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On the Fairness of the Multilateral Trading System

Abstract: Three perspectives on international trade are present in current debates. From the first perspective, trade is regarded as a set of individual transactions among consenting parties and considerations of fairness and justice barely feature, if at all. The second perspective underlines the importance of background structures for trade, maintained by states, which gives rise considerations of fairness and justice. One prominent version of this perspective, for example as defended by Aaron James, views all trading states as having in principle equal claims to the gains from trade. A third perspective puts the focus on exploitation. In this special issue, Mathias Risse and Gabriel Wollner claim that the first perspective should be abandoned and that the type of approach that is instantiated by James fails. This article does not follow them in dismissing the second perspective in its entirety. It suggests that there is a different version of this perspective that is defensible and develops key elements of that version. In a second step, the article seeks to show that, even if there were no plausible account of fairly dividing gains from trade among states, fairness in trade would still generate demanding normative requirements – that can be and should be integrated into a theory of global justice.

Keywords: international trade, fairness in trade, global justice, World Trade Organization (WTO)

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1 Introduction

A number of different moral ontologies, or images, of international trade are present in current debates.¹ Firstly, from the perspective of economics, trade is

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regarded as a set of individual, voluntary transactions among consenting parties (Voluntary Transaction image), and considerations of fairness and justice barely feature, if at all. The second image underlines the importance of background structures for trade (Fair Distribution image). The focus on background structures, maintained by states, triggers considerations of fairness and justice, and trade becomes a central topic for theorists of global justice. One prominent version of this perspective, recently proposed by Aaron James (2012), views all trading states as having, in principle, equal claims to the gains from trade. A third image puts the focus on exploitation (Exploitation image).

Mathias Risse and Gabriel Wollner (2014—in this special issue) dismiss both the first and the second perspective and defend the Exploitation image. I agree that the Voluntary Transaction image should be dismissed, but while I also agree with many of the elements of their criticism of the second perspective, I do not follow them in dismissing the Fair Distribution view in its entirety – at least not on the basis of the arguments they offer. Risse and Wollner seek to show that the entire approach instantiated by James (2012) fails. I suggest that there is a different version of the second view that is defensible. I defend this version in the context of the multilateral trading system and discuss key elements of such an account. I also discuss what it would mean if Risse and Wollner were right and the Fair Distribution view of trade was to fail. What would that imply for fairness in the multilateral trading system?

So I have two main purposes. First of all, I wish to show that there is a plausible account of fairness in trade that entails principles for a fair division of trade benefits among states. I call this account the Multilateral Trading System approach.² Secondly, I wish to show that, even if there were no plausible account of how trade benefits could be fairly divided among states, fairness in trade would still generate demanding normative requirements – that can and should be integrated into a theory of global justice.

The paper is structured as follows. Section 2 discusses the Fair Distribution image. It begins by arguing why the Voluntary Transaction image should be abandoned in favour of an account that takes seriously the background structure of trade. The section then discusses Risse and Wollner's objection to the Fair Distribution image and explains how this objection can be rebutted (Section 2.1). Next, assuming that there is a plausible basis for the fair division of trade benefits, the section discusses the principle according to which they should be distributed (Section 2.2). Sections 3 and 4 move beyond the Fair Distribution perspective. Section 3 argues that an exclusive focus on formal

² I will mostly focus on the distribution of trade benefits and leave the discussion of the demand to take care of the burdens or the losers of trade to another paper.

trading opportunities in terms of the absence of market access barriers is not sufficient and that there is a normative demand to enable trade partners to make use of formal market access opportunities. Section 4 discusses the Exploitation image and argues that it can be interpreted as having important implications for the principles that should be applied in the context of the multilateral trading system. Section 5 concludes by summarising the main arguments and discussing the role of different images of trade for a theory of global justice.

2 The fair distribution view in the multilateral trading system

The problem with the Voluntary Transaction image is that it regards trade as a set of transactions among consenting parties such as exporters, importers and consumers. By disregarding the significance of background structures for trade and the inescapability of the multilateral trading system, this view of trade understates the extent to which considerations of fairness and justice have a bearing on trade.

The Fair Distribution image underlines that states are needed to set up and maintain cooperative and coercive background structures which ensure the completion of contractual transactions and engender sufficient confidence among market participants that markets will continue to exist in the future. According to that view, a normative assessment of trade must focus on the institutional background before which interactions among individuals and companies occur. Along those lines, James (2012, p. 37) describes trade as a set of exchanges conducted against a background of “market reliance practices” that are maintained by states. Those practices constitute a structure that could be set up in various ways. In light of this coercive and cooperative background structure, trade becomes a “ground” of justice and we can refer interchangeably to fairness and justice in trade (Risse and Wollner 2014).

James (2012) argues that gains from trade are a jointly produced surplus that should be divided among those who participated in the generation of these gains. Risse and Wollner (2014) seek to show that this view should be abandoned. They dismiss the Fair Distribution image and argue against any perspective on fairness in trade that assigns to states a share in the overall amount of trade gains they generate. In the next sub-section, I shall discuss Risse and Wollner’s objection to the Fair Distribution image and explain how their objection can be rebutted.

2.1 Defining the baseline

According to Risse and Wollner, the key argument against the Fair Distribution image, i.e. a view that entails reflection on the division of gains from trade, hinges on the baseline question. James proposes and defends the use of an autarky baseline: “a hypothetical world of universal economic autarky, where there are no international trade deals, no trade flows across borders, and no economic gains or losses” due to trade exchanges (James 2012, p. 153). Risse and Wollner criticise this baseline as implausible. It is because of the implausibility of the autarky baseline that they regard the Fair Distribution view in its entirety as implausible – and because they do not envisage what an alternative baseline could amount to. I agree that the autarky baseline is implausible. In what follows, I briefly set out why that is the case.

James thinks that states do not need to fairly distribute all their gains from trade but only those that constitute a surplus beyond what they would gain in a state of autarky. But his approach only works if we can determine a baseline that would enable us to plausibly identify which share of the gains from trade states can consider theirs because they can generate them by themselves in autarky. The problem that Risse and Wollner (2013, 2014) point out is that what states could generate today in autarky has been shaped by past trading activities. So, identifying what states can do by themselves that does not depend on the effects of past trading activities is an impossible task in a present shaped by centuries of trade exchanges.³

However, contrary to Risse and Wollner, I think that it is possible to defend a plausible baseline for the division of trade benefits.⁴ If I succeed in showing that there is such a baseline, their objection against the Fair Distribution image fails and their argument for why that approach should be abandoned would not hold as they propose but would have to be dismissed. Rather than addressing normative questions regarding international trade in general, the approach I propose focuses on an assessment of trade in the context of the multilateral trading system. The Multilateral Trading System approach, I suggest, puts the spotlight not on gains from trade per se but on trade benefits from multilateral trade liberalisation that are generated on the basis of trade agreements concluded under the auspices of the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT). So far, eight

³ For a recent exposition of James’ view on the role of the autarky baseline, which partly addresses Risse and Wollner’s critique, see James (2014b – in this special issue).

⁴ Note that I grant the justifiability of states and do not dispute that we live in an interconnected world.

multilateral agreements have reduced trade barriers and generated new rules for international trade, thereby giving rise to benefits and burdens from trade, and the ninth round of negotiations for a new multilateral trade agreement, the Doha Round, is currently underway. Staying away from the WTO is arguably not an option, and by now the Organization has 160 member states. A focus on the multilateral trading system is both important and plausible because the GATT/WTO system is the “unique supplier of the global public good of universal rules” for trade (Low 2009, p. 331) and its rule-making role is of key significance for the distribution of the benefits and burdens of international trade. Against this background, the relevant baseline for assessing benefits and burdens of trade is the situation prior to the adoption of any new trade agreement. States should fairly share the trade gains that are generated as a result of trade rule changes they have agreed to in the context of the multilateral trading system.⁵

While the Multilateral Trading System approach, proposed as one version of the Fair Distribution image, succeeds in avoiding the baseline problem, narrowing the focus to trade benefits generated as a result of multilateral agreements demands additional justification insofar as critics might regard it as being too limited in scope. Suppose, plausibly, that before the GATT/WTO system came into existence, trade benefits were very unequally distributed. Why, one might ask, is it only the gains that result from multilateral liberalisation whose distribution is a matter of justice?

The focus on the multilateral trading system is justifiable because there is a normatively relevant difference between trade benefits that are generated in the context of multilaterally agreed rules and those that are not. Of course, there used to be trade benefits before GATT was concluded in 1947. However, before GATT, trade benefits came about on the basis of a large set of uncoordinated interactions by exporters and importers across different states – uncoordinated in the sense that their trade exchanges were not conducted

5 We can distinguish between what it takes for the Fair Distribution rationale to apply to trade at all, and, if it does apply, what its scope of application is. Regarding the second question, there is an “ambitious” version, e.g. proposed by James (cf. 2012, 2014a), which sweeps in more social product than a “modest” version, which limits itself to gains due to the multilateral trading system or specific trade agreements and which is at the centre of this article. James would agree that the “modest” version holds even if no autarky baseline is intelligible. If I were to agree that the “ambitious” version was correct if some baselines were workable, James and I would disagree only about scope of application. But, as outlined in the next paragraph, I think that trade gains that arise under the auspices of the multilateral trading system or in the context of trade agreements are in normatively relevant ways different from trade gains more broadly defined, which in turn casts doubt on the “ambitious” version outlined above. I am grateful to Aaron James for pressing me on this point.

under, or governed by, internationally agreed rules. Individual trade exchanges, even the sum of many of them, differ from trade that is a social practice that is subject to “collective governance” (James 2012) and structured by rules that can be changed by collective decision. Multilateral trade gains under the auspices of the multilateral trading system are a social creation arising from collectively governed international cooperation. This in turn matters from a normative perspective. While individual trade interactions may only have to fulfil rather minimal moral demands, for instance the absence of oppression, social practices subject to collective governance should satisfy more demanding requirements. Since the GATT/WTO system was established, with its rule of decision-making by consensus and its coercive dispute-settlement system, international trade has fulfilled the conditions for being such a practice.

Moreover, adopting the Multilateral Trading System approach does not imply that the above-mentioned trade inequalities prior to and independent of the GATT/WTO system cannot be normatively condemned. First of all, principles for trade justice in the context of multilateral trade agreements are by no means the only normative principles that may be applicable to the above-mentioned inequalities. For example, trade relations and the resulting, potentially unequal, trade gains should be regarded as unfair if and when they contribute to oppression or the violation of negative rights (Risse 2007) or human rights, where these rights may be understood to include a minimally decent standard of living (Miller 2010). Moreover, as I shall argue in Section 4, the concept of exploitation, once we take account of the challenge of background injustices in the multilateral trading system, can give rise to demanding normative principles that might address inequalities between WTO member states and thereby also have a bearing on the distribution of trade gains among them. Last but not least, in addition to these trade-related normative requirements, there may of course be additional trade-independent principles for justice beyond borders that address inequalities between states or individuals that might in turn reduce unequal trade gains.

So far I have tried to reply to the baseline objection put forward by Risse and Wollner by showing that there is a plausible account of a baseline for fairness in trade once that account focuses on the multilateral trading system and trade rule changes on the basis of multilateral agreements. This in turn leads to the question of what the Fair Distribution image implies in the context of the multilateral trading system. In the next sub-section, I will briefly address why it is states and not individuals that matter for the distribution of multilateral trade gains before I go on to discuss according to which principle trade benefits should be distributed among WTO member states.

2.2 Dividing trade benefits

Normative theorising in the context of the multilateral trading system should focus on states rather than individuals for two main reasons. Firstly, WTO rules do not directly apply to citizens because they are coercively enforced by the member governments. Secondly, cooperation in the WTO emanates from the decisions of states. An account of trade justice in the multilateral trading system does not therefore provide scope for comparing and limiting relative levels of gains from trade for any two individuals across state borders but should instead focus on the distribution of benefits *among* states. *Within* states, in relation to both the benefits and burdens from trade, what matters are domestic principles of social justice. Justice requires that the overall distribution of benefits and burdens in society is just, and not merely the distribution of those specific benefits and burdens that are generated on the basis of international trade.

Which normative principles matter for assessing the distribution of benefits among states? James (2012, pp. 221–226) thinks that equality should be the key principle. While the equality principle might be defended by pointing to the domestic case, Risse and Wollner (2013) argue that the international trade practice is different from the domestic case in morally relevant ways. According to them, while the multilateral trading system has very profound effects on individuals' lives, it has a less pervasive impact on shaping individuals' lives than the basic structure of society. Moreover, while the international trade practice does indeed involve a cooperative and coercive background structure, the ways in which it is cooperative and coercive is different and thinner than in states (Risse 2012).

In response it could be argued that the cooperative and coercive nature of the GATT/WTO system is sufficiently similar to the cooperative and coercive nature of the state in order to justify the equality principle. But it could also be argued that the rationale for equality in the context of the multilateral trading system might be different from the rationale that applies in the domestic case. The rationale for equality might be that if a surplus is produced for which no particular agent can claim credit, the natural way to divide it is equally. Insofar as multilateral gains from trade are such a jointly produced surplus, all trading states have in principle equal claims. The underlying idea is that everything is everyone's joint product, because the cooperative gains in question are the result of multilateral agreement among all members, and each state has an equally good claim to the gains from international trade – or, at any rate, no state has a distinctly better claim than any other.⁶

⁶ At the same time, the equality approach is compatible with the equal division of trade benefits being adjusted according to the relevant endowments of each member state, such as their level of national income or their population size (James 2012, pp. 179–185).

However, Risse and Wollner would object. They question whether countries that contribute only marginally to the joint surplus should receive an equal share of that surplus and suggest that contributory fairness should be regarded as a more promising candidate for the relevant principle for dividing trade benefits (Risse and Wollner 2013, pp. 394–396). But how should we understand the relevant notion of “contribution” in the multilateral trading system? I shall argue that, depending on how we conceptualise the notion of a contribution, the distributive implications of a contributory fairness approach and those of an equality approach might end up being the same.

Risse and Wollner propose that contributory fairness means that each member state should benefit in some kind of proportion to its economic contribution to the gains of cooperation. I suggest, however, that the relevant notion of contribution in the context of the WTO might be understood differently. It might be regarded as referring to the contribution of each member to upholding the system of rules of the multilateral trading system. This in turn could be interpreted as demanding an equal distribution of the cooperative surplus on the basis of an equal contribution to that upholding. Similarly, in the domestic context, Andrea Sangiovanni (2007, p. 26) argues that even though some may contribute more to the overall joint product of society than others, their having made such a contribution depends on background institutions, to which all contributed, even if only through their submission. Similarly, in the multilateral trading system, each and every member state does its part in upholding the scheme and this can justify each member receiving an equal share of the cooperative surplus. This “contribution as upholding” interpretation acknowledges the normative plausibility of the notion of “to each according to contribution” but undermines the idea that each WTO member state’s fair share of the gains from trade that result from a new round of successful trade talks simply consists in a share of these gains that is strictly proportional to the member state’s economic contribution to these gains.

3 The multilateral trading system and effective market access

In Section 2, I defended an approach that focuses on the fair division of trade gains generated in the context of the multilateral trading system. In this section, I shall also argue that even if there were no plausible account of fairly dividing gains from trade among states as suggested by the Fair Distribution image, fairness in trade within the global trade system might still give rise to

considerable normative demands by arguing that an exclusive focus on formal trading opportunities in terms of the absence of market access barriers is not sufficient.

Trading opportunities relating to market access in the multilateral trading system can be characterised in different ways, depending on the opportunity theory in question. On the one hand, opportunities can be understood as the absence of *formal* discrimination or market barriers in established trade rules. On the other hand, they can entail requirements of “fair opportunity”, which includes, for example, certain infrastructural requirements needed for *effective* opportunities to be available.

In the WTO, an exclusive focus on formal trading opportunities is not adequate because formal market access is of little use, for instance, in the absence of adequate infrastructure to make use of new market access opportunities. Consider also the domestic case: in the domestic context, it is important that individuals do not only enjoy certain formal rights but are also entitled to a share of the social means that allow them to effectively exercise those rights. So too in the WTO: formal market access guarantees would be meaningless unless WTO members were able to make effective use of such guarantees. For example, numerous WTO members, especially poor countries, do not have adequate infrastructure such as testing facilities that will help ensure and certify that their products meet technical regulations and health and sanitary standards in their main export markets (Hoekman 2008).

At first sight, the focus on standards and regulations might seem to imply a very restricted perspective. But it turns out to play a substantial role in recent and also ongoing trade negotiations. Existing approaches to fairness in trade, however, usually disregard this fact, thereby ignoring the important role of non-tariff barriers such as standards, rules and regulations in new areas such as services or intellectual property rights.

Why are agreements that involve non-tariff barriers and new areas different? And why does that matter from a normative perspective? Firstly, in contrast to tariff reductions, the implementation of such obligations costs money and may require institution-building and the creation or improvement of infrastructure, for example for progressively more complex certification and testing procedures for new standards (Finger and Nogués 2002). Moreover, there is no assurance that all countries that are implementing these standards and regulations will actually benefit, especially since the standards and regulations are essentially those that are already in place in the industrialised countries and since they display little recognition of the limited capacities of poor countries to accomplish the functions that the terms of the agreements address (Finger and Nogués 2002). Against this background, I suggest that there is a duty of assistance in the

context of the multilateral trading system to create or improve certain types of trade-related infrastructure.

This raises several questions. First, it might be asked for which type of infrastructure a member state might be able to receive assistance. While a broad definition of trade-related infrastructure might refer to the case in which the lack of adequate roads and ports may undermine a country's opportunity to gain from market-access provisions of trade agreements, a narrow definition, on the other hand, might refer to the case where, to comply with WTO standards and rules, countries need specific infrastructure in place, for example for standard testing. I shall suggest that the duty of assistance within the WTO is limited to this narrower understanding of trade-related infrastructure that is specifically needed to be able to comply with WTO rules and standards that have been negotiated in the context of multilateral trade rounds. Without the conclusion of multilateral agreements, there would be no need to establish the specific infrastructure in question. This is not the case for trade-related infrastructure more broadly defined. There is thus a much less immediate link between trade agreements and that type of infrastructure, especially insofar as roads and ports are not only required to be able to make effective use of trading opportunities but are also essential for transport within countries or for non-trade-related transport across borders. Secondly, insofar as countries enter WTO negotiations with the aim of improving their economic position, and if it turns out that for agreements to work fairly they are going to have to contribute a lot of resources to help build infrastructure in other countries – this would presumably be a disincentive for entering into negotiations in the first place. At the same time, the restricted scope of the duty of assistance within the WTO does not mean that other duties of justice beyond borders might not require funding for infrastructure like roads and ports.

What gives rise to this duty of assistance in the multilateral trading system? In the WTO, different member states will be able to make different use of trade rules which improve market access, and some countries, presumably poorer ones, will have fewer chances to make use of market access than others as a result of their poor infrastructure. Due to extant infrastructure inequalities, some countries have to invest substantially more than others to be in a position to generate benefits from the trade agreement. The cooperative venture of collectively governed trade liberalisation thus involves more severe challenges for some countries to actually benefit from multilateral trade agreements than for others. From a normative point of view, it seems unacceptable to establish a supposedly mutually beneficial trade regime without assisting those who will foreseeably be challenged to actually benefit from it and, for the above-mentioned reasons, this seems to be especially relevant in the multilateral trading

system in the context of recent and ongoing negotiations regarding non-tariff trade barriers like standards and other regulations in new areas. While WTO member states have a negative duty not to harm, the indictment at stake is not harm insofar as poor countries are still likely to benefit overall, compared to a situation without an agreement. The assistance measures in question are thus not a compensation for the violation of a negative duty not to harm. Rather, the argument is that there is a positive duty to provide assistance such that all member states can benefit from market access provisions of multilateral trade agreements. This assistance should be regarded as an indispensable complement to formal market access offers in the context of multilateral trade negotiations.

The case would be different if the parties likely to be burdened by special challenges had a passable chance to stay away from the WTO or a better chance to shape multilateral agreements in accordance with their needs. Yet, to the extent that staying away is not an option and to the extent that less powerful countries have entered the WTO due to a lack of better alternatives and have little power to shape the negotiations, and insofar as they confront special, severe challenges to actually benefit from membership, those who do not need to cope with analogous challenges should employ their benefits to lessen the weight of the special challenges faced by the former. The relevant criterion for the duty of assistance is the existence of inequalities in infrastructure between the member states: member states with poor infrastructure which prevent them from gaining from trade agreements, presumably the poor member states, should receive assistance so that their gains are more commensurate with those of other countries. At the same time, this by itself does not mean that gains have to be distributed in the specific way that the Fair Distribution image recommends. The implicit principle of distribution might be different from the one that Fair Distribution recommends although both types of principles will be comparative or relative in nature. The relevant difference between the Effective Market Access and the Fair Distribution perspective is one of scope.⁷ The Effective Market Access view is only interested in the distribution of the gains in those areas where poor countries are being penalised by having inadequate infrastructure as discussed above.

Who has the remedial responsibility to assist in establishing and creating the needed prerequisites in order to make the gains of those member states with poor infrastructure more commensurate with those of other countries? Making use of David Miller's (2007) "connection theory" of remedial responsibility, I suggest that the rich and presumably powerful WTO member states should be

7 I am grateful to an anonymous reviewer for pressing me on this point.

considered remedially responsible because they are connected to the situation of the disadvantaged countries in several ways.⁸

First, in order to find an answer to the forward-looking question of remedial responsibility, we should examine backward-looking outcome responsibility, i.e. “whether a particular agent can be credited or debited with a particular outcome” (Miller 2007, p. 87). We need to know who has helped to bring about the situation that demands remedy in order to decide how to distribute the costs of solving it fairly. There is a presumption that where A is outcome responsible for a bad situation for B, A may have to compensate B or make redress (Miller 2007, pp. 87–90). I presume that A can be held outcome responsible for the consequences of his or her actions, insofar as these consequences are both foreseeable and avoidable.⁹ Against that background, I suggest that the richer and more powerful WTO member states bear stronger outcome responsibility insofar as they contribute more to bringing about the situation at hand, i.e. an agreement that some members can easily comply with while others cannot without making additional investments, if and when they pressure less powerful states to accept such an agreement while the consequences of this agreement are both foreseeable and avoidable.

This is arguably what happened in the Uruguay Round, at the end of which the WTO was established on the basis of GATT. When most developing countries stated their intention not to sign up to the deal that was on the table, including cost-inducing standards and new rules on intellectual property rights, the USA and the EU withdrew from GATT 1947 and in 1995 joined the WTO, which they constructed as a “single undertaking”, leaving reluctant member states no affordable alternative but to sign the whole package of new WTO obligations. Some developing countries would have preferred the old GATT over the newly established WTO, but they consented to the WTO because they would have been in an even worse position had they remained members of GATT 1947 after the withdrawal of the USA and the EU (Steinberg 2002). Insofar as this case of making use of bargaining inequalities amounts to taking unfair advantage, i.e.

8 Note that, in the WTO, rich countries will tend to be the powerful ones. Poor countries, on the other hand, due to their small market, have few market-access concessions to offer and thus limited negotiating power and leverage.

9 These two conditions for outcome responsibility are stronger than causal responsibility but weaker than intentionality: they imply that we can hold agents responsible for the outcomes of their actions even if they do not intend them, insofar as they can foresee the consequences of their actions to a reasonable extent and have a certain degree of control over these consequences. Insofar as all WTO member states have causal responsibility for the terms of a new trade agreement if they do not object to that agreement, the causal notion of responsibility does not necessarily identify the rich states as being remedially responsible.

exploitation, and thus displays moral fault, this suggests that powerful states might also be held morally responsible because they deserve moral blame, and making them pay for assistance may be regarded as a way of expressing that blame.

Moreover, in addition to outcome and moral responsibility, an agent's responsibility for remedying a bad situation can be identified by examining the extent to which that agent has benefited from it (Miller 2007, pp. 102–103). This notion of benefit also points to the rich member states because, as empirical analysis indicates, they have indeed substantially benefited from the terms of the agreement and they have gained considerably more than poor countries. Last but not least, an agent's remedial responsibility can be identified by assessing the capacity of an agent to put the bad situation right (Miller 2007, p. 104). From that perspective, responsibility in the remedial sense again falls on the shoulders of the rich and presumably powerful states because they have the resources and the capacity to put the bad situation right. Overall, the above-mentioned connections point to rich and powerful states having the relevant remedial responsibility and a duty to provide assistance to those who lack the specific trade-related infrastructure that is required in order to effectively benefit from formal market access agreed upon in the context of multilateral trade agreements.

This in turn might generate the following question: why should a poor state that has simply not held it necessary to have the relevant infrastructure be able to simply shift the responsibility to other members who have to assist other countries in establishing the requisite infrastructure? Should these states not be held outcome responsible for lacking the needed infrastructure and thus bear the costs of establishing it? In light of the above discussion, I suggest that the answer will be “no”, insofar as poorer and less powerful states are unable to foresee what kind of infrastructure will become a prerequisite for making use of trading opportunities, in any case not until the end of the negotiations, because they are neither able to shape the new trade rules nor in a position to reject the terms of the agreement once they are on the table. In these cases, the lack of necessary infrastructure and the outcome responsibility for that lack pull in the same direction and reinforce each other. Note that rich states in turn should not receive assistance even in the unlikely case that they lack the required infrastructure, insofar as WTO rules and standards reflect those that are already in place in the rich member states. While poor countries will have problems affording the needed infrastructure, rich countries have the funds to establish or improve their infrastructure if there is a need to do so. Moreover, rich states arguably have the bargaining power to make sure that they are not consenting to an agreement that would generate excessive costs for them.

In sum, I have assessed the significance of the fact that recent trade agreements and ongoing negotiations go beyond a focus on mere market access in terms of reducing tariffs and I have argued that it is important not to directly compare market access offers received and offers given by WTO member states without taking a closer look at the nature of these offers and what they imply for different types of countries. During the last round of negotiations, the Uruguay Round, there was no symmetry in the different trade measures on which the trade partners made offers, since more traditional, usually mutually beneficial, liberalisation was exchanged for cost-inducing standards. Why would such an agreement be concluded? Potential reasons include the lack of knowledge about the demands and consequences of implementing cost-inducing standards and, as indicated above, differences in bargaining power among negotiation countries. Both the lack of knowledge and the presence of power inequalities suggest that notions of exploitation have played a role in the context of the conclusion of the Uruguay Agreement. This in turn suggests that what matters is the Exploitation image of trade. It is to such a perspective that I now turn.

4 The multilateral trading system and the exploitation view of trade

Risse and Wollner argue against a view of fairness in trade that entails *substantive* principles for the division of gains from trade. Instead, they defend, as they make explicit, “*procedural* approaches” (Risse and Wollner 2014, emphasis in the original) and propose to focus on exploitation. Exploitation, i.e. unfair advantage-taking, should indeed be an important consideration for fairness in trade – and in a theory of global justice that incorporates trade, both in non-ideal and in ideal theory. But can a plausible exploitation account of fairness in trade be formulated in purely *procedural* terms without reference to any sort of substantive normative principles?

This is questionable in light of the assertion that “the moral defect” of exploitation lies in the joint occurrence of a particular interaction and “a particular outcome” or “a certain distribution or transfer of benefits” (Risse and Wollner 2014). But can a plausible account of exploitation be formulated without reference to substantive principles about outcomes or distributions if an interaction “that would count as *coercive* or *oppressive* becomes *exploitative* if it generates a particular outcome and brings about a certain distribution or transfer of benefit” between exploiter and exploited (Risse and Wollner 2014,

emphasis in original)? Without offering a convincing answer to this question, it does not seem clear that the Exploitation image can be defined as a purely procedural approach.¹⁰

Which type of substantive standards might matter in the context of the Exploitation image of trade in the context of the multilateral trading system? Substantive principles can be distinguished, for instance, according to whether they are of a comparative nature or not. For example, in contrast to the comparative principle of equality, sufficiency refers to a minimum standard in absolute, non-comparative terms, where the nature of the principle suffices by itself to determine what is due to the claimant without concern for any other relational facts. This distinction matters for current global justice debates. While there is broad agreement that justice requires raising all human beings to a minimum threshold of sufficiency and that the scope of such non-comparative principles is global, it remains controversial whether comparative or relative principles like equality are applicable beyond states borders or not. I shall argue that the Exploitation image, once we take account of the problem of background injustices, can give rise to demanding substantive principles; resolving the problem of background justice in the multilateral trading system requires egalitarian principles of justice rather than merely sufficientarian ones.

Due to the focus on the multilateral trading system, I put the spotlight on interactions that should be regarded as exploitative even though they are mutually beneficial interactions to which both parties agree. I assess this case because it is highly relevant in the context of the multilateral trading system, both with a view to the objective of concluding mutually beneficial trade agreements under its auspices and in light of the WTO consensus principle.

So how could mutually beneficial and seemingly voluntary interactions be exploitative? Consider two parties, A and B, who come to a mutually beneficial agreement. It is true that, measured against a non-agreement baseline, such mutually advantageous agreements are beneficial for both parties. However, while A and B may both benefit from having an agreement rather than having none, they care about the different possible terms of the agreement and its consequences. Since the exploited party, say B, gains relative to the non-agreement baseline in the case of mutually beneficial exploitation, it seems better to allow that some allegedly unfair transactions can be mutually advantageous and then to proceed to ask what it is that makes such transactions cases of unfair advantage-taking.

10 In footnote 10, Risse and Wollner (2014) clarify that they refer to “procedural approaches” as those that focus on “how the participants in trade have been treated in the trading”, acknowledging that “distributive principles may still enter as these ideas are spelled out in detail”.

In the context of multilateral trade negotiations, arguably the most relevant case of exploitation is that agents voluntarily enter into transactions in which they are exploited because of background inequalities to which they are deleteriously subjected.¹¹ In the WTO, this is highly relevant, for example, when stronger member states use their bargaining power as a special advantage to induce the other parties to engage in relatively less beneficial agreements.¹² The WTO case thus underlines that free and fair agreements should be identified by more than the absence of direct coercion (Brandi 2011). They also have to be made against background conditions which entail that both parties have enough bargaining power to shape the terms of the agreement at stake or reject it. In sum, mutually advantageous but potentially exploitative interactions arise when both parties benefit in comparison to the non-agreement baseline but where the distribution of the gains is unfair to one party.

To determine whether the resulting distribution of a mutually beneficial interaction is unfair, it therefore seems that we must know the adequate “fairness baseline”, which in turn requires us to refer to substantive criteria about what the fair outcome of the transaction at issue would be. It thus appears as if we have to put forward some independent, substantive criterion of what represents a fair division of the cooperative surplus of trade. Does this in turn suggest that we need to necessarily make use of the Fair Distribution image of trade? This would pose a challenge to the view put forward by Risse and Wollner (2014), who argue that there is no plausible account of fairness in trade that entails substantive principles for a fair division of trade benefits.

However, there may be a way out if we put the spotlight on potential background injustices in the multilateral trading system.¹³ Since the fair outcome is the outcome that a non-disadvantaged party would accept, as mentioned above, the background conditions of the transaction in question are crucial. Therefore, in the remainder of this section, I shall assess what the background starting positions of the agents have to be, rather than what the outcome or distribution has to be, in order that interactions are not exploitative.

11 For instance, Goodin’s (1985) notion of taking unfair advantage of the other’s vulnerability, Sample’s (2003) Kantian notion of exploitation or Vrousalis’s (2013) notion of domination for self-enrichment can account for such cases of exploitation.

12 This case can be regarded as belonging to the third type of exploitation spelled out by Risse and Wollner (2014, pp. 30–32), namely “exploitation as domination”. Insofar as the lack of access to information is a problem in the WTO, the second type, namely “exploitation as taking advantage of the vulnerable” (pp. 28–29), can also be regarded as relevant.

13 The remainder of this Section is in part based on Brandi (2011), which offers a more extensive discussion of the problem of background injustice in the WTO.

The bottom line is that the background conditions have to be such that free and fair interactions are safeguarded. This is why, in the context of exploitation, it is not only particular interactions but the structure of trade that merits normative attention. The reason is that the consequences of a large number of free and fair interactions will have the propensity to undercut, in the longer run, the conditions that enable free and fair interactions in the first place (Rawls 1993, p. 266; 2001, pp. 52–55). For instance, those with greater bargaining power can use this power to shape the background against which interactions occur, to their own advantage, which in turn enables them to increase their benefits in potentially exploitative ways (Pogge 2001). The collective result of a series of voluntary choices made by individuals may create inequalities that then enable exploitation to occur. Moreover, where large inequalities already exist, choices or interactions may not be voluntary in the normatively relevant sense, because of the unfair institutional background structure in which they take place. Free and fair agreements have to be made against just background conditions which entail that both parties have a satisfactory array of alternative options or enough bargaining power to shape the terms of the agreement at stake or reject it.¹⁴ In the case of the multilateral trading system, smaller and poorer members, in particular, often have no genuine choice but to agree. When we can no longer guarantee that the conditions for free and fair agreements are satisfied, we encounter a case of background injustice (Ronzoni 2009).

Preserving just background conditions in turn necessitates creating and maintaining institutions because rules for individual conduct simply do not suffice to safeguard background justice (Rawls 1993, p. 266). Thus, when trade interactions are sufficiently intense to undermine just background conditions, there is an obligation to create institutions that can handle the challenge of preserving background justice. The normative standards that are relevant for such background institutions exceed those that apply to individual transactions and agreements and will unavoidably involve “patterned principles” (Nozick 1974), that is, principles that focus on safeguarding certain relationships between agents by maintaining some *substantive* pattern (Ronzoni 2009, p. 240).

What would the Exploitation image of trade imply in light of potential global background injustices in the case of international trade and the WTO? At first sight, it may seem as if background structures have to be only “sufficiently” just for background justice, for instance to maintain free and fair

¹⁴ Inequalities do not always create opportunities for exploitation. But inequalities are conducive to unfair advantage takings insofar as they undermine the position of one party to shape the terms of the transaction or agreement at stake or reject it. I am grateful for an anonymous reviewer for pressing me on this point.

agreements among member states, to be safeguarded in the context of the WTO. But if the relevant problem of background justice is caused by power asymmetries, such as is arguably the case in the WTO, then the solution to the background injustice at stake requires us to concentrate on the metric of power. A focus on power in turn implies that solving the problem of background justice demands *relative* principles of justice rather than absolute sufficiency. Power consists in the capacity to do certain things or to yield certain outcomes and is an inherently relative concept: the power of an agent increases or decreases according to the relative position of others. This suggests that background injustice, whenever it is caused by power asymmetries, generates duties to “distribute” or “balance” power more or less equally and in so doing gives rise to distributive duties of justice, whether in the domestic context, in the WTO or potentially beyond it.

5 Conclusion

I have made two main arguments. To begin with, I have argued that there is a plausible account of fairness in trade that entails principles for a fair division of trade benefits among states – and a baseline for that matter – once we put the focus on the multilateral trading system, i.e. the GATT/WTO system. Gains from trade that have been generated in the context of multilateral trade agreements should be fairly divided. Second, I have discussed what it would mean if the Fair Distribution image of trade were to fail. I have argued that even if there were no plausible account of the Fair Distribution image, fairness in trade can still generate potentially far-reaching normative considerations. I have illustrated this point in the context of the demand to enable trade partners to make use of formal market-access opportunities and in the context of the Exploitation image of trade. I have argued that poor countries should receive assistance for certain types of infrastructure such as adequate testing facilities for the health and sanitary standards that their trading partners demand in order to make effective use of the market access granted by other WTO members. This assistance should be regarded, from a trade fairness perspective, as an essential complement to market access in the context of multilateral trade negotiations. Moreover, I have underlined that even if we were to restrict our focus to exploitation, fairness in trade can still generate potentially far-reaching normative considerations insofar as solving the problem of background justice in the multilateral trading system due to power asymmetries may generate the need for egalitarian principles of justice.

I will end by asking how the different views of fairness in trade discussed in this paper relate to theories of global justice. Let us begin by asking how the Fair Distribution image and its principles for fairly dividing gains from trade among states relate to theories of global justice. On the one hand, these principles challenge statist positions such as those of Thomas Nagel (2005) or Michael Blake (2001) by arguing that there is, on the basis of existing trade practices in the context of the multilateral trading system, a justification for principles of distributive justice beyond state boundaries. On the other hand, they differ from cosmopolitan accounts of justice because they confine the scope of the relevant distributive principle to trade benefits and they focus on states rather than individuals.

The version of the Fair Distribution image of trade I propose, the Multilateral Trading System approach, does not only offer a plausible baseline that provides a response to Risse's and Wollner's autarky-related objection but also avoids another objection to James's account. As Risse and Wollner (2014) point out, James's version of the Fair Distribution image implies that gains from trade are subjected to their own principles and thereby exempted from being subject to domestic principles of justice. They regard this as problematic insofar as it means that, because of trade, we need to change the principles that apply to domestic distribution. In contrast, the version of the Fair Distribution image of trade that I propose does not interfere with domestic gains and domestic principles of justice as James's account does. The Multilateral Trading System approach is explicitly limited to the trade benefits generated on the basis of agreements between member states of the multilateral trading system. Only the part of the outcomes of domestic activity that can be linked to these multilateral trade agreements is subject to international principles concerned with trade – but not gains from trade more generally. The specific benefits generated on the basis of trade agreements are to be distributed fairly among member states but *within* these states, as mentioned above, principles of social justice require that the overall distribution of benefits and burdens in society be just, not merely the distribution of those specific benefits and burdens that are generated on the basis of international trade.

But let us assume, for a moment, with Risse and Wollner, that there is indeed no plausible account of fairness in trade that entails substantive principles for a fair division of trade benefits. Firstly, if we accept the plausibility of the argument that assistance for certain types of trade-related infrastructure should be regarded as an indispensable accompaniment to the market-access agenda in the context of the multilateral trading system, this has important consequences for the role of trade in a theory of global justice. A number of scholars suggest that pre-existing inequalities not due to trade are beyond the scope of principles of fairness in trade. For example, Van Parijs (2012, pp. 639–640) characterises fairness in trade as “peripheral justice” that leaves these international pre-existing inequalities off

the table and only concerns the division of the cooperative surplus of the trade gains that have been generated as a result of a trade practice or a newly adopted WTO agreement. James (2012) also argues along those lines. This position is at least in part undermined once we agree that assistance for certain types of trade-related infrastructure, for example, in the form of standard-testing facilities, should be an indispensable accompaniment to market access in the context of the multilateral trading system. Measures such as these, in turn, would contribute to reducing pre-existing inequalities between different countries. This is one of the ways in which fairness in the multilateral trading system – even if it does not entail the division of gains from trade – can reinforce, and perhaps extend, international assistance measures warranted by humanitarian assistance or other trade-independent principles of global justice.

Yet, even if we were to rely exclusively on the Exploitation image of trade, once we take account of the problem of background injustices due to power inequalities, the exploitation perspective can be interpreted as giving rise to demanding normative principles in the context of the multilateral trading system to distribute or balance power more equally. One potential option to better balance or level down power would be to dismantle – or weaken the competences of – the institutions through which power is wielded. This might be an option in cases in which it is the institution in question that empowers the relevant players in the first place. However, in many cases, power asymmetries exist independently of the institutions in which power is exercised. In fact, the WTO arguably reduces rather than increases the extent to which power is exercised. The multilateral rule-making dimension of the WTO, in combination with its dispute-settlement body, limits the impact of power asymmetries on international trade relations – especially in comparison to a situation where trade rules are absent, but also in comparison to bilateral and regional agreements in which powerful players are more likely to get their way. Thus, it seems more promising to explore ways in which the extent to which power plays out in certain international institutions can be further reduced, rather than to dismantle or weaken the institutions at stake – which might end up increasing the degree to which power can be exercised in the international arena.

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