.

[118] US Library of Congress, "The Environment and the 1991 Persian Gulf War," countrystudies.us/saudi-arabia/17.htm; Energy Information Administration, "Petroleum Basic Statistics," www.eia. doe.gov/ basics/quickoil.html.

[119] epi.yale.edu

[120] Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, "Governance Matters VI: Governance Indicators for 1996 – 2006" World Bank Policy Research Working Paper No. 4280 (2007). papers.ssrn.com/sol3/papers.cfm?abstract_id=999979

water quality indicators. Government effectiveness shows a slight negative correlation with performance on the sulfur dioxide indicator.

There appears to be a positive correlation between environmental performance and the level of Voice and Accountability. This trend is equally strong for both Environmental Health and Ecosystem Vitality suggesting that increased public awareness and public involvement in government have positive effects on all national environmental objectives.

These results cannot be taken as firm, as neither of the compared indices is authoritative (and the EPI in particular is quite new). However, the results may add some weight to the *a priori* suspicions of an environmental resource curse and threat.

A second and more focused piece of evidence comes from examining a single source of both environmental damage and GHG emissions: gas release during petroleum extraction. Oil typically comes to the surface with associated natural gas. In countries like the United States all but a very small percentage of this associated gas is captured and either reinserted into the earth, turned into methanol or used to power local generators. However, in other countries the gas is regularly either "flared" (set alight) or vented directly into the atmosphere.

Flaring causes light and noise pollution, as well as higher temperatures, in nearby communities. Oil droplets and dust fall over affected areas, and there have been persistent complaints that the particulates causes acid rain that eats through the metal roofs common in shanty towns. Flaring releases toxins like benzene, toluene, mercury, arsenic and chromium (the 'Erin Brokovich' metal), and has been linked to cancers, immune system retardation and reproductive disorders such as spontaneous abortion.[121]

Worldwide flaring burns at least 150 billion cubic meters of gas per year, equivalent to 25% of US gas consumption. This flaring contributes 400 million tons to annual CO_2 emissions.[122] As for venting, the US Environmental Protection Agency has estimated that methane emissions from oil extraction amounts to 100 bcm per year, which is the equivalent (methane is a potent greenhouse gas) of 1 billion tons of carbon dioxide. Together flaring and venting add emissions equal to twice that of the reduction mechanisms currently submitted within the Kyoto scheme.[123]

Nigeria banned gas flaring without ministerial approval in 1984, and has since announced several deadlines for flaring to stop. Flaring continues, and in fact the last

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[121] Maass, pp. 67-8.

[122] World Bank, Global Gas Flaring Reduction Partnership web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTGGFR/0,,menuPK:578075~pagePK:64168427~piPK:64168435~theSitePK:578069,00.html.

[123] www.flaringreductionforum.org/downloads/20081204-900-1015/Varma.pdf

government report suggested that Nigeria flares enough gas annually to provide power for half of Africa.[124]

Indeed an inspection of the World Bank's most recent list of the top 10 flaring countries makes one suspect that there may be a connection between flaring and poor governance:[125]

1. Russia:	28.7% of global emissions in 2008.
2. Nigeria:	10.6%
3. Iran:	7.4%
4. Iraq:	5.0%
5. Algeria	3.9%
6. Kazakhstan	3.7%
7. Libya	2.6%
8. Saudi Arabia	2.6%
9. Angola	2.2%
10. Qatar	2.1%

Measured on the seven-point Freedom House scales, the weighted mean score of these top 10 countries is 5.55, solidly within the range of "Not Free."[126] For comparison, countries that score a combined 5.5 for political rights and civil liberties include Afghanistan, Angola, Republic of Congo, Ivory Coast, and Kazakhstan. Poor governance along dimensions characteristic of the resource curses and gas flaring appear to be correlated.

The Growing Potential for Environmental Harm

If environmental harm is a follow-on to the resource curses of authoritarianism, civil conflict, and economic dysfunction then we can expect this harm to increase. Here is one way to see this. Paul Collier estimates that OECD nations have an average of $120,000 of known resource wealth under a square kilometer of soil (even after

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[124] TVE, "Billion Dollar Bonfire," www.tve.org/earthreport/archive/doc.cfm?aid=1842.

[125] go.worldbank.org/VVG983O970

[126] Freedom House, *Freedom in the World*, Table of Independent Countries (2009).

exploitation of those resources since the Industrial Revolution).[127] By contrast, African nations have an average of $23,000 of known resource wealth: approximately $100,000 less per square kilometer. Yet there is no reason to believe that the sub-soil resource density in Africa is in fact less than in the OECD (indeed, one might expect that density is greater). What is less is our information about where those resources are. As Africa's true hydrocarbon and mineral wealth is discovered, the resource curses—and their hypothesized correlated environmental risks—can be expected to intensify.

What I would like to suggest more specifically is that the world's growing demand for natural resources, combined with technological innovation, will push resource extraction into regions that are more remote from population centers. This push will increase the risks of environmental damage and GHG emissions, both because of the nature of these remote areas and because governance over these areas will tend to be of lower quality.

The economics of the extractive industries register repulsive forces from competing uses for surface area. (If there is oil beneath London, it may never be found.) In less densely populated regions, such as rainforests, deserts, and steppes, there is less competition for land and the market will tend to assign lower values to a resource base that is less well understood. The same forces push petroleum exploration further from the coast, which residents and navigators prefer to remain uncluttered.

Technological advances can also enable the exploitation of resources in more remote locations. For example, the huge Hibernia rig in the frigid waters off Newfoundland holds 55 million gallons of crude oil, and can withstand the impact of an iceberg. The new Sevan Driller, now floating off the coast of Brazil, can stretch its equipment through 12,000 feet of ocean, and still drill a well 40,000 feet down.

The extension of resource extraction to more remote regions raises environmental risks for several reasons.

First, government monitoring of facilities and enforcement of environmental regulations will be more costly in remote areas. There is for example almost no independent environmental oversight of Nigeria's offshore oil rigs, which would require a significant commitment of boats and helicopters.[128]

Second, the more remote a region is the less political pressure to improve environmental oversight can be anticipated. Communities in remote regions such as the Brazilian Amazon tend to be poorer and so less able to project their interests through protests and legal action.[129] The largest collection of gas flares in the world is in western

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[127] Paul Collier, *.

[128] Amnesty, p. 29.

[129] Brad Barham, Stephen G. Bunker, Denis O'Hearn, *States, Firms, and Raw Materials: The World Economy and Ecology of Aluminum* (Madison: University of Wisconsin, 1994), pp. 5-6.

Siberia, a region of minimal population and political clout. There are few people in western Siberia to complain of direct harm from these flares, and so there will be less incentive for the Russian government to stop the flaring.

Third, the remoteness of a region may itself be a function of environmental fragility, as such regions may in the past have been found not to be suited for larger settlement. The arrival of resource-related labor, and also possibly migrants, may bring especially destructive forces to bear on these environments, particularly since these groups may be unfamiliar with the features that make the environments fragile.[130]

These remoteness effects can be expected to be the most pronounced in countries with poor governance. However, no country will be immune to resource-curse related environmental risks. In 2003 the US Energy Information Administration increased its estimate of Canada's proven reserves from 5 billion to 180 billion barrels to accommodate the newly-feasible extraction of oil from the sands of northeastern Alberta, making Canada second only to Saudi Arabia in proven reserves. Extraction of oil from the sands is more damaging to the surrounding land than conventional drilling, and "well-to-wheels" emissions of CO_2 are estimated to be 5-15% greater than for conventional crude.[131] Canada's exploitation of its oil sands explains its failure to come close to meeting its Kyoto commitments, and the government has been negotiating to keep oil sands emissions from falling under new regulatory frameworks.[132] Whether even Canada will be able to manage the environmental risks emerging from resource exploitation in its remote regions remains to be seen. The risks in the other major oil sands country, Venezuela, will be greater still.

If environmental damage and greenhouse gas emissions are sequelae to the three known resources curses, then measures that are effective in combating the latter may help to reduce the former as well. Thus the Clean Trade initiatives may thus be "clean" in a second, environmental sense as well.

A2: Defining the People and Their Rights

Article 1 of the human rights covenants states that, "All peoples may, for their own ends, freely dispose of their natural wealth and resources." Who are "the people," and what precisely are their rights over the resources of their territory?

The question of the identity of a people in international law used to be more difficult than it is today. Historically the language of the self-determination of peoples

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[130] Ibid.

[131] IHS CERA, *Growth in the Canadian Oil Sands* (2009), p. ES4.

[132] Laura Palombi, "Canada's Kyoto Woes," (2009) snrecmitigation.wordpress.com/2009/03/11/canada's-kyoto-woes/.

was most important in the struggle of colonized populations for self-rule. Anti-colonial movements used the word "peoples" to describe the groups for whose freedom they were fighting, because as colonial subjects the members of these groups had no independent political status (the individuals in Kenya, for instance, were under British rule). So in the international documents the word "people" means "the entire population of a territory."[133]

At independence colonial subjects were transformed into citizens, which means that now "the people" is easily identified as all of the citizens of the independent country. The people (now the citizens) are, under the principle of self-determination, the holders of ultimate political authority over the territory. So today when it is said that the Kenyan people "may freely dispose of their natural wealth and resources," this means that the citizens of the Kenya hold this ultimate right of free disposition.

The recognition of ultimate political authority within peoples was a remarkable historical event. When the twentieth century began most of the earth's surface was ruled under color of title by the few great powers. The empires covered one quarter of the Americas, more than half of Asia, ninety percent of Africa, and nearly all of the South Pacific.[134] The British state, for example, was regarded as having rightful political control over a land area 10 times the size of the United Kingdom, and over a population 100 times larger than the British population. By the end of the century all of the colonies of all of the old empires had gained their independence. Membership in the United Nations, which at 51 in 1945 already included some newly-independent nations, had by century's end grown to 192. The triumph of the principle of self-determination marked a transition of enormous significance, and one sometimes under-appreciated in the United States (which largely escaped its entanglement with imperial rule in the 18th century). Decolonization and the entrenchment of the right of independent peoples to rule themselves has been perhaps the greatest success of the UN charter system that supplanted the Westphalian legitimation of imperialism.

Although word "sovereignty" is notoriously protean and usually best avoided, it is not wrong to describe this historical change as the displacement of Westphalian sovereignty by popular sovereignty. In this transition *might makes right* was replaced by *the people rule* (although, as we have seen in the case of control over resources, not entirely so). Section **A6** below lists some milestones in the history of this transition.

Sometimes it is wrongly thought that references to "the people" in international documents has major legal implications for the standing of minority groups within countries (for example, the Cofán within Ecuador or the Uyghurs in China). Although international law has recently given some recognition to minority groups, the status of these groups within the law has always been secondary and derivative. This is for understandable reasons. States do not wish to sign treaties that threaten the existence of

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[133] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP, 1995), p. 59.

[134] Norrie MacQueen, *Colonialism* (Harlow: Pearson, 2007), p. 25.

states. There has been a persistent apprehension among leaders that recognizing strong rights of political authority in minority groups would be encourage interminable civil conflicts and even secession. So for example international law affirms (as does the Iraqi constitution) that it is the *Iraqi people as a whole* who own all of Iraq's oil. The Kurdish and Sunni and Shi'ite "peoples" within Iraq have no internationally-recognized claims to the oil within what they might regard as "their" provinces, and any decisions about distribution of resource revenues to the provinces must be agreed at the national level.[135] Any other status for minority groups, it has been thought, would be a recipe for chaos.

Therefore while a majority in the General Assembly does sometimes support rights for some minority "peoples" (such as the recent "Declaration on Rights of Indigenous Peoples"[136]) there are no binding legal instruments. At present minority groups are at best shielded against the exercise of power by national authorities, but they do not have international legal personality. Minority groups (analogously to individuals with their human rights) may be protected by the law, but the only ultimate source of law remains "the people"; that is, all of the citizens of the country.

A3: Philosophical Concerns about Peoples and their Resources

The main premise of the arguments above is that the natural resources of a country belong to the people of that country. This premise raises philosophical issues that could be discussed further, as it might be thought incompatible with some theory of individualism, either methodological or normative.

For example, can a collectivity like a people act? We commonly speak of peoples as collective actors—we say, for instance, for instance, that after Pearl Harbor the American people supported war against Japan, and after World War II the British people approved the construction of a welfare state, and that in 1989 the Polish people decisively rejected the ruling communist government. Such assertions can be true without there being entities beyond individual persons or intentions besides individual intentions. A people acts, we might say, when most of its members act as citizens with the same intention. (Individuals act "as citizens" when they vote, march in protest, go off to war, write letters to the newspaper on political topics, and so on.[137]) So we say that "the

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[135] As also seen in the United States, where it is Federal legislation that grants to individual states (e.g., Alaska, Florida) a share of the revenues from the resources extracted from them.

[136] General Assembly Resolution 61/295 (2007).

[137] This account of collective action is more permissive than those in the literature that require, for example that members act toward some goal to which they are jointly committed (see Margaret Gilbert, *A Theory of Political Obligation* (Oxford: Oxford University Press, 2006: 101-47)); or require that each member have beliefs about the beliefs of other members regarding everyone doing their part (see Raimo Tuomela, "Actions by Collectives," *Philosophical Perspectives* 3 (1989): 471-96). On the account sketched here, a people elects candidate C so long as each of a majority of citizens intentionally votes for C (for whatever reasons and with whatever beliefs about what others will do).

Australian people elected a president" after most Australians vote to elect a president, and that "the Finnish people resisted the Russian invasion" when most Finns engaged in acts of resistance. This type of account allows us to talk quite literally of collective agency while remaining as individualistic as we like in our ontology.[138]

As for normative individualists, some libertarians hold views on private ownership that might lead them to suspect any premise that ascribes property rights to a political entity like a people. Left-libertarians hold that each individual should initially own an equal share of the world's resources, and some right-libertarians hold that current property entitlements are determined by a historical process of acquisitions and transfers stretching back to a state of nature.[139]

Simply as a practical matter, all libertarians have good reason to support the Clean Trade approach here. For whoever it is that such theorists say should control natural resources, it will not be the dictators and civil warriors who currently seize these resources by force. Left-libertarians who hold that each individual *should* own an equal share of the world's resources cannot believe that all individuals currently *do* own an equal share. The Clean Trade approach will push the present highly unequal pattern of control over resources toward greater equality among individuals around the world, and so will make progress toward the left-libertarian ideal. Like Pogge's proposal for a Global Resource Dividend, which also accepts the principle of national ownership over resources, Clean Trade can be seen as a step in the right direction.[140]

Right-libertarians should also object strongly to the current system in which tyrants and civil warriors can gain legal title to these resources simply through the exercise of power. Property rights cannot be secured without institutions to protect owners from oppression, banditry, and chaos—which is what the Clean Trade agenda is designed to further.

Moreover, as above the thesis of national ownership is wholly compatible with the common idea that natural resources in a country are and should be privately held. As above, there is nothing in the thesis incompatible with the "grabbers-keepers" principle dominant in US law, which is that sub-soil oil belongs to whoever can first reduce the oil to physical possession. To note an older example of legal private acquisition, this time concerning land itself: national ownership is compatible with the federal law that set off the "land rush of 1889" by granting title in Oklahoma land (up to 160 acres) to whoever

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[138] See the analysis in Philip Pettit, "Rawls's Peoples," in R. Martin and D. Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006), pp. 38-56, and the literature cited there in footnote 13.

[139] For left-libertarianism, see the two volumes edited by Peter Vallentyne and Hillel Steiner, *The Origins of Left-Libertarianism* and *Left-Libertarianism and its Critics* (New York: Palgrave, 2004). The most detailed defense of "historical" right-libertarianism is in the work of Jan Narveson; see *The Libertarian Idea* (Peterborough, Ontario: Broadview, 2001).

[140] Pogge, *World Poverty and Human Rights* second ed. (London: Polity, 2008), pp. 202-20.

could first fence it in. Such rules establish legal procedures for transferring resources from national to private ownership, and any of these rules could become valid in a country by being passed into law by a minimally decent government. The operation of such laws could lead to many or even all natural resources coming to be privately held.

Even so, some backward-looking libertarians might question the idea of national ownership because they hold some theory of pre-political acquisition of property; for example, that current entitlements to resources are determined by a historical process of acquisitions and transfers stretching back to a state of nature. While we cannot engage original acquisition theory in detail,[141] it is unlikely that most contemporary supporters of strong private property rights would use such a backward-looking account to defend current entitlements to resources. Most partisans of the market support strong property rights because of the present and future importance of these rights (in advancing, for example, freedom or prosperity). Few support strong property rights because they want to defend specific entitlements that they know (would legitimately have) emerged from a pre-political property-less state.

Furthermore an insistence on pre-political acquisition of private rights would dislodge the assumptions we ordinarily make about contemporary politics, as an example will illustrate. A newspaper reports that after the fall of Mobutu's dictatorship in the Democratic Republic of Congo, "Troops from six neighboring countries poured across the borders to plunder minerals."[142] When reading this story we accept this assertion of "plunder" without thinking further about the rights over those minerals. Even if Ugandan troops invading the Congo had cut through dense brush to find never-discovered diamond deposits it would not occur to us to exempt their taking of those diamonds from the report of "plunder." We assume *a priori* that Ugandan soldiers taking minerals from even virgin Congolese territory are engaged in plunder.[143] Moreover here it is even clearer than usual that we presuppose that it would be the property of the Congolese people that the Ugandan soldiers were stealing, since there was no Congolese government in place after Mobutu's regime fell and the foreign troops invaded.

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[141] For arguments against pre-political acquisition theory, see Leif Wenar, "Original Acquisition of Private Property," *Mind* 107.428 (1998): 799-819.

[142] "After Congo Vote, Neglect and Scandal Still Reign," *New York Times* March 28, 2007.

[143] The International Court of Justice ruled by a vote of 16-1 (without examining claims of individual title) that Ugandan soldiers had been guilty of "looting, plundering and exploitation of Congolese natural resources" when they occupied the Ituri region of the Congo in 1998-99. The Court required Uganda to pay compensation to the DRC. International Court of Justice, "Press Release 2005/26" (2005).

A4: Self-Determination and Territory

The section discusses in greater detail the people's right to control the natural resources within their territory. To appreciate why the people must have this right, consider first the ultimate right to control the laws that will govern not the land but the *lives* of the residents of a country. Who should hold the right to make a country's laws concerning religion, marriage, expression and so on? If it is not the people themselves, then it must necessarily be some other agency. Were the international system to vest in the government the ultimate right to make laws over persons, we would be back in the Westphalian era of the rule of kings. The people must hold the final right to govern their own lives, and by similar reasoning the people must hold the ultimate right to make laws for the territory. It would make little sense for the people to have final say over the laws for their persons while granting the regime final say over the laws for the land beneath their feet.

We must always hasten to add that while the citizens have *ultimate* authority over the laws governing persons and territory, they do not have *unlimited* authority. Peoples may be self-determining, but even peoples must respect certain rights as they rule. The main class of these rights we have already seen: whatever those with power do, they must respect human rights. Moreover, as above in **A1** it might also be said that minority groups also have (or will or should have) basic rights that constrain the scope of the people's legitimate exercise of power. A case could be made that citizens' authority to control their territory is also attenuated by duties of stewardship for future generations, or by duties against harming the global environment. The era of unlimited authority over "internal affairs" is ended. Yet the authority over persons and territory that does now exist is vested ultimately in the citizens of the country.

Common Article 1 of the human rights covenants declares that peoples have, as an aspect of their self-determination, the ultimate right to control the resources of the territory: "All peoples may, for their own ends, freely dispose of their natural wealth and resources." The covenants here assert both a *jurisdictional* and a *property* right.[144] The people have the jurisdictional right to determine the disposition of the territory's natural wealth and resources, through approving laws governing its exploitation and transfer. And the people have a property right to control what may be done immediately to "their" natural wealth and resources. The jurisdictional right requires that no other agent may pass laws concerning these resources without the people's assent. The property right requires that no other agent may gain possession of these resources without the people's acquiescence.

As noted above the people may approve laws that vest control over the territory's resources in different types of agents. Ordinary legislation, or even the constitution, may pass control over a type of resource or an area of terrain to one agency or another. All of the country's oil may be given over to control of a national oil company, for example, or laws may allow for the appropriation of resource-rich territory by private actors. The

[144] Buchanan, *.

people's right freely to dispose of their resources only requires *original* and *reversionary* rights. The original right is the jurisdictional and property right to control resources in the first instance: to approve the laws that allow, for example, for oil privatization. The reversionary right prohibits anyone transferring resources so that these resources are permanently beyond the people's control when a country has dropped below the minimal political conditions for consent. An authoritarian regime that drives the political conditions of the country below the minimal conditions for popular assent cannot rightly sell off the territory's platinum or copper, for example. To do so would violate the people's enduring right freely to dispose of their natural wealth and resources.

A5: Westphalian vs. Popular Sovereignty

The doctrine of self-determination contains the most fundamental principle of authority in modern international politics and law. This is the principle that the people of a country have the final right to rule themselves and their territory. The people have ultimate authority over the laws that govern their persons, and have ultimate authority over the rules that govern their land.

Self-determination inspired the American Revolution and the Constitution ("We the People..."). It spurred the French revolutionaries in their struggles against an absolute monarch. The central and eastern European peoples gained their self-determination after the fall of the old, and later the Soviet, empires. Self-determination was the core of Gandhi's struggle against colonialism, and of Mandela's struggle against apartheid. The principle is embedded in the Charter of the United Nations ("We the Peoples of the United Nations…"), and it has become a basic principle of law in the international system of states. This section reviews some highlights in the history of the ascendance of the principle of self-determination: the right of the people to decide the fate of their own country, free from external or internal domination.

Westphalian sovereignty

Popular sovereignty locates ultimate political authority in the people, in striking contrast to the Westphalian principle which located ultimate political authority in the regime (the 'sovereign'). A remark from the pre-revolutionary French king Louis XV in 1766 makes vivid the old Westphalian settlement:[145]

> As if anyone could forget that the sovereign power resides in my person only. . . that public order in its entirety emanates from me and that the rights and interests of the nation, which some dare to regard as a separate body from the monarch, are necessarily united with my rights and interests, and repose only in my hands.

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[145] Quoted in Mlada Bukovansky, *Legitimacy and Power Politics* (Princton: PUP, 2002), p. 1.

Within the Westphalian system the people were not subjects of law, but only objects to be directed, protected, sacrificed or ceded according to the desires of the ruler. Legitimate authority tracked not the people's will but rather the regime's effectivity: the regime's continuing coercive power over the population and territory. Once a regime proved itself capable of maintaining control over a population and territory, it was recognized as having nearly unlimited discretion over the laws for the people and the land.

This Westphalian understanding of legitimacy supported the claims of absolute monarchs to free rule within national borders. It recognized the sovereign's privilege to transfer citizens and territory through agreements with other sovereigns. And the Westphalian conditioning of authority on effectivity also recognized the violent seizure of people and land. When a regime gained effective control over a population and territory through defeating another great power, or through colonial conquest, that regime thereby gained the accompanying incidents of sovereignty over that population and territory. In a phrase the Westphalian principle for legitimate authority was *might makes right*.

Popular sovereignty

The counter-principle to *might makes right* that gradually ascended was *the people rule*. The transition from Westphalia to the system of popular sovereignty relocated the source of legitimate authority from the monarch to the people, and so shifted the "self" of the self-determining nation. By 1789 revolutionary France had a National Assembly—an assembly of the representatives of the nation—which proclaimed this new principle. As Article III of the *Declaration of the Rights of Man and of the Citizen* states:

> The principle of all sovereignty resides essentially in the nation. No body, no individual may exercise any authority that does not emanate expressly from the nation.

The shift to popular sovereignty required a basic reconceptualization of the relation between government and people, from a system in which the regime was (at best) the protector of the people to a system in which the government is seen as the agent of the people.

Under the principle of popular sovereignty, a government acting within a constitution endorsed by the people may enact a very wide range of valid laws and act on any number of valid policies. Yet all governments must respect two basic boundaries to legitimate state action: the government must act on laws and policies that can reasonably be thought to reflect the people's will, and the government must not treat citizens in ways that make them unable to exercise their authority. All governments must respect the people's *self-determination* and their *basic rights*. The doctrine of popular sovereignty thus has two pillars, concerning the input to, and the output of, state action.

1. The input pillar is self-determination: The people, not the prince or the powerful, have the ultimate right to decide what laws will be imposed on the population and the territory. The state is the servant, not the master, of the people.

Self-determination is very familiar: its essence is the idea that each people "should have an opportunity freely to choose their own national destiny without restraints, coercion, or intimidation."[146] International law distinguishes two dimensions of self-determination: *external* and *internal* self-determination.[147]

- *External self-determination*: The people have a right against invasion, occupation, or annexation of territory by external powers.

- *Internal self-determination*: "Internal self-determination means the right to authentic self-government, that is, the right of a people really and freely to choose its own political and economic regime… Governments must not decide the life and future of peoples at their discretion."[148]

2. The output pillar is basic rights. Basic rights demand that the state, the agent of the people, must not do certain things *to* citizens and must do certain other things *for* them. Whatever else the state does, it must secure citizens' personal freedoms and their ability together to rule the land.

Basic rights are also very familiar, forming a core of many nations' constitutional rights and also of international human rights. These are rights to speech, assembly, bodily integrity, the essentials of the rule of law, and so on. These rights protect individuals, and by doing so enable a people as a collective agent to exercise the powers of self-determination. Through securing the basic rights of individuals the state secures the people's fundamental right to rule (see **A7: Self-Determination and Human Rights**).

Popular sovereignty's ascendancy over the old Westphalian principle occurred gradually over the past three centuries, with an inflection point in the period around World War II. The milestones in this history constitute many of the pivots of modern international affairs: the gradual end of colonial rule and independence for new nations, the establishment of the United Nations and the repudiation of the legitimate acquisition of territory by force, the establishment of human rights as the basic rights of the international order, the entrenchment of popular supremacy in the constitutions of many nations.

The principle of self-determination is now established in the international system as the settled understanding of the ultimate location of political authority, and the

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[146] US Undersecretary of State Murphy at the UN in 1955. cite

[147] See Committee on the Elimination of Racial Discrimination, "General Recommendation No. 21: Right to Self Determination" (1996), para. 4

[148] Cassese, pp. 101, 128

principle has now been realized— to a greater or lesser degree—throughout the structure of international law.

For example, the doctrine of territorial non-aggression has been a successful revision to the system of international norms. Since World War II there has only been one attempt by a UN member state to incorporate the entire territory of another member state into its own—the 1990 Iraqi invasion of Kuwait, which was quickly reversed with UN Security Council approval. The illegality of seizing a people's territory by force is now well defined and widely accepted.[149]

The realization of self-determination in international law has sometimes been "to a lesser degree" for two main reasons. First, there has been continuing disagreement over what institutional structures popular sovereignty requires—whether, for example, regular multi-party elections on the basis of a universal franchise are essential. The existence of "people's republics" that recognize popular sovereignty but not Western electoral democracy are one manifestation of this disagreement.

Second, other values have competed with self-determination in the influence the shape of the international legal system. Human rights, as we have seen, have been imposed as one significant constraint on the scope of the people's authority. The stability of national borders (*uti possidetis*) has also countervailed the principle of self-determination. When peoples gained their independence from the colonial powers under the principle of self-determination, the old colonial borders over the territory were mostly taken as fixed. It was thought that allowing peoples the right to contest settled borders over territory would be generate conflicts beyond the capacity of the international community to resolve. Whether this is correct we need not decide here; we only note that the principle of self-determination has been constrained by appeal to a significant competing value.

So popular sovereignty is the settlement understanding of political authority in the international system, yet the principle sometimes affirmed in general or delimited forms. This is not surprising in the international context, which contains several traditions of government and which promotes values besides popular rule. However, these two reasons for the "greater or lesser degree" of realization of self-determination do not undermine the assertion that this principle correctly locates the final source of political authority in the people. These two reasons do not locate political authority *somewhere else*. The international system today affirms popular sovereignty while reflecting the facts that there are disagreements over what self-determination requires, and that self-determination is not the only value that needs to be accommodated in the structure of law.

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[149] See the *Charter of the United Nations*, article 2(4); Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* 2nd edition (Cambridge: Polity Press, 2006), pp. 1-10; Christine Gray, *International Law and the Use of Force* 2nd edition (Oxford, Oxford University Press, 2008), p. 327-28. Boutros Boutros-Ghali, *The United Nations Blue Book Series* vol. IX (New York: United Nations, 1996), p. 3.

A6: Highlights in the History of Self-Determination

Self-determination is such an obvious doctrine to us who live in the modern era that we may need reminding just how deeply it now is embedded within our international system. Following are some familiar highlights from the ascendancy of self-determination over the old Westphalian principle. As these highlights go by it is worth noticing how robust are the affirmations of both external and internal self-determination—as well as noting what is our particular focus, the ultimate right of the people to control their own territory.

- 1689: The Glorious Revolution and the *Bill of Rights*: The decisive rejection of absolute monarchy in England as Parliament invites new monarchs to accede to the throne, their power to be limited by basic civil and political rights of all Englishmen.

"…the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed and taken to be; and that all and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said declaration, and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all time to come."

- 1776: American *Declaration of Independence*.

"When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them…

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

- 1789: *US Constitution* and the *Bill of Rights*.

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

- 1789: The French Revolution and the *Declaration of the Rights of Man and of the Citizen*.

- 19th Century: Latin American independence from European rule; Greek independence; Chartism and the Reform Acts; Revolutions of 1848.

- 1907: The *Hague Convention* requires that occupying forces must safeguard the resources of the territory.

"Art. 47. Pillage is formally forbidden.

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

- World War I: Dissolution of the continental European (German, Russian, Austro-Hungarian) empires and the Ottoman empire. Wilson and Lenin invoke the principle of self-determination as independent states are declared in the Baltics, as well as central and eastern Europe.

- 1931: *Statute of Westminster* grants independence to Ireland, Australia, New Zealand, Canada, South Africa after Parliament finds that it cannot legislate for these dominions without their consent.

"We, the people of Éire…"

- 1930: Indian Declaration of Independence; and 1950: Indian Constitution.

"*We the People of India…"*

- World War II: Allied victory over the Axis authoritarians, after which the defeated nations adopted popular sovereignty in their constitutions.

"The German people… have adopted this Basic Law…" "Sovereignty belongs to the [Italian] people and is exercised by the people.." "We the Japanese people…"

- 1945: *United Nations Charter*, signed by the 51 original members.

"We the Peoples of the United Nations Determined… to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…

The Purposes of the United Nations are… To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

- Post WWII: Break-up of British, French, Dutch, Japanese empires in Asia leads to many declarations of national independence. The language of popular sovereignty becomes part of many national constitutions throughout the world.

"We the People of…" Egypt, Bangladesh, Samoa, Namibia, Micronesia, etc.

- 1948: *Universal Declaration of Human Rights*

"Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

- 1960: UN General Assembly resolution 1514 (XV), "Declaration on the Granting of Independence to Colonial Countries and Peoples."

"The General Assembly,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace…

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations…

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law…

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development…

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."

- 1966: The human rights covenants (*International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*).

"Article 1 [both]*:*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources…

ICCPR Article 57, ICESC Article 25:

"Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

- 1970: UN *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*

"The principle of equal rights and self-determination of peoples:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

- 1974: UN General Assembly declares that the natural resources of Namibia are *"the birthright of the Namibian people and that the exploitation of those resources by foreign economic interests... is illegal and contributes to the maintenance of the illegal occupation regime."* (GA Resolution 33/182)

- 1975: International Court of Justice Advisory Opinion in the *Western Sahara* case.

"The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples… The above provisions… thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the people concerned."

- 1975: *Helsinki Final Act*, Conference on Security and Co-operation in Europe (CSCE).

"VIII. Equal rights and self-determination of peoples

The participating States will respect the equal rights of peoples and their right to self-determination…

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self- determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle."

- 1976: *Universal Declaration of the Rights of Peoples* [Algiers, 4 July 1976].

"Article 7

Every people has the right to have democratic government representing all the citizens without distinction as race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms for all.

Article 8

Every people has an exclusive right over its natural wealth and resources. It has the right to recover them if they have been despoiled, as well as any unjustly paid indemnities."

- 1981: *African [Banjul] Charter on Human and Peoples' Rights*.

"Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."

- 1989: Fall of the Berlin Wall. CSCE follow-up to *Helsinki Final Act*.

"Principles

(4) [The Participating States] confirm that, by virtue of the principle of equal rights and self-determination of peoples and in conformity with the relevant provisions of the Final Act, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."

- 1990: German Reunification. *Charter of Paris for a New Europe*, CSCE.

"Ours is a time for fulfilling the hopes and expectations our peoples have cherished for decades: steadfast commitment to democracy based on human rights and fundamental freedoms; prosperity through economic liberty and social justice; and equal security for all our countries....

We are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable. We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."

- 1991: Dissolution of the USSR results in independent states being declared in the Baltics and the 12 former Soviet republics. After Iraq's invasion of Kuwait the UN Security Council states that; *"Iraq... is liable under international law for any direct loss, damage, including... the depletion of natural resources... as a result of Iraq's unlawful invasion and occupation of Kuwait."*

- 1995: International Court of Justice, *East Timor* case.

"In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes *character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations*

Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law."

- 2002: *Constitution of the Democratic Republic of East Timor.*

"The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person.…Sovereignty rests with the people, who shall exercise it in the manner and form laid down in the Constitution."

- 2009: The UN has grown from 51 members to 192.

A7: Self-Determination and Human Rights

The most dramatic statements of the people's rights to self-determination are in the human rights covenants of 1966, one or the other of which have now been ratified by the vast majority of nations in the world:[150]

Article 1 [both]:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources…

ICCPR Article 57, ICESC Article 25:

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

We can reflect on the striking fact that these statements come within (and indeed have pride of place within) the major human rights treaties. The two pillars of popular sovereignty—self-determination and basic rights—are here bound together. Why is that?

One reason is given in the General Comment of the Human Rights Committee. Self-determination is necessary to secure individual human rights:[151]

[150] The Human Rights Committee has stated that Article 1 "imposes on all State parties corresponding obligations," and that the right in paragraph 2 in particular "entails corresponding duties for all States and the international community." "General Comment No. 12: The Right to Self-Determination of Peoples," (1984), para. 2, 5.

> The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

A complementary explanation that reverses this explanatory relationship is suggested by Cassese:[152]

> The correct relationship between the rights of individuals and self-determination, which was brought to the fore in Helsinki, has thus been fully spelled out. It is not sufficient to state, as does the UN, that self-determination is a basic precondition for the enjoyment of the rights of individuals and that an individual cannot fully enjoy his rights and freedoms if the people to which he belongs are subject to colonial rule, foreign domination, or a racist regime. It is necessary to add – with the force and clarity that is found in the Algiers Declaration – that when the rights and fundamental freedoms of members of a people are systematically denied this means that the right to self-determination of that people is also infringed. From this point of view "internal" political self-determination is *the synthesis and summa* of human rights. "Internal" political self-determination does not generically mean "self-government" but rather the right freely to choose a government, exercising all the freedoms which make that choice possible (freedom of speech, of association, etc.). At the same time, it means the right to see to it that the government, once chosen, continues to reflect the will of the people and is neither oppressive nor authoritarian.

Here human rights are necessary not only for safeguarding the interests of individuals as such. The realization of certain human rights of individuals—in particular the political rights—is crucial for the people as a collective agent to be able to exercise its fundamental right to rule themselves and the land. In this sense human rights are important not only in their own right, but also as enablers of self-determination.

A8: The Resource Right and International Recognition

If armed robbers seize a jewelry store or a gas station in New Jersey, do they get the legal right to sell the jewelry or the gasoline in New York? No. And if the New Jersey robbers do manage to fence the jewelry or the gas to New York businesses, will the New York police and courts defend the "property rights" of the businesses that bought the stolen goods? Again, clearly no—and for good reason. You can imagine what kinds of mayhem would break out in New Jersey if New York declared that whoever had the *might* in New Jersey would get the *right* to sell the stolen goods legally to New Yorkers.

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[151] Human Rights Committee, "General Comment No. 12: The Right to Self-Determination of Peoples," (1984), para.1.

[152] Cassese, p. 298.

Yet *might makes right* is the rule that American law declares for natural resources in other countries. If armed gunmen overthrow the government of an oil-producing country, according to American law they do get the legal right to sell the oil to American businesses. And when the barrels of oil arrive on American soil, American police and courts will then protect the property rights of the businesses who imported those stolen goods. By recognizing *might makes right* in other countries the American justice system awards the prize of American consumer demand to whoever can seize control over natural resources, and this sets off violent contests abroad to control resources while brutalizing the people. *Might makes right* generates structural incentives toward authoritarianism, civil wars, and coups in other countries. And *might makes right* then sucks goods made from those coercively-extracted resources into America's malls and gas stations.

In section **A5** we noted that the international system had realized the principle of self-determination "to a greater or lesser degree" for two main reasons. First, there has been disagreement over what institutional structures self-determination requires: electoral democracy, or something else. Second, other values such as basic rights and stability have competed with self-determination in the influence the shape of the legal structure.

To show that international recognition of a state cannot confer the resource right we need only the most limited—and so the least controversial—understanding of what self-determination requires. Electoral democracy will not be presumed necessary for self-determination: even a consultative monarchy could, on this minimal understanding, respect a people's self-determination. Nor will we have cause to constrain the force of self-determination, as the law must, to accommodate values such as predictability or peace. In the context we will be examining, those other values exert only faint pressures if any at all.

The dimension of current practice that I want to highlight as violating the principle of self-determination lies in the attribution of what Krasner calls "international legal sovereignty."[153] States with international legal sovereignty have legal personality within the international system and are juridical equals to other states. A state which has this status possesses internationally valid rights: to become a member of international organizations, to enter into agreements with other political entities, to insist on immunity for its diplomats, and so on.

The relation between international legal sovereignty and the recognition of one state by another is a complex matter, yet the essence can be summarized as follows. When state A recognizes entity B as state, state A indicates that it believes that B possesses the attributes of a state, and typically signals its intentions to interact with B as a state. This recognition also has effects within state A's domestic laws: A's courts will subsequently recognize the sovereign acts and laws of B as valid. When A recognizes B, it is informing both the world and its own courts that it regards B as having the international legal personality of statehood.

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[153] Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: PUP, 1999), pp. 14-20.

What is important for our topic is not only the status that recognition *can* confer on a state but the status it *cannot* confer. Whatever A says about B, A cannot attribute to B a feature of legal personality that no modern state can possess. To take an obvious example, A's recognition of B cannot confer on the government of B the authority to violate human rights. Human rights are *jus cogens* and so standards from which no derogation is allowed by any party in the international system. Any attempt by a state to recognize "a state with the authority to violate human rights" would simply have no legal effect.

The position of this paper is that one accepted contemporary dimension of international recognition violates a different *jus cogens* norm: the principle of self-determination. (In saying "a different norm," I am for clarity's sake for the moment putting aside the fact that self-determination is a human right.)

At issue here is one quite specific feature of legal personality that states currently recognize in one another. Today the recognition of B by A standardly includes the attribution to the government of B the legal power to sell off the natural resources of the territory, even if the citizens of the country could not possibly assent to those resources permanently passing beyond their control. That is, today's practice is to recognize each state as a "state with the authority to sell resources against the people's will."

Once state B is so recognized, its government (allegedly) gains the legal authority to sell the territory's resources to A's citizens without any acquiescence of the people of B. And because of the effects of A's recognition on A's domestic law, property rights in the resources transferred by B's government will then be enforced by A's courts. Once the British government recognizes Equatorial Guinea, British courts will subsequently enforce property rights within Britain over the natural gas bought from the dictator of Equatorial Guinea, no matter what.

Yet today's standard recognition of "a state with the authority to sell resources against the people's will" should have just as little legal effect as an attempt to recognize "a state with the power to violate human rights." Today's practice of recognition denies the people's right freely to dispose of their natural resources, just as the hypothetical second recognition would attempt to deny the people's basic rights.

To see this, imagine (as is all too frequent) that a general seizes the government of a never-democratic country through a violent coup, and then maintains control over the population through sheer coercive force. At present, when a state recognizes this authoritarian leader's state, it recognizes his government as having the legal right to sell off the territory's oil, gas, and minerals with no conceivable assent from the people. Yet consider: if that legal right really is conferred through this kind of international recognition, who actually holds the ultimate right to control that territory's resources? Not the people of the territory, whose control over the resources is never affirmed. Under contemporary practice, the ultimate right to control over a territory's natural resources is in fact held not by the people, but rather by the conjunction of the recognizing state and the recognized authoritarian. And there is no space within that conjunction for the principle of self-determination.

This aspect of contemporary practice is actually a throwback to the old Westphalian principle of effectivity: states are recognized as having rights over the territory simply because of their coercive control. Today's practice is for one state to affirm that another state has rights to dispose of territory even if that second state has no better claim to that territory than military dominance over it. The recognized state is here not the agent of the people, but the ruler of the people regardless of the people's desires concerning their territory. This practice clearly undercuts self-determination. No people can be said to have ultimate control over its territory if legal control over that territory's resources can be won simply by a government's exercising *effective* control over the people and land—if a government comes to have this right simply in virtue of its might.

Moreover, any supporters of this aspect of international recognition cannot point to the usual reasons to justify the "greater or lesser" realization of the principle of popular self-determination in the law. Recall that international law has sometimes seen fit to hedge on whether electoral democracy is required by self-determination—but we are working within a framework that is neutral on electoral democracy. *Whatever* one's test for a people having the right to control over territory (the right "freely to dispose of their natural wealth and resources"), some currently recognized states must fail it. Think, for example, of the recognized states of Equatorial Guinea, Burma, Sudan, North Korea or Turkmenistan.

Nor can the other values that sometimes exert pressure on the shape of international law, such as peace and predictability, support the current practice of recognition that limits the principle of self-determination. For such values are not obviously furthered by granting the often highly lucrative rights to sell off a country's resources to authoritarians and leaders of successful military coups. Muammar Khadaffi, Saddam Hussein, the Grand Ayatollahs of Iran, the military rulers of Nigeria, dos Santos of Angola and Bashir of Sudan, for example, have not been notable promoters of the stability of the international system.

The primary consideration in favor of the current practice of international recognition seems to be that the practice has been thought to promote a steady supply of natural resources for importing countries regardless of the political conditions in exporting countries. Yet that is not a value that can be invoked to countervail—and indeed to contradict—the principle of self-determination. The desire of resource-importing countries for continuous access to oil, gas and minerals can no more override a people's ultimate right to control their laws governing their land than it could override individuals' human rights. The desire for resources must be fulfilled within a system that enforces the basic principle that within each country the people rule.

OTHER RESOURCE-CURSE ALLEVIATION PROPOSALS

A9: Macroeconomic Policy and Stabilization Funds

[The importance of sound macroeconomic policy in resource-rich countries is emphasized; stabilization funds endorsed where appropriate]

A10: Registration Initiatives: The Kimberley Process

[Kimberley endorsed (despite recent worrisome developments). The Process should be greatly strengthened in its enforcement capacities, and expanded to include all minerals.]

A11: Transparency Initiatives: EITI, PWYP

[The Extractive Industries Transparency Initiative (EITI) was launched by the British Government in 2002, specifically in response to the resource curse:[154]

> The EITI supports improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas and mining. Many countries are rich in oil, gas, and minerals and studies have shown that when governance is good, these can generate large revenues to foster economic growth and reduce poverty. However when governance is weak, they may instead cause poverty, corruption, and conflict – the so called "resource curse". The EITI aims to defeat this "curse" by improving transparency and accountability.

An EITI report is essentially a publicly-accessible external audit of extractive resource sales. Governments that implement the EITI procedures publish audited reports of what resources they have sold, to which companies, and for how much. Over 20 countries have committed to the EITI process so far, and one (Azerbaijan) has been judged compliant.[155]

The EITI has broad support on the highest governmental and inter-governmental levels. The EITI has been endorsed by the G8, the OECD, and the IMF. The World Bank has not only endorsed the EITI, but has also set up a team to support the Initiative and is administering its trust fund.[156] The EITI is also supported by NGOs such as Transparency International, Global Witness, and the Open Society Foundation. It has been endorsed by

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[154] www.eitransparency.org/section/abouteiti. See also www.publishwhatyoupay.org.

[155] Other EITI-committed countries include Chad, Kazakhstan, Bolivia, and Peru.

[156] web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21095412~pagePK: 34370 ~piPK:34424~theSitePK:4607,00.html.

the American Petroleum Institute, the International Council on Mining and Metals, and the International Organization of Oil and Gas Producers. Finally, it is supported by some of the largest international resource corporations, including Anglo American, Barrick Gold, BHP Billiton, BP, ChevronTexaco, ExxonMobil, Marathon, Rio Tinto, Shell, Statoil, and TOTAL.

Publish What You Pay (PWYP) is a parallel transparency initiative on the corporate side. Under proposed legislation companies would be required to report all payments for resources into a publicly-accessible database. The aim of the initiative is to reduce the bribery and corruption of export-country officials. In the US, the Extractive Industries Transparency Disclosure (EITD) Act, which would bind any company registered with the Security and Exchange Commission, has been submitted to both the US House and Senate.

These transparency initiatives are complementary to the Clean Trade approach. Transparency initiatives will be more effective in countries where political conditions are better (like Indonesia, Ghana, Tanzania). In these countries citizens and civil society organizations are more free to pressure their governments to make reforms.

Clean Trade will be most effective for the "worst of the worst"-governed countries (like Sudan, Equatorial Guinea, Burma). These are places where political repression or institutional failure make public movements to pressure governments less likely.]

A12: Revenue Distribution Initiatives

[The *might makes right rule* for the right to transfer resources is sustained in the international legal system neither by principle nor propriety, but simply by inertia and interest. Dictators and juntas, coup plotters and civil warriors want the rules for resources to remain as they are. Their main customers, the international resource corporations, are also heavily invested in the system as it is. These powerful interests lock the old provision into place, rendering infeasible otherwise promising proposals to reform the system of international trade.

Sala-i-Martin and Subramanian propose a direct replacement for the *might makes right* rule: requiring governments to divide revenues from resource sales equally among all adult citizens of the country.[157] Using Nigeria as their example, they argue that oil revenues should not go straight to government officials (which inflames corruption and undermines growth) but should instead be divided equally into the bank accounts of all

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[157] Sala-i-Martin and Subramanian "Addressing the Natural Resource Curse." See also B. Eifert, A. Gelb and N. Tallroth "The Political Economy of Fiscal Policy and Economic Management in Oil Exporting Countries," in J.M. Davis, R. Ossowski and A. Fedelino (eds), *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (Washington, DC: International Monetary Fund, 2003): 82–122.

Nigerian citizens ("ultimately their true and legitimate owners"[158]). The government would then have to tax the citizenry to gain its revenues as other states do, necessitating at least minimal political accountability to the people. This reform is elegant and desirable.[159]

The reform is also currently political infeasible. The officials who sell Nigeria's oil have little to gain and much to lose by handing petroleum revenues over to Nigeria's citizens. With no pressure from the outside, these actors will never renounce the privileges that keep them in power and rich.]

A13: International Panels to Disqualify Resource Sales

The challenge in framing a proposal to reform the resource privilege is to find a way to transform the current system in which anyone with sufficient power within a territory can sell off that territory's resources into a system that makes distinctions: *these* regimes can sell resources, while *those* cannot. This challenge is in fact four separate problems. The first is the *grounding value problem*: to which values should reformers appeal to distinguish among the regimes currently offering resources on the international market. The second is what Pogge calls *the criterial problem*: what conditions determine whether a territory is or is not above the line that marks legitimate resource sales. The third is the problem of *authoritative notice*: what is the decisive public indication that the criterion used is or is not satisfied. The fourth problem concerns *enforcement*: what institutions could possibly be powerful enough to enforce a judgment that trade in resources with some regime should stop.

Pogge's proposal for meeting these challenges turns on two mechanisms: an amendment to national constitutions of resource-rich developing democracies, and an international panel to decide when this amendment has been activated. Imagining himself to be a political leader of a fledgling resource-exporting democracy, Pogge recommends:[160]

> A constitutional amendment in which our country declares that only its constitutionally democratic governments may effect legally valid transfers of ownership rights in public property and forbids any of its governments to recognize ownership rights in property acquired from a preceding government that lacked such constitutional legitimacy.

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[158] Sala-i-Martin and Subramanian, "Addressing the Natural Resource Curse," p.18. See also Paul Collier, "Angola: Options for Prosperity" (www.sarpn.org.za/documents/ d0002079/ index.php).

[159] For some doubts see Erika Weinthal and Pauline Jones Luong, "Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth," *Perspectives on Politics* 4.1 (2006): 35-53, p. 42.

[160] Pogge (2008), p. 169.

Such an amendment, Pogge says, would reduce the resource revenues that predatory authoritarians could expect from overthrowing the fledgling democratic regime. Should a non-democratic regime seize power after such an amendment is passed, that regime's sales of resources will not be recognized as valid within the country if democracy is restored thereafter. Now as Pogge says, a non-democratic government that seizes power may revoke this amendment and transfer the country's resources at will. But the amendment will signal to international actors who might buy resources from the non-democratic government that their title to the goods will be questioned should a democratic government return to power.

Pogge's plan is that this amendment would make potential purchasers of a country's resources more wary of dealing with any authoritarian who gains power. Potential authoritarians, aware of this reduced demand, would then be less likely to attempt to destabilize the democracy in the first place.

The grounding value of this proposal is democratic governance. To solve the criterial problem and the problem of authoritative notice Pogge describes a "Democracy Panel." This is "an international panel, composed of reputable, independent jurists living abroad who understand [the country's] constitution and political system well enough to judge whether some particular group's acquisition and exercise of political power is or is not constitutionally legitimate."[161] Not all transitions away from democracy are as dramatic as a *coup de etat*, and the Democracy Panel is intended to provide swift, authoritative determination of when a country that has passed Pogge's amendment has gone from above to below the democratic line. Once a Democracy Panel ruled that a country was no longer democratic, all potential purchasers would be on notice that resource sales from that country will not be not viewed as legitimate (until the Panel ruled that democracy had been reinstated). Any fledgling democracy could empower such a Democracy Panel; if enough countries used the same panel then Pogge suggests it could naturally find a home within the United Nations system.

Part of the difficulty with Pogge's proposal for replacing the resource privilege is the proposal's grounding value: democracy. Democracy is too strong a value to ground a feasible proposal for reform of international institutions. By Pogge's criterion even the non-democratic but relatively decent Kuwaiti government, for instance, could not legitimately sell its country's oil to foreigners. A universal requirement of democracy is too contestable a premise on which to rest a realistic proposal for the reform of the global economic order.

Clean Trade's alternative for reforming the international resource privilege turns not on democratic rights but on property rights. The criterial question here is whether the political conditions in the country in question are good enough for it to be possible for the citizens of the country to agree to some regime selling off the country's natural resources (which, in international law, the people have the ultimate right to control). Property is better than democracy as a grounding value because the proposal based upon it will

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[161] Pogge (2008), p. 162.

disqualify fewer regimes, and so will be more feasible. More significantly, the value of enforcing property rights is a value that no corporation or rich government can credibly deny. The proposal presents itself as a demand that the major players in the global market correct large-scale violations of property rights. Such a demand is considerably less contestable than a demand to boost democratic participation in resource-rich countries.

Nevertheless, Pogge's proposal to reform the resource privilege through a constitutional amendment and a Democracy Panel is characteristically imaginative and careful. Pogge attends to the incentives this proposal would create, as well as to the unintended consequences that the proposal might engender.

Indeed Pogge is so scrupulously honest about his own proposal that, in the end, he states it cannot work as intended. The main obstacle that he points to is enforcement. It would be a "miracle," he says, if the envisioned amendment and panel could stop Shell, for example, from buying oil from some future authoritarian regime that overturned the democracy in Nigeria.[162] There is just too much gain to be made from these purchases of petroleum. No ruling from an international panel that some country was insufficiently democratic could be weighty enough to convince a Western oil major to stop dealing with the regime in that country. And, we might add, a panel's ruling would be even less likely to halt the national oil companies of China, which have become major players in the extraction of African oil. Without credible enforcement mechanisms, the panel's judgments would be ignored by those engaged in international resource trade.

There are also further limitations to Pogge's proposal. First, any solution that turns on a democratically-passed amendment can only help in those countries that have already achieved democratic governance—so not Equatorial Guinea, for example, which has never has been democratic.[163] Second, the proposal is not entirely *incentive compatible*: it creates incentives which work against its own grounding value. Consider the incentives of rich-country leaders whose corporations are buying oil from a poor-country despot who seized power after Pogge's amendment was democratically passed. These rich-country leaders know that if democratic governance returns to the poor country their corporations will face accusations of misappropriation of foreign goods. These leaders will then have significant political incentives to assure that democratic governance does not return to the poor country. And potential authoritarians, aware of these future incentives to entrench them, will be more likely to attempt to destabilize the democracy in the first place. So the proposal would generate significant incentives that point in a counter-productive (anti-democratic) direction.[164]

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[162] Pogge (2008), p. 171.

[163] Pogge's proposal could also only help in countries with a written constitution, since only a written constitution can be explicitly amended in the way that Pogge suggests.

[164] Pogge's proposals for using a Democracy Panel and Democracy Fund to reform the international borrowing privilege has similar difficulties with counter-productive incentives. (Pogge's Democracy Fund is a pool of money which temporarily services the debts of democratic governments that have passed the constitutional amendment, in the event that unconstitutional rulers take over and refuse to

Pogge suggests that his Democracy Panel proposal should be implemented despite its limitations, so that the current moral situation can at least be clarified. Such clarification may, he offers, eventually bring about change in public opinion in the rich world, which in turn may bring unspecified improvements. But this hope for gradual reform of the current global economic order through changes in public opinion is not sufficient as proof of the feasibility of Pogge's proposal.

A14: Odious Debt and Loan Sanctions

Pogge's critique of the contemporary global economic order singled out a pair of "privileges" granted to even the worst regimes: the "resource privilege" (here the resource right) and the "borrowing privilege." The borrowing privilege empowers authoritarians to access international credit markets in the name of the country they are dominating, and to take out loans that will burden less-authoritarian successor governments. This borrowing privilege has allowed the generation of "odious debt," which has been a significant drag on countries attempting to improve growth and transition away from authoritarian rule.

Since the resource and the borrowing privileges are closely connate, one might guess that proposals for reforming one privilege would be promising for reforms of the other. This is correct. Here I sketch how the Clean Trade framework can be extended to add a loan sanctions mechanism designed to prevent future odious debt. The resulting extension (a "Clean Credit" mechanism) could be used by resource-importing countries as an additional source of pressure against resource-funded authoritarians, or it could be deployed as a stand-alone sanction against authoritarians whether resource-funded or not.

Jayachandran and Kremer propose a loan sanctions mechanism to forestall the creation of odious debt:[165]

> Suppose, for example, that the United Nations Security Council unanimously declared that any future debt incurred by a particular dictator would be considered illegitimate and nontransferable to successor regimes. Suppose also that the United States and the European Union implemented legal changes to prevent assets of the successor regime from being seized to enforce repayment of the dictator's debts. We argue that this would create incentives for lenders in third countries to avoid lending to the dictator.

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honor these debts.) Consider the incentives of a large bank (call it "Bank") based in, and influential with the government of, a G8 country. If Bank sees that there is a large pool of money from which it can be reliably paid when the democratic government is overthrown (the Democracy Fund), then it has an incentive to work to undermine that government. If Bank believes that any debts that a predatory authoritarian government owes to it will not be honored if the predator government is replaced by a democratic government then Bank has incentives to keep the predator government in power. And, most importantly, if Bank sees that a Democracy Panel will have the authority to annul large debts on its books, it will work against the establishment of this panel or work to capture it.

[165] Jayachandran and Kremer (2006), p. 82.

Jayachandran and Kremer add that this *ex ante* declaration of illegitimate debt could be reinforced by further policy measures, such as withholding foreign aid from countries that repay debts which have been declared illegitimate. The aim of all of these measures is to change the risk profile of authoritarians so as to make lending to them unattractive.

This loan sanctions proposal has the same strategic gestalt as the Clean Trade proposals: to change the policy and law of major powers (declare certain debt illegitimate, prohibit seizure of assets to enforce repayment of illegitimate debts, retool foreign aid) so as to change the incentives of the major players in the sector (here banks and foreign governments) whose incentives currently point toward perpetuating the problem (odious debt). Jayachandran and Kremer have left certain aspects of their proposal unspecified, presumably to make the proposal maximally appealing. Here I speculate how specifying this proposal within the Clean Trade framework could create a feasible loan sanctions mechanism and address some of the challenges that Jayachandran and Kremer highlight.[166]

Jayachandran and Kremer leave open the nature of the illegitimacy of the debt run up by dictators, mentioning both of the classic criteria: a) that the debt is incurred without the consent of the people; and b) that the debt does not benefit the people.[167] Within the Clean Trade framework it is of course the consent of the people that is at issue. Indeed Jayachandran and Kremer's proposal for loan sanctions could be powered within the Clean Trade framework by the same principle of self-determination that powers the trade sanctions. The argument for loan sanctions could be grounded within international law in common Article 1 of the two major human rights treaty—here the first instead of the second paragraph of that article:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources…

No people can exercise their right freely to determine their political status and freely to pursue their economic development when an authoritarian regime may maintain

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[166] Jayachandran and Kremer register some criticisms of trade sanctions, but these criticisms apply less if at all to Clean Trade sanctions. For the criticism that trade sanctions can be evaded see **15. Question: Trade Sanctions have an Uneven Record of Success**; for the concern that they hurt the poor in the sanctioned country see **16. Question: The Policies will Hurt the Poor in Resource-Rich Countries**. Jayachandran and Kremer say, "Both trade and loan sanctions may hurt the population in the short run. Loan sanctions, however, create a long-run benefit for the population by preventing it from being saddled with debts run up by the dictator to finance looting or repression." (2006, p. 86) Clean Trade sanctions create long-run benefits for the population as well, since they pressure bad regimes to give up power by making it harder for them to sell off the country's valuable and depletable resources.

[167] Jayachandran and Kremer, pp. 82-3.

itself in power by running up the country's debt without any possible consent from the people. As has been discussed at length above, self-determination is one of the weightiest principles in international law and politics, and the announcement of loan sanctions can be anchored in it.

Moreover, loan sanctions can be tightly targeted within the Clean Trade framework. As with the resource right, sanctioning states need not take the dramatic step of declaring that a state or government is entirely illegitimate,[168] but need only say that the government cannot legitimately exercise certain powers—here that it cannot take out loans in the name of the people. It will be specifically the borrowing privilege of the authoritarian regime that is denied; whether that regime may legitimately issue currency or defend the country's borders or enter into negotiations over nuclear nonproliferation are left as separate issues. The sanctioning state could thus use the loan sanctions mechanism while maintaining flexibility toward the sanctioned regime in other areas of its foreign policy.

The main challenges that Jayachandran and Kremer identify for their own proposal concern the identity of the agent who will judge that some regime is not a legitimate borrower, the criteria for disqualification, and how to discipline the system against political bias. For these challenges the loan sanctions proposal might simply take over the Clean Trade approach:

- Clean Trade is oriented toward the major powers such as the US, UK, Germany and France, and to multinational entities like the EU, which combine a public commitment to the idea of self-determination with significant influence on the global economic system. Their governments will be the most promising agencies for effecting Clean Credit sanctions (although other agencies, such as the Security Council or an international financial institution, should not be ruled out).[169]

- In the US case, the loan sanctions mechanism could use the Freedom House ratings and set the trigger for illegitimate borrowing at the same "worst of the worst" rating on that scale. US policy should be that no regime that fulfils the criteria for an FH rating of "7" can legitimately exercise *either* the resource or the borrowing privilege. Since the Freedom House ratings are already part of the US government's policy framework, these could naturally be extended to into a loan sanctions mechanism. In other countries or regions, another rating scale or a composite scale might be preferred.

- For the US case, discipline against political bias would be provided by the independence of Freedom House, and could be enhanced through enacting Clean Credit legislation. A Clean Credit Act could require the US government to impose loan sanctions in the way that Jayachandran and Kremer recommend on all regimes in

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[168] Jayachandran and Kremer, p. 91.

[169] For the prospects of civil litigation in rich-country jurisdictions aimed at odious debt see the citations in footnote 44.

countries that receive a "worst of the worst" rating, deterring the government from playing favorites among equally odious regimes.

It appears that many features of the Clean Trade framework can be transposed directly into a loan sanctions mechanism to forestall odious debt. Indeed one could even speculate—although at this point this is highly conjectural—on the possibility of a mechanism parallel to the Clean Hands Trusts.

Western powers have recently expressed concerned that Chinese lending in Africa might counteract the effects of their own recent debt relief initiatives in Heavily Indebted Poor Countries, with the U.S. Department of the Treasury reportedly even going so far as to label China as a "rogue creditor" engaged in "opportunistic lending."[170] A parallel to the Clean Hands Trust (a "Clean Banks Trust") would see the US government imposing import duties of $X (or even declaring its sovereign debt to China reduced by $X) whenever China made a loan of $X to a disqualified regime such as the one in Zimbabwe. That money would be put into the Trust for the people of Zimbabwe until a minimally decent government representing all the people were in place, at which point it would be turned over the new Zimbabwean government on the understanding that the funds would be used to pay off the odious debt owed to China. Much more investigation would be needed to give reasonable assurance that such a "Clean Banks" mechanism would be feasible; it is perhaps worth further study.

Loan sanctions and trade sanctions can be grounded in the same political principles, and the strength of each could be reinforced by its being tied to the other. In a very optimistic scenario a country like the United States would institutionalize a combined Clean Trade/Clean Credit policy, announcing in advance that any country falling into the disqualified zone would face both types of sanctions simultaneously. Such an announcement would significantly dampen the prospects of potential authoritarians (to take Jayachandran and Kremer's example: generals considering a military takeover of the government of Nigeria). And the combined policy would be politically credible because of its very comprehensiveness: the US could not be charged with the hypocrisy of denying loans to an authoritarian regime while also buying oil from it.

There are good theoretical grounds for denying that authoritarians are vested with the right either to sell off resources or to run up sovereign debt. An effective policy would deny to authoritarians both rights at once.

[170] Phillips, Michael, "G-7 to Warn China over Costly Loans to Poor Countries," *Wall Street Journal*, Sept. 15, 2006. online.wsj.com/article/SB115826807563263495.html.