

Realistic reform of international trade in resources
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Many readers of Thomas Pogge's work have found it opens what is for them a new world:

We live in extreme isolation from severe poverty. We do not know anyone earning less than \$30 for a 72-hour week of hard, monotonous labor. The one-third of human beings who die from poverty-related causes includes no one we have ever spent time with. Nor do we know anyone who knows and cares about these deceased – someone scarred by the experience of losing a child to hunger, diarrhoea, or measles, for example. (4)¹

This is the world of 18 million premature deaths every year from poverty. “If developed Western countries had their proportional shares of these deaths, severe poverty would kill some 3,200 Britons and 16,000 Americans per week. Each year, 14 times as many US citizens would die of poverty-related causes as were lost in the entire Vietnam War.” (104) It is in fact our world, which we never knew was there.

How could it be that this world is there without our realizing that it is the same world on which we stand every day? “The global poor,” Pogge says, “who labor all day for a few dollars a month, are unable to cause us the slightest inconvenience and unable even to alert us to their plight.” (133) These part of the planet have been kept, for us, out of sight:

Our world is arranged to keep us far away from massive and severe poverty and surrounds us with affluent, civilized people for whom the poor abroad are a remote good cause alongside the spotted owl.²

¹ All parenthetical references are to pages in Thomas Pogge, *World Poverty and Human Rights*, second edition (London: Polity Press, 2008).

² Pogge, *World Poverty and Human Rights*, first edition (London: Polity Press, 2002), p. 26.

Pogge's greatest public impact over the past 20 years has been to force the world's rich to see the world's poor. His statistical inventories and depictions of the manifestations of poverty in powerlessness, disease, and death, have been startlingly eye-opening.

Having made vivid these distressing realities, Pogge adds a second, disturbing thought. We are, to some extent, responsible for our world being as awful as it is:

There is a simple two-part explanation for why our new global economic order is so harsh on the poor. The design of this order is fashioned and adjusted in international negotiations in which our governments enjoy a crushing advantage in bargaining power and expertise. And our representatives in the international negotiations do not consider the interests of the global poor as part of their mandate.... Our representatives ruthlessly exploit their vastly superior bargaining power and expertise, as well as any weakness, ignorance, or corruptibility they may find in their counterpart negotiators, to tune each agreement for our greatest benefit... The cumulative result of many such negotiations and agreements is a grossly unfair global economic order under which the lion's share of the benefits of global economic growth flows to the most affluent states. (26-27)

Our world is not just bad, Pogge says, it has been made bad. And it has been made bad by people working for us, who use our great collective power to wring from the world more wealth for us while squeezing the poor to death. This thought is resisted even by many who admit the intolerable nature of global poverty. For Pogge, this resistance is again the result of a kind of blindness. The mechanisms by which the global order is formed and then reformed in our favor are largely unseen by most citizens. Part of the genius of Pogge's writing is to connect dark events like the renegotiation of a convention on the law of the sea, or the implementation of an international treaty on intellectual property rights, with the painful fading from existence of thousands of human lives. (131-2, 224-29) We squint at the world while allowing our politicians to continue to fill our pockets. We in this way help to create, Pogge suggests, a counter-Panglossian dystopia: "the worst of all possible worlds to which the strong can morally reconcile themselves." (6) We help to create, that is, "the vast evil of global poverty." (142)

1. Pogge's work

Anyone surveying Pogge's writings on justice for the past 20 years will be struck first by the range of its subjects. More than any other contemporary theorist, Pogge has vetted power, poverty and disadvantage, and advanced progressive proposals for reforms. Pogge caused a storm with an article on the moral priorities of international aid organizations, where he argued that these NGO's should focus their resources on projects that favor the poor who can be cheaply aided instead of the poor whom it is expensive to help. He examined the ethics of Western pharmaceutical companies testing new drugs on poor foreigners. He scrutinized the propriety of armed humanitarian intervention, paying particular attention to the actions of the UN and the US during the Rwandan massacres. He lectured on the real implications of the West's "war on

terrorism.” He excoriated the World Bank’s methodology for assessing the extent of global poverty, and outlined an alternative framework. He asked what claims people with disabilities have on the social institutions of their countries. He studied what language instruction should be given in public schools to children whose home language is not the dominant one in the society. He explored whether democracy could be made more robust by making constituencies self-forming instead of leaving them geographically defined.³ And more as well—and no doubt there is more still to come.

Beyond the range of Pogge’s work what strikes the reader is its tone. The moral tone of everyday life for many born in rich countries is complacency. In Pogge’s writing one feels moral urgency. This urgency can be felt in the stylistic feature of Pogge’s writing most present to his readers, which is its relentlessness. The style is dense and demanding. The style says: ‘This is hard, but important; and we can do something about it.’ Should we not be impatient with a global plan—progressively and disingenuously watered down by the governments of rich countries—to reduce severe poverty by only half over a span of almost two decades? (11-13) Let’s get on this, Pogge’s writing suggests, and stay on it. On issues like these we must be uncompromising.

There are two further features of Pogge’s work that stand out, this time viewing this work from a theorist’s perspective. The first is how well-stocked this work is conceptually. Pogge gives us (at times almost in passing) ready analyses of some of the hardest ideas in the international theory: of human rights, for example, and of cosmopolitanism, and of sovereignty. (52, 70; 175; 183). Moreover, in order to describe the realities of the global order Pogge has also fashioned new concepts: explanatory nationalism, loopholes in moralities, the “sucker exemption,” the distinction between institutional and interactional understandings of moral constraints, the might-is-right principle, radical inequality and more. Every theorist can appreciate, both while working and on reflection, this new collection of conceptual tools.

The second feature of Pogge’s writing that commends it to theorists can only be called its honesty. Pogge always calls them as he sees them. One gets a sense of how deeply this is true by surveying Pogge’s many discussions of Rawls.⁴ Pogge is at once one of Rawls’s most fertile

³ Thomas Pogge, “Moral Priorities for International Human Rights NGOs,” in Daniel A. Bell and Jean-Marc Coicaud, eds., *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations* (Cambridge: Cambridge University Press, 2007), pp. 218-56; “Testing Our Drugs on the Poor Abroad,” in Ezekiel Emanuel and Jennifer Hawkins, eds., *Exploitation and Multi-National Research* (Princeton: Princeton University Press, forthcoming); “Moralizing Humanitarian Intervention: Why Jurying Fails and How Law Can Work,” in Terry Nardin and Melissa Williams, eds., *Humanitarian Intervention, NOMOS vol. 47* (New York: New York University Press, 2005), pp. 158-187; “How Not to Count the Poor,” (with Sanjay Reddy, in Sudhir Anand, Paul Segal and Joseph Stiglitz, eds., *Debates in the Measurement of Global Poverty* (Oxford: Oxford University Press, forthcoming); “Justice for People with Disabilities — The Semiconsequentialist Approach,” in Leslie Francis and Anita Silvers, eds., *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* (New York: Routledge, 2000), pp. 34-53; “Accommodation Rights for Hispanics in the US,” in Jorge Gracia and Pablo de Greiff, eds., *Hispanics/Latinos in the United States: Ethnicity, Race, and Rights* (New York: Routledge, 2000), pp. 181-200; “Self-Constituting Constituencies to Enhance Freedom, Equality, and Participation in Democratic Procedures,” *Theoria* 99 (2002): 26-54.

⁴ To date Pogge has over twenty publications on Rawls, ranging in critical posture from *Realizing Rawls* (Ithaca: Cornell University Press, 1991) to “The Incoherence between Rawls’s Theories of Justice,” *Fordham Law Review* vol. 72, no. 5 (2004): 1739-1759.

interpreters, and also one of Rawls's severest critics. Aristotle, at the start of his critique of Plato's doctrine of the forms, exhibits the honesty that characterizes Pogge's writing in this passage:⁵

Perhaps we had better examine the universal and consider critically what is meant by it; although such a course is awkward, because the forms were introduced by friends of ours. Yet surely it would be thought better, or rather necessary (above all for philosophers), to refute, in defense of the truth, even views to which one is attached; since although both are dear, it is right to give preference to the truth.

2. The harm argument and feasibility

What has attracted so many to Pogge's writings are his studies of particular global institutions, why these institutions have such great impact on the lives of the poor, and how they might be reimagined. Concerning Pogge's argument that the affluent are harming the world's poor the reaction has been more mixed. This is the argument that affluent individuals are harming the poor insofar as they actively cooperate in designing or imposing institutions that foreseeably cause human rights deficits that they (the affluent) know could be avoided. There have been several scholarly appraisals of this argument, to which Pogge has replied forcefully.⁶ My sense, however, is that many who hear Pogge's arguments remain uncertain about the claim of harm itself. Many find the descriptions of the human rights deficits compelling, and the proposal for reform intriguing. Yet they tend to understand the appeal to "harm" as only the idea that things are bad and we might be able to do something to make them better.

In part this hesitancy about the harm argument seems rooted in the fact that the natural home for the concept of harm is what Pogge would call an interactional setting, not an institutional one. Hitting is harming; paying taxes may not seem available for that kind of evaluation. This hesitancy may also result from most affluent individuals feeling that they have no rational strategy to relate differently to national or global institutions. Even fairly wealthy people feel that (short of risking prison) they have little choice but to support national and global institutions by paying taxes and obeying other laws. So even if these wealthy people were to agree that they harm by upholding the global order, they may feel that they are being forced to harm. And being forced to harm normally cancels any moral responsibility to compensate for harms caused.

The main source of hesitancy in accepting Pogge's harm argument, however, appears to come from uncertainty that his proposals for the reform of global institutions are realistic, and that they will bring the advantages that he asserts they will. In order to carry through on his harm argument, Pogge must show not only that current global rules generate very bad consequences, but that we can be fairly certain that different rules would do better. As he says, in order to prove harm, "We must be able to be confident that the alternative institutional design would do much

⁵ Aristotle, *Nicomachean Ethics*, trans. J. Barnes (New York: Penguin, 2003), p. 10.

⁶ See for example the critical essays and Pogge's reply in the symposium on *World Poverty and Human Rights* in *Ethics & International Affairs* vol. 19, no. 1 (2005).

better in giving participants secure access to the objects of their human rights.” (26) Without this confidence in the possibility of a superior alternative we are left with the conclusion only that things are bad, instead of the conclusion that we are making them worse than we know they should be.

It is the feasibility of Pogge’s recommendations for institutional reform that will be studied here, with a focus on one area of possible reform in particular. One can see the issue of feasibility absorbing increasing amounts of Pogge’s attention as his work on global justice has unfolded over the past 20 years. In the articles of the 1990’s a concern for feasibility is present but certainly not central. For example, in “Cosmopolitanism and Sovereignty” there is only a single paragraph asserting that the article’s major reform agenda to disperse sovereignty away from the state will produce greater global peace and security than the statist status quo. (187-88) And in Pogge’s proposal for the global resources dividend there are but two paragraphs that sketch how countries that fail to meet their obligations to contribute to the scheme should be sanctioned by other countries. (213-14)

By the time we reach the work of the 2000’s, however, Pogge has made feasibility the hub of his investigations. In some articles one can see Pogge working through possibilities for reform on the page. For example, in the article on incentivizing the creation of essential medicines to combat the diseases that afflict the poor Pogge first asks whether differential pricing of drugs in rich and poor countries could work. He shows why this is a dead end, and starts afresh. He then presents an entire reconceptualization of the global patent system for essential medicines, paying equal attention to how this new system *would* work and why it *could* work given the capacities and interests of the major players involved.

Pogge’s proposal for a parallel drug patenting system has grown into a major research initiative, which is one of the most progressive and potentially beneficial contemporary proposals for reform of global institutions.⁷ Feasibility is here center stage. Pogge has worked with epidemiologists, economists, lawyers, corporate leaders and representatives of international health organizations to ensure that the initiative is more than a theorist’s dream. This initiative now sets a standard for serious, innovative responses to global poverty. Pogge has created by example the sense that morally alive researchers should either be critiquing his proposals in order to improve them, or should be advancing proposals for institutional reform as bold and sophisticated as his own.

Whether Pogge’s proposals for reform are feasible is crucial for his harm argument. As above, unless Pogge can give us confidence that better institutions are available he cannot prove that we are harming the poor by imposing the current institutions upon them. Yet the importance of Pogge’s proposals also transcends the harm argument. Those who feel the awful toll of poverty, and understand the malleability of institutions, will look for ways to make global institutions better for the poor. If Pogge has put forward feasible proposals for reducing severe poverty those proposals will attract people of good will even if they do not follow Pogge in pursuing the harm argument.

⁷ See www.yale.edu/macmillan/igh/.

3. The international privileges and the claim of imposition

Pogge singles out two features of the current global order as particularly ripe for reform: the international resource and borrowing privileges. In the world as it is:

Any group controlling a preponderance of the means of coercion within a country is internationally recognized as the legitimate government of this country's territory and people—regardless of how this group came to power, of how it exercises power, and of the extent to which it may be supported or opposed by the population it rules.... [This means] that we accept this group's right to act for the people it rules and, in particular, confer upon it privileges freely to borrow in the country's name (international borrowing privilege) and freely to dispose of the country's natural resources (international resource privilege). (118-19)

Pogge says that these “two aspects of the global economic order, imposed by the wealthy societies and cherished also by authoritarian rulers and corrupt elites in the poorer countries, contribute substantially to the persistence of severe poverty.” (121)

The remainder of this chapter will examine one of these privileges – the international resource privilege – and proposals for how it can be restructured. This is a vital topic because Pogge is clearly right that the current international resource privilege generates a great deal of misery, and that if it can be reformed it must be. Before turning to the specifics of the resource privilege, however, we might pause to consider Pogge's assertion that these privileges “are imposed by the wealthy societies.” Is it in fact correct that “the citizens and governments of the wealthy societies” (121) dictate that these two international privileges must be in force?

In order to show that wealthy societies are imposing the international privileges on the world it is of course not sufficient to show that wealthy societies are benefitting from these rules. (Disaster victims put first in line for medical attention benefit from the rules of triage, but this does not establish that disaster victims impose those rules.) Nor is it sufficient to show that rich countries could, if they tried, change those rules. To take an analogy, the American president could, if he made it a high enough priority, likely change any number of features of global institutions: getting India a permanent seat on the UN Security Council, for example, or expanding the drug-testing regime of the Olympic games. Yet these facts do not in themselves show that the American president imposes the global institutions that we now see. And the mere fact that the ideas of the national borrowing and resource privileges originated in the rich northern countries (if indeed they did) does not show that these rich countries are imposing these features of institutions, any more than origination of ideas would show that the North is imposing on the world the international rules for postage stamps.

The question of how Pogge would redeem his assertion that rich countries are imposing the international privileges on poor countries is interesting, because from a *historical* perspective the truth seems to be closer to the reverse. This is apparent from the history of the twentieth century.

The twentieth century saw two monumental movements for progressive reform of international institutions, of which Pogge focuses preponderantly on only one: human rights. The second movement, which was at least as important for advancing human well-being and dignity, was anti-colonialism. The rule for resources before the anti-colonial movement was that the colonial powers had rights to dispose of the resources of their colonies.

The epochal and bloody struggle of anti-colonialism was, to a great extent, nothing less than the struggle to replace the old colonial rules for resources with the national resource and borrowing privileges that we have today. These two privileges were seen by the anti-colonial movements as crucial incidents of self-determination. The significance of this transition from colony to self-determining nation can be seen in the urgency, even the pride, with which these crucial anti-colonial rights are asserted within the international legal instruments that proclaim the former colonies' victory. For example, the important African (Banjul) Charter of 1981 declares that:⁸

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... States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.... States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

As a matter of historical fact, the international borrowing and resource privileges were wrested by the poorer countries away from the wealthier ones, often through violence and at the cost of many thousand lives. It would not be inaccurate to summarize this history by saying that the great triumph of many poor societies in the twentieth century was to impose the current order of international privileges on the wealthy societies that had formerly denied these privileges to them.

Now Pogge might not believe that this historical narrative affects his assertion that the rich are imposing the two-privilege system on the poor. His readers will know that he has argued against using historical baselines to analyze whether the rich are currently *harming* the poor.⁹ Pogge might similarly argue that we should not take a historical perspective when evaluating whether the rich are currently *imposing* these major structural features of the current global order. He might favor instead a more complex subjunctive analysis of what imposition comes to. He might, for example, identify the agency that imposes a system of rules as that set of agents who could and would together effectively resist attempts by others who are bound by the rules to change those rules (or, perhaps, as that set of agents that appears in all or almost all such sets).

⁸ African (Banjul) Charter on Human and Peoples Rights, Article 21, clauses 1,4, 5.

⁹ Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor," *Leiden Journal of International Law*, vol. 18, no. 4 (2005): 717-745, 728-9.

Subjunctive analyses of “imposition” would be intriguing, if extremely complex, analyses to carry through. Analyzing who in this sense imposes the TRIPS agreement that regulates the intellectual property regimes of WTO members would be one level of complexity. Analyzing who imposes major structural features of the global economy like the two international privileges would be an order of magnitude more complex. These analyses might well point to “the citizens and governments of the wealthy societies.” They could possibly point to other agents (say, members of the G20 developing nations) as well.¹⁰ Without some serious empirical discussion it is difficult to say.

What we can say is that Pogge’s assertions of “imposition” will be very controversial among social scientists, however the subjunctives are cashed out. For in passages like the ones quoted at the beginning of this section Pogge cuts against the foundational premise of mainstream international relations theory. This is the premise the global order is anarchic.¹¹ According to Pogge, the citizens and governments of the rich countries (perhaps in concert with the leaders of poor countries) impose the major structural rules of the global economic order like the two international privileges, meaning that in some sense these actors have coercive control over setting and enforcing these rules. According to mainstream international relations theory, there is no agent that has such coercive control—any more than there is such an agent in classic state of nature theories.¹² Pogge could perhaps draw on minority views within international relations (e.g., dependency theory) to support his denial of anarchy at the global level. Yet victory against the dominant theories in international relations—realism and liberalism in their many elaborations—will require a real fight.

My view is that the redemption of the claim of “imposition” would be worthwhile, but that this is again not the prime interest in Pogge’s work. Like the harm argument, Pogge’s assertion of imposition is not the main event. Pogge’s most urgent investigations concern whether the rules of the global order like the international privileges are in fact leading to significant oppression and poverty – and, if so, whether there are feasible paths to improving these rules. If Pogge has put forward realistic proposals for institutional reform, then, again, those proposals will attract people of good will even if they do not follow Pogge in pursuing the claim of “imposition.”

¹⁰ The G20 developing countries are Argentina, Brazil, Bolivia, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, and Zimbabwe.

¹¹ As Hedley Bull famously put it, “[A]narchy it is possible to regard as the central fact of the international system and the starting place for theorizing about it.” Hedley Bull, “Society and Anarchy in International Relations,” in *Diplomatic Investigations*, ed. Herbert Butterfield and Martin Wight (London: George Allen and Unwin, 1966), pp. 35-60, 35.

¹² “International politics takes place in an arena that has no central governing body. No agency exists above individual states with authority and power to make laws and settle disputes. States can make commitments and treaties, but no sovereign power ensures compliance and punishes deviations. This—the absence of supreme power—is what is meant by the anarchic environment in international politics.” Robert Art and Robert Jervis, *International Politics*, third edition, (Boston, Harper Collins, 1992), p. 1.

4. The resource privilege and the resource curse

The resource privilege is the international legal convention that any group sufficiently powerful to maintain coercive control over a territory's population holds the legal right to sell off that territory's natural resources. According to this customary rule, *might makes right*: specifically, might vests the legal right to sell a territory's resources to foreigners. Pogge contends that the resource privilege is very unlikely to be a rule that is part of a morally acceptable global economy:

How, for instance, can our ever so free and fair agreements with tyrants give us property rights in crude oil, thereby dispossessing the local population and the rest of humankind?... Not only is the oil taken away for our consumption (and much environmental damage done) without [the consent of the people of the country], but their tyrant is also propped up with funds he can spend on arms and soldiers to cement his rule. What is more, we are offering a prize to every would-be autocrat or junta anywhere: whoever can gain effective power by whatever means will have the legal power to... confer internationally valid ownership rights in the country's resources...

We authorize our firms to acquire natural resources from tyrants and we protect their property rights in resources so acquired. We purchase what our firms produce out of such resources and thereby encourage them to act as authorized. In these ways we recognize the authority of tyrants to sell the natural resources of the countries they rule. We also authorize and encourage other firms of ours to sell to the tyrants what they need to stay in power—from aircraft and arms to surveillance and torture equipment. (148)

The resource privilege, as Pogge says, is both suspect in principle and pernicious in its consequences. Indeed the resource privilege is a major contributing factor in one of the most significant poverty traps in the contemporary world: “the resource curse.”

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, and minerals. Less developed countries that gain a large portion of their national incomes from these extractive resources are subject to three overlapping resource “curses.” They are more prone to authoritarian governments, they are at a higher risk for civil wars and coup attempts, and they exhibit lower rates of growth. Several causal pathways explain the correlations between natural resources and these pathologies in political economy.¹³

First, resources correlate with authoritarianism.¹⁴ As Pogge says in the passage above, 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

¹³ Here and elsewhere I draw from Wenar, “Property Rights and the Resource Curse,” *Philosophy and Public Affairs* 36.1 (2008): 2-32.

¹⁴ Leonard Wantchekon, “Why do Resource Dependent Countries have Authoritarian Governments?” *Journal of African Finance and Economic Development* 5.2 (2002): 57-77.

security forces, spies, and weapons to put down domestic challenges to their rule.¹⁵ The money from resource sales can also free authoritarians from raising revenues through taxation, and so release them from financial accountability to the citizenry.¹⁶ Authoritarians supported by resource money can also use these funds as sources of patronage, bribing local leaders and buying off potential resistance movements.¹⁷

The second resource curse is civil conflict: civil war and coup attempts.¹⁸ 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.¹⁹ The presence of oil, gas 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 offshore oil) that will enrich whoever controls the national government.²⁰ The contribution of extractable resources to civil conflict has been affirmed by academics, nongovernmental organizations, and UN Security Council resolutions.²¹

Civil conflict is one reason that resource-rich countries are subject to the third resource curse: lower rates of growth.²² 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.²³ Even without civil conflict,

¹⁵ For example, the repressive Burmese regime remains in power partly by selling the country's natural gas to Thailand and using these revenues to buy weapons from India. The regime is being protected from UN sanctions by China partly in exchange for access to Burma's large energy reserves.

¹⁶ As in Turkmenistan, where large energy export revenues enable the authoritarian regime to keep national tax rates very low.

¹⁷ Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley, Calif.: University of California Press, 1997), pp. 58-64.

¹⁸ On resources and civil conflict see 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.

¹⁹ 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.

²⁰ 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).

²¹ See, for example, Oxfam, "Africa at the Crossroads," Oxfam Briefing Paper 19; Global Witness, *The Sinews of War: Eliminating the Trade in Conflict Resources* (London: Global Witness, 2006); UN Security Council Resolutions 1625 (2005) and 1653 (2006).

²² On resources and growth see Richard Auty, "Introduction and Overview" in *Resource Abundance and Economic Development*, ed. Richard Auty (Oxford: Oxford University Press, 2001), pp. 3-16.

²³ Paul Collier and Anke Hoeffler, "Civil War," Working paper (2005) (<http://users.ox.ac.uk/~econpco/research/pdfs/Civil-War.pdf>), p. 24.

resource-dependent economies are more vulnerable to growth-retarding economic shocks, adverse exchange-rate effects, and corruption.²⁴ 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.²⁵ Resource dependence is correlated, for example, with higher rates of child malnutrition, lower healthcare and education budgets, higher illiteracy rates, higher poverty rates, and lower life expectancy.²⁶

Of course abundant resources are neither necessary nor sufficient for authoritarianism, civil conflict or low growth. For example, Eritrea 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.²⁷ 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. The recent histories of Nigeria (oil), Sierra Leone (diamonds) and Angola (both oil and diamonds) illustrate the deadly effects of the resource curse on very large scales.

Equatorial Guinea is worth special attention as a particularly dramatic example of these curses. Equatorial Guinea is in central Africa, bordered by Gabon and Cameroon, ruled since 1979 by the strongman Teodoro Obiang. Obiang is the kind of autocrat who has not shied from himself proclaimed “the country’s God” on state-controlled radio, or from having his guards slice the ears of political prisoners and smear their bodies with grease to attract stinging ants.²⁸ 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 became the third-largest oil exporter in Africa.

Because of the huge influx of oil money, Equatorial Guinea now has one of the highest *average* incomes in the world: higher than that of Switzerland, Sweden, and Canada.²⁹ Yet almost all the income is at the top – the people have yet to partake in prosperity. *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

²⁴ Macartan Humphreys, Jeffrey Sachs, Joseph Stiglitz, “Introduction” to their edited volume *Escaping the Resource Curse* (New York: Columbia University Press, 2007): 1-20.

²⁵ Michael L. Ross, *Extractive Sectors and the Poor* (New York: Oxfam America, 2001), p. 8.

²⁶ Ross, *Extractive Sectors and the Poor*; Thorvaldur Gylfason, “Natural Resources, Education, and Economic Development,” *European Economic Review* 45.6 (2001): 847-59.

²⁷ Andrew Rosser, “The Political Economy of the Resource Curse: A Literature Survey,” IDS Working Paper 268 (2006).

²⁸ “Equatorial Guinea’s ‘God,’” BBC News, 26 July 2003; U.S. State Department, “Equatorial Guinea Country Report on Human Rights Practices (1998).”

²⁹ CIA, *World Factbook 2008*, “Rank Order – GDP – per capita (PPP).”

Hess, and has recently spent 55 million of these petro-dollars adding a sixth private jet to his fleet. Meanwhile raw sewage runs through the streets of the country's capital, three-quarters of the country's people are malnourished, and the majority of its citizens survive on less than what one could buy in the United States with \$1 a day.³⁰ The prospect of seizing that revenue stream 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 tied for 168th place out of the 179 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. Obiang's 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.³³ Given their situation, the people of Equatorial Guinea may well feel cursed by their country's resource wealth.

5. Pogge's Democracy Panel

In the twentieth century colonies fought to end colonial oppression and exploitation by wresting the resource privilege away from the colonial powers. Today within countries like Equatorial Guinea the resource privilege is in turn being used by bad regimes to oppress and exploit the country's population. These countries suffer from a kind of "internal colonialism," whereby bad regimes (funded by rich outsiders) treat the territory as a colony in the old style. These bad regimes exercise their coercive power, as the old metropolitan centers did, to maintain control over resource revenues for their own purposes. And like the old colonial powers, these bad regimes do whatever they must both to and for the people in order to keep the resources flowing. In countries like Equatorial Guinea, Sudan, and Burma what these regimes have been willing to do to the country's people is nearly unlimited, and what they have done for the people is often very little indeed. Whether Spain's past colonial rule of Equatorial Guinea was more inhumane than is Obiang's current "internal" colonial rule is a live question.

Pogge's work has been pivotal in bringing the contribution of the resource privilege to the resource curse to the attention of political theorists. Pogge has also been a leader in insisting on reform to the resource privilege so that it no longer does such great damage. To be feasible, as Pogge says, a reform to this aspect of the global order would have to generate its own support by being morally and prudentially appealing to the major players who would be affected by it. (224) The questions of feasibility is particularly intense with respect to the resource privilege because

³⁰ "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."

³¹ The *Economist* journalist Adam Roberts gives full treatment to the 2004 coup attempted by a group of international businessmen and mercenaries in *The Wonga Coup* (London: PublicAffairs, 2006).

³² http://www.transparency.org/policy_research/surveys_indices/cpi/2007.

³³ "Playboy Waits for his African Throne," *Sunday Times*, September 3, 2006.

of the tremendous economic and political stakes involved in the international trade in extractive commodities.

Oil, for example, is by far the most valuable resource that is traded across borders. Oil accounts for over half the value of all global primary commodity transactions.³⁴ 90% of the world's transportation runs on oil. Any proposal to deny the resource privilege to regimes in resource-rich countries will disrupt some of the current flow of oil. Such action will therefore need to be able to withstand the tremendous commercial and so political pressures to bring ever more oil to market. Oil companies are very powerful transnational actors. Four of the top five, and seven of the top 10, largest privately-traded corporations in the world are oil companies. 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. When one adds that any reform to the resource privilege will also have to be enforced for international sales of extractable resources beyond oil (such as natural gas, diamonds, copper and tin) the demand that such a reform be resilient only intensifies. The resource privilege, so deeply implicated in how rich countries get their most vital resources, will not be easily restructured.³⁵

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:

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. (169)

³⁴ The percentage of trade figure is from WTO, *International Trade Statistics 2007*.

³⁵ Pogge suggests in passing that a poverty-reducing alteration in the resource privilege would be a "minor reform" (263); but surely in terms of either political difficulty or divergence from current legal practice this must be an understatement.

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." (162) 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 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.

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. (171) 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, in itself, 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 are quickly becoming 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.³⁶ 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.³⁷

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. Indeed, this rather vague hope does not meet Pogge's own standards for success. To return for a moment to the harm argument, recall that by Pogge's own standards in order to prove harm, "We must be able to be confident that the alternative institutional design would do much better in giving participants secure access to the objects of their human rights." (26) Pogge's proposal for an amendment and a Democracy Panel cannot, as it stands, give us this confidence.

Elsewhere I have set out an agenda for reforming the international resource privilege that draws on Pogge's work but points in a different direction. This agenda frames the resource curse not as a democratic deficit but rather as a violation of property rights and national self-determination.³⁸ I believe that we can have more confidence in the feasibility of this agenda. Unless Pogge endorses that agenda, or some other proposal that is even more promising, he cannot make good on his claim that the members of wealthy countries are harming the world's poor by imposing the international resource privilege. And, more significantly, without a feasible proposal we will be missing a crucial asset in the drive to change global institutions so as to reduce repression and severe poverty.

³⁶ 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.

³⁷ 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 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.

³⁸ See cleantrade.org.

6. Grounding values, authoritative notice and enforcement

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.

The alternative for reforming the international resource privilege turns, as mentioned, not on democratic rights but on property rights. The critical 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 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.³⁹ 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 democracy in resource-rich countries.

We can now take a wider perspective on strategies for meeting the other challenges facing proposals to reform the resource privilege. Whether democracy or property is used as the grounding value, any proposal for reform of the resource privilege will need to give some account of what will put outsiders on notice that the minimal critical conditions for purchase of natural resources do or do not obtain within some country. Authoritative notice that the minimal conditions do not obtain will 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 any 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.⁴⁰

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

³⁹ Wenar, "Property Rights," p. 16.

⁴⁰ Pogge, *World Poverty*, p. 155-58.

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."⁴¹ Shafter is not as sanguine as Pogge about the United Nations: he worries that the inclusiveness of the UN would mean that the panel would be put under pressure by governments that do not meet the minimal conditions or that would have no compunction about subordinating the panel's aims to political bargaining.⁴² Shafter's alternative suggestion is for the panel to be embedded in a self-standing international organization, with a membership composed of "diplomatic political appointees from member states to the organization."⁴³

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.⁴⁴ 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 major 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.⁴⁵ And this suspicion, it must be admitted, is also widespread within the American

⁴¹ Jonathan Shafter, "The Due Diligence Model: A New Approach to the Problem of Odious Debt," *Ethics and International Affairs* 21.1 (2007): 49-67.

⁴² Shafter has similar worries about the UN Security Council filling the role of the panel. But see Seema Jayachandran and Michael Kremer "Odious Debt," *American Economic Review* 96.1 (2006): 81-92.

⁴³ Shafter, "The Due Diligence Model," p. 59.

⁴⁴ Pogge leaves this question open, mentioning both the political and judicial branches of rich countries' governments. Pogge, *World Poverty*, pp. 164-65.

⁴⁵ 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).

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) lift the resource curse 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. The advantage of this direct judicial solution is that it resolves the question of enforcement. Unlike an international panel, the rulings of domestic courts immediately bind all actors that operate within that court's jurisdiction.

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 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 have, 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 bright-line 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. I will describe this source of evidence for courts, and then close by noting how it could also be used within trade policy to complete the agenda of reforming the resource privilege.

7. The Freedom House ratings

The central principle of the property-based framework is that the natural resources of each country ultimately belong to the people of that country. This principle is deep within international law, and is here taken as read.⁴⁶ Accepting this principle that the citizens of a country should have final control over the country’s resources, the legitimacy of resource sales then turns on whether these owners could authorize anyone to sell their resources abroad. The argument of the property-based framework is that unless certain minimal political conditions obtain within a country, the people could not possibly authorize such sales.

The argument begins along familiar proprietarian lines. 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, neither the assent nor the silence of the owner can possibly authorize any sale of that owner’s property. In the context of peoples and their resources these three conditions require that citizens must have at least minimal civil liberties and political rights. There must be, that is, at least some absolutely minimal press freedom if citizens are to have access to information about what resource deals the regime is making. The regime must not be so deeply opaque that it is impossible for the people to find out what happens to the revenues from resource sales. Citizens must be able to pass information about the regime 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 sales: at least a

⁴⁶ The principle of national ownership is discussed in Wenar, “Property Rights,” pp. 9-12. The principle is affirmed in, for example, in Article 1 of both of the major human rights covenants.

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 authorization. Absent these conditions, the people's silence is just silence. In countries where these minimal political conditions do not obtain the people cannot authorize resource sales, and so no regime can pass good title of the territory's resources to an international corporation. Therefore absent these conditions, any corporation that accepts resources from a regime in that country is receiving stolen goods. Possession of stolen goods will then be the subject of litigation in rich-country jurisdictions against international resource corporations such as the oil majors.

The strategy of litigation returns us to the questions of what standards can be used as evidence in for example American courts that the minimal political conditions above are lacking within some country. To rule that an international resource corporation has received stolen resources from a foreign regime American courts will, as we have seen, be aided by public, bright-line standards that establish that these minimal political conditions in some country are unfulfilled.

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 Account (MCA) as a mechanism for distributing development aid to poor countries. President Bush required that the MCA 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."⁴⁷ 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; it has a regional headquarters in Europe and field offices in several developing countries. Its Board of Trustees is filled with well-known figures of the American establishment.

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."⁴⁸ The U.S. government has used the

⁴⁷ Speech of George W. Bush, March 14, 2002 (<http://www.whitehouse.gov/infocus/developingnations/millennium.html>).

⁴⁸ 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.

Freedom House ratings not only for the MCA, but also, for example, for setting official targets for the performance of the State Department.⁴⁹

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:⁵⁰

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:

⁴⁹ Department of State and U.S. Agency for International Development, "FY 2007 Joint Performance Summary, Strategic Goal 7: Democracy and Human Rights" (2007).

⁵⁰ Freedom House, *Freedom in the World 2008*.

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' on 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 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.

8. Resistance and support in the property-based framework

One central concern about the property-based 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. Should the current proposal be effected, 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 property-based approach protects Freedom House from capture is to generate counter-pressures for it to raise its scores. Power is normally required to balance power, and the full implementation of the property rights approach to the resource curse (which involves trade duties and “Clean Hands Trusts”) will generate just such counter-pressures.⁵¹ 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., Equatorial Guinea, Libya) with whom American 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.

What is more, 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 that would restrict the activities of all American corporations equally, and so will meet with less resistance. New rules that bind 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 political economies 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.⁵²

⁵¹ See Wenar, “Property Rights,” pp. 26-31.

⁵² “Governance issues, the transparency of operations, and political stability matter in every oil-producing country, not just Saudi Arabia and Kuwait. It’s a concern everywhere. [Reforms] don’t just produce benefits for the

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.⁵³ 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 reforming the international resource privilege can make good use of this consensus by presenting these indices as weighty, independent sources of information about the political conditions in foreign countries in front of domestic courts.⁵⁴

Once the judicial strategy has been successful within a country like the United States, the resource corporations of that country will then agitate not to lose competitive advantage with respect to corporations based elsewhere. This is where the second stage of the agenda for reform would begin. Here the United States (for example) would use its trade policy to levy duties on imports from countries (such as China) whose corporations receive stolen resources from a disqualified regime, or from any country in a chain of transactions that stretches back to such a regime. These duties would discourage other countries from dealing with disqualified regimes, and so again exert a counter-pressure to the resource curse.

This trade agenda, which revolves around the Clean Hands Trusts, faces important questions about feasibility that are too far-reaching to be answered here.⁵⁵ Two key supports for the agenda are that it, like the litigation strategy, can be presented as a mechanism for enforcing property rights in global trade; and that it aligns with the interests of powerful domestic industries such as manufacturing, agriculture and banking. It should also be appealing to the public across the political spectrum in a country like America, from left to right. This trade agenda is designed to work with the grain of dominant domestic interests and partisanship, and so to offer a promising approach to the reform of international trade in natural resources.

10. Conclusion

Thomas Pogge has made visible to many a world of vast poverty and inexcusable domination. The rules by which the contemporary world operates generate much of the misery which we now see. These rules are not immutable and, as with the resource privilege, they often run counter to

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), http://www.cfr.org/publication/8996/pefnicious_effects_of_oil.html.

⁵³ See <http://www.bertelsmann-transformation-index.de/16.0.html?&L=1>, http://www.transparency.org/policy_research/surveys_indices/cpi, <http://info.worldbank.org/governance/wgi/index.asp>.

⁵⁴ 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.

⁵⁵ See cleantrade.org for more on these issues of feasibility.

the ideals on which those in the affluent world pride themselves. Pogge has vivified the costs in human well-being and dignity that result from failing to live up to our own principles. The imperative is to join Pogge in working to make the world that we now see more tolerable for both the poor and the rich who share it.