

Property Rights and the Resource Curse

Leif Wenar

ABSTRACT

The resource curse afflicts poor countries that derive a substantial portion of their GDP from extractive resources like oil and diamonds. Such countries are prone to repressive governments, civil wars, and slower growth. The paper argues that the resource curse results from a failure to enforce property rights: the property rights of each country's people in that country's natural resources. This right is widely affirmed in international law, but violated when dictators and civil warriors sell off a territory's resources in circumstances where the people could not possibly authorize them to do so. Firms that acquire extractive resources from such regimes are therefore receiving stolen goods, and then passing these stolen goods on to consumers.

Previous attempts to address the resource curse have centered on trying to convince kleptocratic regimes to behave better, or on applying pressure to them through novel international institutions. This paper proposes two property rights enforcement mechanisms that use existing institutions to sanction the middlemen between resource-cursed countries and the affluent consumers who end up buying their resources. The first mechanism is litigation in rich-country courts against the international corporations that transport the stolen goods. The second mechanism is an "anti-theft" system run by rich governments to penalize countries that have bought resources from a disqualified regime.

The paper shows that authoritarianism, civil conflict, and slow growth in less developed countries often result from a failure to enforce the property rights of the poor. This flaw in the system of international trade can be corrected by bringing all international resource sales within the scope of market rules.

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Table of Contents

1. *The Resource Curse*
2. *The Cause of the Resource Curse*
3. *The Ownership of Natural Resources*
4. *The Right to Sell Natural Resources*
5. *Two Unfeasible Proposals*
6. *The Principles of Ownership and Sale*
7. *Passing Title: The Law of Property and Contract*
8. *The Law Applied to International Transfer of Extractive Resources*
9. *Authoritative Notice*
10. *Authoritative Standards*
11. *Applying the Legal Framework*
12. *Objection: Political Bias of the Standards*
13. *Objection: Political Pressure to Change the Ratings*
14. *Objection: Meddling in the Affairs of Other Countries*
15. *Objection: The Happy Subjects*
16. *Objection: The Rules are Too Restrictive*
17. *Objection: Peoples are not Actors or Owners*
18. *Objection: The Incompetent People*
19. *Objection: No Proof of Illicit Sales*
20. *Objection: Won't Bad Regimes Sell the Country's Resources Elsewhere?*
21. *Objection: Isn't this just Economic Sanctions?*
22. *Objection: The Approach will Hurt the Poor in Resource-Rich Countries*
23. *Objection: Rich Countries Need Poor-Country Resources*
24. *Conclusion*

[This is a long article, and some readers may wish to focus on the sections where the main ideas are introduced. Sections that contain literature reviews or elaborations of the main ideas are marked by an asterisk () below]*

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Because of a major flaw in the system of international trade, consumers in rich countries unknowingly buy stolen goods every day. Consumers may buy stolen goods when they buy gasoline and motor oil, drugs and cosmetics, clothing and magazines, cell phones and laptops, cars and jewelry. The raw materials used to make many of these goods have been taken—sometimes by stealth, sometimes by force—from some of the poorest people in the world. Those engaged in trade in these stolen goods excuse their deals by invoking a subterranean provision in international law left over from the days of absolute sovereignty and colonial rule. Yet this anachronistic feature of customary law clashes with the most basic principles of ownership and sale.

The plainest criticism of global commerce today is not that it is unfair by some abstract distributive standard, but that it flouts the first premise of capitalism. The system of international trade that transports huge quantities of stolen goods to consumers violates property rights, and violates them on an enormous scale. The first priority in reforming global commerce does not require replacing “free trade” with “fair trade.” It requires replacing trade for theft.

Ending this global traffic in stolen resources will require no novel theories or new international agencies. The principles of ownership and sale are well understood, and global commerce has already created institutions with the power to enforce rights of property and contract. What is required is to use these institutions to bring all resource sales into the system of enforced market rules. This article sets out a theoretical and practical framework for doing this.

1. The Resource Curse

To understand why stolen goods currently flood to consumers we can trace the path of these goods back to the countries where the thefts take place. Economists have noticed a peculiar phenomenon that afflicts some less developed countries, which is a symptom of the violation of property rights that concerns us. They have named this the “resource curse.” Economists have

noticed that many countries that have a wealth of natural resources are also full of very poor people. For many less developed countries, resource wealth has been an obstacle to prosperity instead of its foundation.

The resource curse afflicts many countries that derive a large portion of their national income from high-value “extractive” resources such as oil, natural gas, diamonds, gold, and copper. Less developed countries that gain a large portion of their national incomes from these extractive resources are subject to three overlapping “curses.” First, they are more prone to authoritarian governments. Second, they are at a higher risk for civil war and coup attempts. Third, they exhibit lower rates of growth. Several causal pathways explain these surprising correlations between natural resources and national misery.

First, resources correlate with authoritarianism.² The presence of extractable natural resources in a country can greatly strengthen authoritarian regimes and increase their means of repression. Oil, gas, and minerals fetch high bounties: whoever controls their sale receives a large stream of revenue, often billions of dollars per year. A strongman or junta that seizes this revenue stream can use the money to pay for extra security forces, spies, and weapons to put down domestic challenges to their rule.³ The money from resource sales can also free authoritarians from needing to raise revenues through taxation, and so release them from financial accountability to the citizenry.⁴ Authoritarians flush

² Wantchekon surveyed 141 countries over a 40 year period and found that a one per cent increase in natural resource dependence (measured by the ratio of primary exports to GDP) increased the likelihood of authoritarian government by nearly 8 per cent. Leonard Wantchekon “Why do Resource Dependent Countries have Authoritarian Governments?” *Journal of African Finance and Economic Development* 5.2 (2002): 57-77.

³ For example, the repressive Burmese regime remains in power partly by selling the country’s natural gas to Thailand (and is dealing to sell much more to China and India). Stein Tønnesson and Åshild Kolås, *Energy Security in Asia: China, India, Oil and Peace* (Oslo: International Peace Research Institute, 2006), p. 66-92.

⁴ As seen in Dubai, which is virtually “tax-free.” See Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley: University of California Press, 1997), pp. 60-64.

with resource money can also use these funds as sources of patronage, bribing local leaders and buying off nascent resistance movements.⁵

The second resource curse is civil conflict.⁶ Many rebel groups have sustained their expensive armies by capturing some territory and selling off its resources. Other military leaders have sold off rights to future exploitation of territory they hope to control.⁷ The presence of oil, gas and minerals in a country increases the odds of civil war substantially, and these resources have played a major role in sustaining some of the longest-running and most ferocious civil conflicts in recent history.⁸ As for coup attempts, they become more likely in countries that contain one major resource revenue source (like offshore oil) that will enrich whoever controls the national government.⁹ The contribution of

⁵ See the literature on Saudi Arabia and Libya cited in Ross, "Does Oil Hinder Democracy?" *World Politics* 53.3 (2001), pp. 333-34. See also Nathan Jensen and Leonard Wantchekon, "Resource Wealth and Political Regimes in Africa" *Comparative Political Studies* 37 (2004): 816-841; Daron Acemoglu, James Robinson and Thierry Verdier, "Kleptocracy and Divide-and-Rule: A Model of Personal Rule" CEPR Discussion Paper No. 4059 (2003).

⁶ On resources and civil conflict see Paul Collier and Anke Hoeffler, "On Economic Causes of Civil War", *Oxford Economic Papers* 50 (1998): 563-573, and "Greed and Grievance in Civil War," *Oxford Economic Papers* 56 (2004): 563-595; M. Doyle and N. Sambanis, "International Peacebuilding: A Theoretical and Quantitative Analysis," *American Political Science Review* 94.4 (2000): 779-801; R. Auty, "Natural Resources and Civil Strife: A Two-Stage Process," *Geopolitics* 9.1 (2004): 29-49; Michael Ross, "A Closer Look at Oil, Diamonds, and Civil War," *Annual Review of Political Science* 9 (2006): 265-300.

⁷ For example, Pol Pot supported the Khmer Rouge army by capturing a strip of Cambodian territory rich in rubies and sapphires; and Sassou of Congo-Brazzaville sold future drilling rights to a French oil company to support his private militia. See Michael Ross, "The Natural Resource Curse: How Wealth Can Make You Poor" in *Natural Resources and Violent Conflict: Options and Actions*, ed. Ian Bannon and Paul Collier (World Bank, 2003); and Ross, "Booty Futures," Working paper 2005 <http://www.polisci.ucla.edu/faculty/ross/bootyfutures.pdf>.

⁸ For example, the conflict in the Democratic Republic of Congo (DRC) in 1998-2002, which caused approximately 3.3 million deaths.

⁹ Philippe Le Billon "The Political Ecology of War: Natural Resources and Armed Conflicts," *Political Geography* 20 (2001): 561-584; Paul Collier and Anke Hoeffler, "Coup Traps:

extractable resources to civil conflicts has been affirmed by academics, non-governmental organizations, and UN Security Council resolutions.¹⁰

Civil conflict is one reason that resource-rich countries are subject to the third resource curse: lower rates of growth.¹¹ Collier and Hoeffler estimate that the total economic cost of a “typical” civil war in a less developed country is around 250% of that country’s initial GDP, or around \$54 billion.¹² Even without civil conflict, the volatility of commodity prices leaves resource-dependent countries more vulnerable to economic shocks and to official corruption.¹³ Resource abundance exacerbates income inequality between the populace and the political elite.¹⁴ And 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 who control the resource revenues no incentives to invest in the education, training, or health of the people. The more a country relies on exporting minerals, the worse its standard of living tends to

Why does Africa have so many Coups d’Etat?” (Centre for the Study of African Economies, 2005) (<http://users.ox.ac.uk/~econpco/research/conflict.htm>).

¹⁰ 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).

¹¹ On resources and growth see Jeffrey Sachs and Andrew Warner, “Natural Resource Abundance and Economic Growth,” NBER Working Paper no. 5398 (1995); Sachs and Warner, “The Curse of Natural Resources,” *European Economic Review* (2001) 45: 827-838; R. Auty, “Introduction and Overview” in R. Auty (ed.), *Resource Abundance and Economic Development* (Oxford: Oxford University Press, 2001), pp. 3–16.

¹² Paul Collier and Anke Hoeffler, “Civil War,” Working paper <http://users.ox.ac.uk/~econpco/research/pdfs/Civil-War.pdf>.

¹³ R. Mikesell, “Explaining the Resource Curse, With Special Reference to Mineral Exporting Countries,” *Resources Policy* 23.4 (1997): 191–99; C. Leite and J. Weidmann, “Does Mother Nature Corrupt? Natural Resources, Corruption, and, Economic Growth,” IMF Working Paper WP/99/85 (1999); M. Katz et al., *Lifting the Oil Curse* (Washington D.C.: IMF, 2004).

¹⁴ Ricky Lam and Leonard Wantchekon, “Political Dutch Disease,” NYU Working Paper (2003) (<http://www.nyu.edu/gsas/dept/politics/faculty/wantchekon/research/lr-04-10.pdf>).

be.¹⁵ 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.¹⁶

Around 3.5 billion people live in countries (about 50 of them) where extractive commodities play an important role in the economy. This is a very large group potentially subject to the resource curse. Of course abundant resources are neither necessary nor sufficient for authoritarian repression, civil conflict or low growth. For example, Eritrea has a repressive government but few easily saleable resources; and Norway has both large oil reserves and decent, representative politics. Social scientists are still debating how to predict exactly where and how hard the curse will strike.¹⁷ 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.

Nigeria, Africa's largest oil exporter, has a population of over 130 million (larger than Britain and France combined). Between 1965 and 2000 Nigeria received a very substantial percentage of its GDP from oil revenues that totaled about \$350 billion. However in the 30 years after 1970 the percentage of Nigerians living in extreme poverty (\$1/day) increased from 36 percent to almost 70 percent—from 19 million to 90 million people. All of the oil revenue contributed nothing to the average standard of living, and indeed the period of oil exploitation saw a decline in living standards. Moreover inequality in Nigeria simultaneously skyrocketed. In 1970 the total income of those in the top 2 percent of the distribution was equal the total income of those in the bottom 17 percent. By

¹⁵ Michael Ross, *Extractive Sectors and the Poor* (New York: Oxfam America, 2001), p. 8.

¹⁶ Ross, *Extractive Sectors and the Poor*; T. Gylfason, "Natural Resources, Education, and Economic Development," *European Economic Review* 45.6 (2001): 847-59; Karl, *The Paradox of Plenty*.

¹⁷ Andrew Rosser, "The Political Economy of the Resource Curse: A Literature Survey," IDS Working Paper 268.

2000 the top 2 percent made as much as the bottom 55 percent.¹⁸ Meanwhile corruption was everywhere evident in the Nigerian government, and most strikingly at the top. For instance, in just four years in power General Sani Abacha and his family embezzled around \$3 billion.¹⁹

In the 1980s the corrupt government of **Sierra Leone** embarked on disastrous economic policies and lost control over the armed gangs that were overseeing the exploitation of the country's rich diamond fields. In 1991 a small group of insurgents launched an extraordinary brutal campaign of terror (including random shootings, rape, and chopping off hands) to gain control of these regions, recruiting child soldiers and enslaving locals to work the diamond pits. With the money they received from selling these diamonds (so-called "Blood Diamonds") abroad, the insurgents bought enough weapons nearly to topple the government. The government was only able to defeat the rebels by trading diamond mining futures for the services of a South African mercenary force. The decade-long civil war in Sierra Leone cost about 50,000 lives, and displaced one third of the population. Sierra Leone now ranks 176th out of 177 countries on the UN Human Development Index.²⁰

During the vicious civil war in **Angola** resource wealth funded large arms purchases on both sides. The rebel UNITA movement sold off the country's diamond wealth to fund their army, while the government used large oil revenues to pay forces to resist the rebels.²¹ The government remained astonishingly corrupt, but eventually prevailed. By the late 1990s, three-quarters of Angolans were living on less than a dollar a day, life expectancy was 45 years, and over

¹⁸ Xavier Sala-i-Martin and Arvind Subramanian, "Addressing the Natural Resource Curse: An Illustration from Nigeria" IMF Working Paper WP/03/139 (2003). The oil revenue figure is in 1995 dollars. The \$1/day figure is the standard World Bank 1993 PPP standard for extreme poverty.

¹⁹ Transparency International National Integrity Systems Country Study Report Nigeria 2004, p. 13 (<http://www.transparency.org/content/download/1685/8494/file/nigeria.pdf>).

²⁰ UNDP, *Human Development Report 2006*.

²¹ Philippe le Billon, "Angola's Political Economy of War: The Role of Oil and Diamonds," *African Affairs* 100 (2001): 55-80.

three million civilians had been displaced.²² The UN reports that today almost half of Angola's children are severely malnourished, and less than half of adults can read and write.²³

Equatorial Guinea deserves special attention, as it is such a pure case of a country currently stricken by the resource curse. Equatorial Guinea is in central Africa, bordered by Gabon and Cameroon. Since 1979 it has been ruled by President Theodoro Obiang. Obiang is the kind of ruler that has not shied from having political opposition jailed, tortured, and killed, or from having himself officially proclaimed as a god who is "in permanent contact with the Almighty."²⁴ In the 1990's quite 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 has become the third-largest oil exporter in Africa.

Because of this huge influx of oil money, Equatorial Guinea now has the third-highest per-capita income in the world: 20% higher than the per-capita income of the United States.²⁵ Yet the people have yet to partake in this prosperity. As the US Department of Energy reports:²⁶

Since 1995, oil exports (currently 97 percent of total export earnings) have caused the Equatoguinean economy to grow rapidly... Despite the rapid growth in real GDP, allegations abound over how the Equatoguinean government has misappropriated its oil revenues. While the government has made some infrastructure improvements to

²² Global Witness, *The Sinews of War*, p. 17.

²³ United Nations World Food Program, "Angola: Bleak Future for Angola's Children," Press Release 19 September 2005.

²⁴ "He can decide to kill without anyone calling him to account and without going to hell because it is God himself, with whom he is in permanent contact, and who gives him this strength," a presidential aide announced on [state-controlled radio]." "Equatorial Guinea's 'God'" BBC News, 26 July 2003 (<http://news.bbc.co.uk/2/hi/africa/3098007.stm>) .

²⁵ CIA Factbook 2006, "Rank Order – GDP – per capita (PPP)" (<https://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html>).

²⁶ http://www.eia.doe.gov/emeu/cabs/Equatorial_Guinea/Background.html

bolster the oil industry, the average Equatoguinean has yet to experience a higher standard of living from the oil revenues.

The head of Global Witness US states:²⁷

Equatorial Guinea is the dictatorship that no one talks about. The government earns over \$2.7 billion from oil annually, but the majority of its citizens live on less than \$1 a day.

The Freedom House country report says much the same:²⁸

Despite the country's economic windfall from oil, however, there have been few improvements in the country's living standard. The majority of the country's impoverished citizens depend on subsistence agriculture, while ruling elites reap growing financial gain from oil profits.

Forbes Magazine recently listed President Obiang as one of the richest leaders in the world, with an estimated personal wealth of \$600 million.²⁹ The prospect of capturing this kind of wealth from offshore oil sales has attracted coup attempts, which have so far failed.³⁰ And there is little doubt that the oil money has fueled significant corruption. Transparency International's latest

²⁷ Global Witness, "New U.S. Envoy to Equatorial Guinea Must Hold Government Accountable for Corruption and Human Rights Abuses," Press Release March 8 2006 (http://www.globalwitness.org/press_releases/display2.php?id=373).

²⁸ Freedom House, *Freedom in the World 2006*, "Equatorial Guinea" (<http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6958>).

²⁹ "Oil Royals Rule List of Richest Leaders," *Washington Times*, May 6, 2006 (<http://www.washtimes.com/world/20060505-095638-1742r.htm>).

³⁰ The *Economist* journalist Adam Roberts gives a full treatment to the 2004 coup attempted by a group of international businessmen and mercenaries (including Margaret Thatcher's son Mark Thatcher) in *The Wonga Coup: Guns, Thugs and a Ruthless Determination to Create Mayhem in an Oil-Rich Corner of Africa* (London: PublicAffairs, 2006).

Corruptions Perceptions Index ranks the country as tied for 152nd place out of the 159 countries surveyed.³¹

Instead of using his country's remarkable oil windfall to benefit the people, Obiang has captured the new wealth and used it to consolidate his personal power. The Freedom House report gives a fuller idea of what political life is like in Equatorial Guinea at present:

Citizens of Equatorial Guinea cannot change their government democratically, and the country has never held a credible election. [Obiang] holds broad powers and limits public participation in the policy-making process. The 100 members of the unicameral House of People's Representatives are elected to five-year terms but wield little power...

Press freedom is constitutionally guaranteed, but the government restricts this right in practice. The 1992 press law authorizes government censorship of all publications, and nearly all print and broadcast media are state run and tightly controlled. A few private newspapers and underground pamphlets are published irregularly. Criticism of the country's leadership is not tolerated, and self-censorship is widespread. Publications that irk the government are banned from the newsstands without explanation... Equatorial Guinea has one internet provider affiliated with the government telephone monopoly, and there were unconfirmed reports that the government monitored citizens using the internet.

Freedom of association and assembly is restricted. Authorization must be obtained for any gathering of 10 or more people for purposes deemed political. There are no effective domestic human rights organizations, and the few international nongovernmental organizations operating in Equatorial Guinea are prohibited from promoting or defending human rights. Dozens of opposition activists remain in prison.

The judiciary is not independent, and laws on search and seizure—as well as detention—are routinely ignored. Amnesty International and the International Bar Association allege that the trials for two separate groups of alleged coup plotters were marked by flagrant human rights abuses, including torture and forced confessions.

³¹ http://www.transparency.org/policy_research/surveys_indices/cpi/2005/media_pack.

Unlawful arrests are common, and government security forces routinely act with impunity, using torture and excessive force. Civil cases rarely go to trial. A military tribunal handles cases tied to national security. Prison conditions, especially in the notorious Black Beach prison, are often life-threatening.

Constitutional and legal protections of equality for women are largely ignored, and violence against women is widespread... Few women have educational opportunities or are able to participate in the formal economy or government.

President Obiang's reign will end soon, as he is dying of prostate cancer. His tempestuous playboy son and likely heir, Teodorín, is by all accounts at least as determined as his father to control the country's oil revenues for his personal use.³² Given their situation, the people of Equatorial Guinea may well feel cursed by their country's new-found resource wealth.

2. The Cause of the Resource Curse

The oppression of the citizens of Equatorial Guinea, and the denial to them of the revenues from the country's oil deposits, may strike outsiders as a cause for sympathy. The situation in Equatorial Guinea appears truly miserable, the oppression of the people seems unjust, and something should be done about it. One might think of an aid program to help the Equatorial Guineans with their health and education provision, or of asking Western leaders to put pressure on Obiang to share more of the oil revenues with his people. These kinds of proposals may not spark much optimism—aid money is often captured by repressive governments, and rich dictators often seem to be able to resist a good deal of Western pressure. However, even if we cannot think of specific initiatives that are likely to be effective, the sense remains that something should be done to help these Africans in their dire conditions.

This natural course of thinking about the situation in Equatorial Guinea overlooks a morally significant fact. This is that outsiders to Equatorial Guinea

³² "Playboy Waits for his African Throne" *Sunday Times*, September 3, 2006.

are already doing a great deal with regard to the plight of its citizens—outsiders are making it worse. The resource curse is only one-half about resources. The dictator Obiang could not after all subdue his political opponents by dousing them in crude oil. The other half of the equation—and the more important half—is the foreign money that flows into the dictator’s bank accounts when the country’s resources are transferred abroad. It is this money that allows Obiang to buy weapons and pay security forces, to control the channels of patronage, and to rise above other possible power-bases in the country. The money that outsiders pay for the resources of Equatorial Guinea ends up being used against the people of that country.

The contribution of external funds to internal repression seems clear enough when pointed out, and may cause those reflecting on it slightly more discomfort. After all we do not like to think of ourselves as contributing to severe political repression and avoidable poverty, even if only indirectly. The thought that some percentage of what we pay to fill up our cars might end up being spent on Obiang’s security forces or personal jets is not at all welcome. Yet, one might think, this is the way it often is in our contemporary world. In a globalized market economy we pay for all sorts of goods. We typically do not know—indeed we often cannot know—where the goods originate or where the money we use to purchase them eventually goes. Some of the money we pay at the pump may go to support dictators, but that seems just a fact of modern life. If the Equatorial Guineans have a political problem in their country that is very unfortunate. But it is in the end their problem, and we should try to help them (if at all) through private charity or through the political influence of our government.

This way of looking at the contribution that outsiders make to the situation in Equatorial Guinea through the market again fails to connect the facts. Indeed it is particularly inadequate from a market perspective. The resource curse is not a curse that falls on poor countries because they have abundant resources. Natural resources are always in themselves valuable (by definition, one might say). In a functioning market the discovery of new natural resources will always open new economic opportunities for the owners of those resources, and the

discovery of vast new energy resources will always improve a prudent owners' economic prospects. The "curse" lies in the failure of the rules that allocate control over these resources. The fault is not in nature, but in human institutions—here specifically markets.

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

3. The Ownership of Natural Resources

The resource curse results from a failure of institutions: specifically, a failure to enforce property rights. This defect in the system of global commerce allows strongmen and civil warriors to capture for themselves the money that consumers around the world spend on everyday goods. The strongmen and civil warriors have no right to this money. The natural resources of a country belong, after all, to its people. The blessing of resources turns into a curse when tyrants and insurgents are allowed to sell off a country's resources without the consent of the people, and to use the proceeds in ways that make the people worse off.

The idea that the people of a country own the natural resources of that country is so intuitive that most people will need no more proof than its statement. America's resources belong to the American people, Canada's resources belong to the Canadian people, Equatorial Guinea's resources belong to the Equatoguinean people, and so on. If it were discovered that Russia had drilled a long diagonal pipeline under Alaska and was now siphoning out oil, the American people would immediately (and perhaps literally) be up in arms. The oil within the territory of the United States is American oil, and foreigners must not take it without permission. One can imagine similar outrage were the American president to announce that the Alaskan oil reserves did not in fact belong to the

American people, but were his own personal property. The American people are the original owner of all of America's natural resources: all subsequent users of these resources must have some sort of authorization, ultimately from the people, to use them.

The fact that the people of a country own its natural resources is part of a common-sense understanding of today's world. It is therefore no surprise to find that the nations of the world have embedded this fact deep within international law. For example, Article 1 of the major human rights treaty on civil and political rights begins with these words:³³

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

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

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

The principle of ownership by the people is also enshrined in many national constitutions. For example, the (American-approved) Iraqi constitution of 2005 proclaims that:

³³ International Covenant on Civil and Political Rights, Article 1. Article 1 of the other major human rights treaty, the International Covenant on Economic, Social, and Cultural Rights, is identical. 151 of the 192 UN member states (including the United States and all other OECD countries) have ratified one or both of these treaties. The non-ratifiers are mostly small countries like Palau.

Oil and gas are the property of the Iraqi people in all the regions and provinces.³⁴

Examples from national constitutions as well as UN declarations and resolutions are easily multiplied.³⁵ The right of peoples to their resources is widely *accepted* around the world.³⁶ This right, however, is also regularly violated, under cover of an archaic provision of the international system that is incompatible with any coherent conception of property rights.

4. *The Right to Sell Natural Resources*

The idea of a group like a people owning property is familiar: married couples, club members, and the shareholders of corporations are all examples of group owners. We also commonly speak of peoples making decisions—we say,

³⁴ *The Constitution of Iraq*, Article 108. George W. Bush agrees with the Iraqi constitution on this point: “The oil belongs to the Iraqi people. It’s their asset.” (President’s Statement to the Press, June 12 2006. <http://www.whitehouse.gov/news/releases/2006/06/20060612-6.html>). A variety of administration figures have echoed this assertion, including Colin Powell when he was US Secretary of State (<http://edition.cnn.com/2003/WORLD/meast/01/23/iraq.powell/>) and Commerce Secretary Don Evans (<http://www.whitehouse.gov/ask/20031022.html>). Tony Blair has asserted the more general fact: “Iraq’s natural resources remain the property of the people of Iraq.” (Press conference March 16, 2003, <http://www.whitehouse.gov/news/releases/2003/03/20030316-3.html>). Indeed world leaders from across the political spectrum have made analogous assertions: Hugo Chavez has stated that the Venezuelan people own Venezuela’s oil (<http://www.energybulletin.net/4656.html>), and Ayatollah Ali Khamenei has said that the Iranian people own Iran’s oil (<http://www.globalsecurity.org/wmd/library/news/iran/2002/12-080402.html>).

³⁵ See e.g., Angolan Law N. 13/78 (1989): “All deposits of liquid and gaseous hydrocarbons which exist underground or on the continental shelf within the national territory... belong to the Angolan People.”; UN General Assembly Resolution 1803 (XVII) (1962) “Permanent Sovereignty over Natural Resources”; and the “Declaration on the Right to Development” adopted by the United Nations in 1986.

³⁶ Some might read the international documents as ascribing political instead of property rights to peoples: *dominium* instead of ownership. Since both of these are rights to control resources, this interpretation would change the language but not the conclusion of the argument that follows.

for instance, that after Pearl Harbor the American people supported war against Japan, and after World War II the British people approved the construction of a welfare state. The citizens of each country own the natural resources of that country, therefore the citizens—like any owner—have the right to decide what happens to what they own. The people of a country can rightly decide whether their resources should be used immediately, or saved for the future, or transferred to private ownership, or sold abroad.

The right to sell natural resources abroad is the crucial right for understanding the resource curse. Every owner has the right to decide whether their property should be sold. For anyone *besides* the owner legitimately to sell the property, this party must somehow have gained the right that inheres originally in the owner. A thief who steals your watch from your nightstand cannot legally sell your watch to anyone else—for neither you nor anything else in the law has empowered the thief to sell your watch. The thief may have taken *possession* of your watch and then transferred possession to someone else, but no valid transfer of the title to your watch has taken place. The watch is still your property, and thief and the third party have merely handled stolen goods.

Who besides the people then has this “resource right”: the right legitimately to sell off the resources of the territory so that they are permanently beyond the people’s control? The traditional answer has been that the government of the country has this resource right. The government is the representative of the people, and so empowered to sell off the nation’s resources. The thesis that a government is the people’s representative—carrying out the people’s wishes, looking after the people’s interests—is common currency in the theory of international relations. It is accepted by realists and liberals alike.³⁷ This traditional answer has a good deal of plausibility in many

³⁷ In Morgenthau’s “fiduciary realism” the responsibility of state leaders is to act so as to maximize the national interests of their people. See Allen Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford: Oxford University Press, 2004), pp. 35-36. As for liberals, Rawls writes that “An important role of a government... is to be the effective agent of a people as they

cases: many governments can in fact be seen as legitimate selling agents of their people. The question is whether the resource right vests in any party who merely asserts it: whether any group claiming the rights of governance—or indeed whether any group simply asserting the right to sell off the territory’s resources—must be thought to have the resource right.

The answer to that question must of course be “no.” It cannot be that anyone who declares the right to sell someone else’s resources thereby gains that right. Saying does not make it so. What else then is necessary beyond mere assertion to make some individuals the legitimate selling agent of a people with respect to their resources?

Here we uncover the provision in the system of international trade that certainly gets the answer wrong. In current international practice all that is necessary for a group to be vested with the legal right to sell a territory’s resources—beyond the declaration of that right—is the power to inflict violence on the territory’s people. Whoever can maintain coercive control over a population (or in the case of civil warriors, over part of a population) is recognized internationally as legally authorized to sell off that country’s resources. According to this customary rule, might makes right—specifically, might vests the legal right to transfer property. From any moral perspective, this provision looks nonsensical:³⁸

A group that overpowers the guards and takes control of a warehouse may be able to give some of the merchandise to others, accepting money in exchange. But the fence who pays them becomes merely the possessor, not the owner, of the loot. Contrast this with a group that overpowers an elected government and takes control of a country. Such a group, too, can give away some of the country’s natural resources,

take responsibility for their territory.” *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 8; see also p. 38.

³⁸ Thomas Pogge, “Recognized and Violated by International Law: The Human Rights of the Global Poor,” *Leiden Journal of International Law* 18.4 (2005): 717-45. Pogge uses the term “resource privilege,” but as he notes this is actually a Hohfeldian power. Here I use the term “resource right.”

accepting money in exchange. In this case, however, the purchaser acquires not merely possession, but all the rights and liberties of ownership, which are supposed to be — and actually *are* — protected and enforced by all other states' courts and police forces.

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

The existence of this international “might makes right” rule, which flies so strongly in the face of common sense and which has such disastrous consequences in many countries, calls for explanation. Some have noticed that the convention is quite convenient for rich countries, who get continuous access to poor countries' resources regardless of who is in charge in those countries.³⁹ While this seems plausible, it is also plausible (and compatible) to see this aspect of international practice as a holdover from the previous era of international law based on absolute state sovereignty. In this previous era, commonly identified

³⁹ Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 4-6.

with the Treaty of Westphalia,⁴⁰ whatever group of individuals could maintain coercive control over a territory thereby gained international recognition of the legitimacy of whatever actions they took within that territory. For hundreds of years, the rule in international relations was that might did make right within a territory's borders. Whoever maintained coercive control over a population was recognized as having nearly total discretion over the country's "internal affairs."

The old rule on unqualified internal sovereignty helps to explain the persistence of the "might makes right" rule for resource sales. Under these old rules any sufficiently coercive regime could simply use its power to arrogate to itself the right to sell off the territory's resources. Yet the old rules can play no role in justifying current international practice. For we can say with certainty that the old Westphalian rules are not valid, and that almost no international actor holds them to be so.

The human rights revolution that began with the *Universal Declaration of Human Rights* in 1948 has been extremely successful in displacing the idea of absolute sovereignty in international law. The basic thrust of human rights doctrine is to insist that there are certain things that the rulers of a country must not do to the people of that country (torture them, enforce their enslavement, kill or arrest them arbitrarily, etc.), and other things that rulers must do for them (e.g., protect their personal property, provide them with fair trials). No one claiming to rule a country can now claim that their abuse or neglect of the people is only a matter of "internal affairs." Human rights qualify the sovereignty of those who hold power in a country, and securing human rights is now seen as a condition for legitimate rule.⁴¹ Every nation on earth has by now ratified a major human rights treaty, signaling the legal death of the Westphalian settlement.

⁴⁰ Krasner casts doubt on the accuracy of the term "Westphalian," but judges it to be too entrenched to give up. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), p. 20.

⁴¹ See Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*; Kofi Annan, "The Responsibility to Protect" (<http://www.un.org/News/Press/docs/2002/sgsm8125.doc.htm>).

The “might makes right” norm that enables the resource curse is a remnant a pre-modern world of absolute sovereignty and colonial rule. The contrast between this anachronism and the modern understanding of legitimacy is vivid. It makes just as little sense that a capacity for violent domination should give a regime legitimate authority over citizens’ resources than that a capacity for violent domination should give a regime legitimate authority over citizens’ persons. Once the old idea of unqualified sovereignty is given up for one, the other too must go. Indeed there need not be a “resource rights” revolution to follow the human rights revolution, because as we have seen the fact that a people owns its resources is proclaimed by the major human rights treaties already in force. Each people’s right to its resources *is* a human right.

The most salient reform of international trade must be to remove the “might makes right” rule that grants the right to sell resources to whoever can cow a population by violence. Unlike the popular ownership of resources, this rule is nowhere codified or ratified in international law. It persists by custom because powerful global actors have strong interests in maintaining the status quo. Removing the “might makes right” rule from international practice is the crucial step in bringing all trade in natural resources within the scope of enforced market rules.

We can be sure that the mere seizure of power should not give to any regime an internationally recognized resource right. What then *is* necessary for a regime legitimately to claim this right to sell a country’s resources? In answering this question we will focus exclusively on this one limited aspect of sovereignty. We will not be concerned here with the separate questions of whether some regime has or lacks legitimate authority to do other things: to issue currency, to keep public order, to defend the country from external aggression, and so on. This is the point of the end of the old Westphalian settlement: sovereignty no longer comes all in a piece. We are concerned specifically with what is needed for some group that has coercive control over a territory legitimately to sell off the resources of that territory. Whatever else is true about a regime, if it asserts the

legal right to sell off the people's oil, gas, or diamonds it must appeal to some credible rationale to validate this right.⁴²

5. Two Unfeasible Proposals ()*

The “might makes right” rule for the right to transfer resources is sustained in the international legal system neither by logic nor propriety, but simply by interest. Dictators and juntas, coup plotters and civil warriors have interests in the rules for resources remaining status quo. Their main customers, the international resource corporations, are also heavily invested in the system as it is. These powerful interests currently lock the old provision into place, and render unfeasible otherwise promising proposals to reform the system of international trade.

Sala-i-Martin and Subramanian propose a direct replacement for the “might makes right” rule: requiring governments to divide revenues from resource sales equally among all adult citizens of the country.⁴³ Using Nigeria as their example, they argue that oil revenues should not go straight to government officials (which inflames corruption and undermines growth) but should instead be divided equally into the bank accounts of Nigerian citizens (“ultimately their true and legitimate owners”⁴⁴). The government would then have to tax the citizenry to gain its revenues as other states do, necessitating at least minimal

⁴² In this article I will use the term “regime” to refer to groups within a territory that have coercive power over a significant proportion of that territory's population. The term thus applies both to the office-holders of national governments and to the leaders of rebellions during a civil war.

⁴³ Sala-i-Martin and Subramanian “Addressing the Natural Resource Curse.” See also B. Eifert, A. Gelb and N. Tallroth “The Political Economy of Fiscal Policy and Economic Management in Oil Exporting Countries” in J.M. Davis, R. Ossowski and A. Fedelino (eds), *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (Washington, DC: International Monetary Fund, 2003): 82–122.

⁴⁴ Sala-i-Martin and Subramanian, “Addressing the Natural Resource Curse,” p.18. See also Paul Collier, “Angola: Options for Prosperity” (<http://www.sarpn.org.za/documents/d0002079/index.php>).

political accountability to the people. This reform is elegant and desirable.⁴⁵ It also unfortunately has zero political feasibility. The officials who sell Nigeria's oil and the international corporations that buy it have little to gain and much to lose by handing petroleum revenues over to the Nigerian people. With no pressure from the outside, these actors will never renounce the old Westphalian provision that keeps them in power and rich.

Pogge proposes to replace the "might makes right" provision with a rule that a regime can only sell off the resources of a country with the full democratic assent of the people.⁴⁶ He suggests that poor countries which have installed at least a fledgling democratic government should pass a constitutional amendment stating that only democratic governments have the right legally to transfer the country's natural resources. 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 should democracy be restored thereafter. Now as Pogge says a non-democratic government that seizes power may revoke this amendment and transfer the country's resources as it will. But the amendment will put those international actors who might buy resources from the non-democratic government on notice that their title to the goods will be questioned if and when a democratic government returns to power.

Pogge's proposal, should it be realized, would be an advance over the current state of affairs in international trade. However, as Pogge admits, it would be a miracle for any amendment to persuade oil companies not to buy oil from an authoritarian ruler who had taken over in an anti-democratic coup.⁴⁷ Passing such an amendment might at most clarify the moral situation from the perspectives of the people of the poor country and, perhaps, some citizens of the rich world.

⁴⁵ For some doubts see Erika Weinthal and Pauline Jones Luong, "Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth" *Perspectives on Politics* 4.1 (2006): 35-53, p. 42.

⁴⁶ Thomas Pogge, *World Poverty*, pp. 162-66.

⁴⁷ Pogge, *World Poverty*, p. 165.

There are also other limitations to Pogge's proposal. First, any solution that turns on a democratically-passed amendment can only help those peoples which have already achieved democratic governance—so not Equatorial Guinea, for example, which never has been democratic.⁴⁸ Second, the proposal is not *incentive compatible*: it creates incentives which work against its own realization. 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. It is plausible to assume that the rich-country leaders will then have significant political incentives to assure that democratic governance does not return to the poor country. So the proposal would generate powerful incentives that point in the wrong (anti-democratic) direction.

A final concern is Pogge's criterion for a government legitimately to be able to sell the people's resources, which is that the government must be democratic. Many will believe this to be too strong. By Pogge's criterion even the non-democratic but relatively decent Kuwaiti government, for instance, could not legitimately sell the country's oil. Yet a universal requirement of democracy appears too controversial a premise on which to rest a feasible proposal for the reform of the global economic order.

A feasible proposal for reform will be more broadly applicable and better aligned with political incentives than the two proposals above. A feasible proposal will also ideally rest on fundamental moral and legal principles that all parties concerned—even powerful corporations and the governments that support them—can scarcely deny.

⁴⁸ 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.

6. *The Principles of Ownership and Sale*

Oil is big business. In fact, oil is the biggest business. Five of the 10 largest corporations in the world are oil companies, and oil accounts for over half the value of all global commodity transactions—over one and a half trillion dollars a year.⁴⁹ Any action to deny the resource right to regimes in poor countries will disrupt some of the current flow of oil. Such action must therefore be able to withstand the tremendous commercial and so political pressures to bring ever more oil to market.⁵⁰ Oil companies are very powerful transnational actors, and these companies are not charities. Their main operational goals 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. Any action aimed at restraining oil companies and the rich governments that support them will have to be grounded in deep principles that cannot easily be dismissed or defined away. These principles will also need natural political allies, who will come to their defense when their enforcement inevitably comes under political attack. When one adds that these principles must also be enforced for international sales of other extractable resources such as natural gas, diamonds, copper, cobalt and coltan the demand that they be resilient only intensifies.⁵¹

Such rules already exist, and in fact are the ground rules of the global capitalist system. The rules are nothing other than the principles of ownership

⁴⁹ Oil industry global revenues in 2005 were \$1.62 trillion, 81% of which went to the five “super-major” integrated oil companies. Congressional Research Service, “Oil Industry Profit Review 2005” RL33373 (2006), p. 5. For comparison, the US GDP in 2005 was \$12.46 trillion (<http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>).

⁵⁰ These commercial pressures will grow more intense as global demand for oil builds. The world currently uses about 85 million barrels a day. The International Energy Agency projects that demand will grow by about one or two percentage points a year, so global demand for oil could pass 115 million barrels a day by 2030. International Energy Agency, *World Energy Outlook 2006* (<http://www.worldenergyoutlook.org/summaries2006/index.htm>), p. 3.

⁵¹ Cobalt has a wide range of industrial uses, and is also found in paints, inks, electroplate and tires. Coltan, an excellent conductor, is used to make the capacitors found in electronic devices such as laptop computers and mobile phones.

and sale. The players in the global market, including large corporations and national governments, can hardly disclaim these principles. Corporations depend on the principles of ownership and sale for their very existence as both buyers and sellers. And the governments of the United States and other rich countries have championed the spread of market principles around the globe. Yet international resource corporations currently defy these basic market rules in a substantial portion of their dealings. We can show this first with a common-sense argument, and then also in some detail within legal doctrine.

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

The force of this argument comes from the power of the principles of ownership and sale. To make the argument part of a realistic proposal for reform of the international system it must be put into precise and actionable form. There are likely many ways to generate reforms out of this common-sense argument.⁵² In the next sections I show that there is at least one legal framework for reform,

⁵² See, for example, the parallel legal framework based around the Alien Tort Claims Act in the case against UNOCAL for abetting human rights violations in its dealings with the repressive regime in Burma (*Doe v. Unocal*, 2003 WL 359787 (9th Cir.)).

built around the most resilient principles in all of commercial law: the principles of property and contract.

7. Passing Title: The Law of Property and Contract

The modern principles of property and contract have deep roots in the law. In English-speaking countries property and contract are grounded in the common law and in equity; and both civil law and common law jurisdictions have inherited a fund of principles from Roman law. The principles of property and contract now have statutory codification in domestic laws (in the US the Uniform Commercial Code, which has been made law in all 50 states) and treaty codification in international law (the Convention on Contracts for the International Sales of Goods). These principles define legality for the bulk of commodity transfers both within and across national borders. No principles are more basic to the global capitalist system.

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

A thief—who gains possession by stealth—can never pass title to a good. In legal parlance a thief’s title is “void,” and therefore the title of anyone who receives property from the thief is also void. However commercial law allows certain exceptions to the *nemo dat* rule, and in building a legal framework we must keep track of these exceptions.⁵³ The law treats differently vendors who

⁵³ Here I summarize American law, which is (because of America’s position in global trade) one dominant model. Commercial law in other countries has slightly different patterns, but not in ways that will affect the outcome of the argument here. There is also some variation in the

gain possession of a good not through stealth, but rather through deception, duress, or undue influence. Such a vendor's title is not "void" but "voidable." The owner may repossess the good by voiding such a vendor's claim to it before the good is sold. But it is also possible for the vendor to pass good title to a third party if he does so before his voidable title is voided.⁵⁴

This legal exception to the common sense rule may be surprising, since it seems to reward criminals by allowing them to pass better title than they have. But any developed commercial order must find some way to balance the interests of innocent owners against those of innocent purchasers. When the goods of an innocent owner have reached the hands of an innocent purchaser, and the money from the sale cannot be extracted from the culpable vendor (because he is absent or insolvent), then either the owner or the purchaser will have to lose out.⁵⁵ The commercial rules separating void and voidable title divide up the situations in which innocent owners and innocent purchasers will prevail.⁵⁶

Yet in order for an innocent purchaser to gain valid title through any transaction he must actually *be* innocent. Only a *good faith* ("*bona fide*") *purchaser* can gain title from a vendor with voidable title. A good faith purchaser is one who buys without notice of any circumstances that would make a person of ordinary prudence inquire whether the vendor's title to the goods being sold

law between American states, although not much—it is obviously more efficient to have uniform rules for interstate commerce. The model for all state codes is the US Uniform Commercial Code, which is described here.

⁵⁴ The seller, of course, does not get off unpunished in any of these situations. He may be vulnerable to any number of civil and criminal penalties, including penalties for robbery or fraud.

⁵⁵ On the history of legal treatment of these kinds of situations from the Code of Hammurabi through Talmudic law and Roman imperial law to the present day see Saul Levmore, "Variety and Uniformity in the Treatment of the Good faith Purchaser" *The Journal of Legal Studies* 16.1 (1987): 43-65.

⁵⁶ These rules also give both parties an incentive to avoid dealings with shady characters: purchasers have the incentive to avoid thieves, and owners have the incentive to avoid robbers and fraudsters.

was valid.⁵⁷ An executive who buys a Rolex from the sales counter at Saks Fifth Avenue is a good faith purchaser. He gains good title to the watch, even if somehow it turns out that Saks received the watch from the Rolex corporation through deception, duress, or undue influence. But an executive who buys a Rolex on the street from an unshaven man carrying several watches inside his coat cannot be a good faith purchaser. This executive should suspect that the unshaven man may not have valid title to the watch. This executive is a *bad faith* (“*mala fide*”) *purchaser*, and the law will not favor him. If the true owner of the Rolex appears, a court will order the executive to hand the watch (or its market value) over to that owner.⁵⁸

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

8. The Law Applied to International Transfers of Natural Resources

The law described governs the sale of all goods within the United States, and it is standardly used for trade across international borders as well. It is applied to sales of wheat and steel as well as watches, and to contracts between New York and New Delhi as much as between New York and Nebraska. The

⁵⁷ The US Uniform Commercial Code and most state codes are moving from an “honesty in fact” standard that turns on the purchaser’s actual beliefs to a “reasonable man” standard (“the observance of reasonable commercial standards of fair dealing”). Either standard is useful for our purposes. Other legal systems such as those in England and France have an exception to the good faith requirement for goods sold at an open market (“market-overt”). This exception would also not affect the outcome of the argument here.

⁵⁸ The executive is, in this situation, free to try his luck by taking legal action against the street merchant for violating an implicit warranty of title.

principles behind these laws are the basis for the domestic US commercial code and they fit within the dominant global commercial code that sits on top of national commercial laws. These are the rules of the US market, and with a few variations they are also the rules of the global market.

These legal rules are the right form to make our case. The challenge is to apply these rules to current international trade so that the result is robust. Regimes such as Obiang's in Equatorial Guinea very much want to transfer their country's resources, and large corporations like ExxonMobil very much want to receive these resources. Both will argue strenuously that the rules of the market allow the transfer to take place. Obiang will insist that the people have given him explicit or tacit consent to sell off the nation's resources. The oil companies will portray themselves as good faith purchasers, who could not reasonably be expected to know of secrecy, deception, duress, or undue influence in the relations between the regime and the people. The corporations will assert that even if such events were occurring nothing could have put them on notice that they might be receiving goods without valid title. For our legal framework to stand up to such vigorous and well-funded challenges, its application to cases like this must be solid.

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

To prove this we will need theory on two levels. First, we will need an account of the absolutely *minimal conditions* that must obtain in a country for it to be possible for a people to authorize a regime to sell its resources. Second, we will need an account of *authoritative notice* that indicates when these minimal conditions do or do not obtain. Authoritative notice that a country has not achieved the minimal conditions necessary for the people to authorize a regime will establish publicly that the regime cannot possibly be authorized to sell the

country's natural resources. When such authoritative notice has been given, no corporation can buy from the regime in good faith and so no legitimate transfer of these resources can go through—no matter how strongly desired by the regime or the foreign corporations.

This section sets out the first theory: that of minimal conditions. What we need here is an account of the minimal conditions that must obtain in a country for it to be possible for a people to be able to authorize a regime to sell its resources. Such an account is simple to derive, since it follows directly from the concept of valid consent to a sale.

To gain the people's authorization to sell, a regime must have some sort of valid consent. A regime may claim that the people *asked* it to sell off their resources, or that the people *agreed* that it should do so. At last resort a regime may assert that the people signaled their *acquiescence* to the sale of their resources by remaining silent as the sales occurred. This final assertion—that the people tacitly consented to resource sales by remaining silent—is the claim that strongmen and civil warriors are most likely to make.

However, for a people to perform any act of authorization—including the act of acquiescing by remaining silent⁵⁹—certain minimal conditions must be met. For any owner to authorize a sale, even tacitly, the owner must:

1. Be informed about the sale;
2. Be able to stop the sale by objecting without incurring severe costs;
3. Not be subject to extreme manipulation by the seller.

If an owner is not under these minimal conditions, then no action taken by the owner can authorize the sale of that owner's property.⁶⁰

⁵⁹ Signaling acquiescence by remaining silent is an action. "Consent is called tacit when it is given by remaining silent and inactive... nonetheless, tacit consent is given or expressed. Silence after a call for objections can be just as much an expression of consent as shouting 'aye' after a call of ayes and naves." A. John Simmons, "Tacit Consent and Political Obligation," *Philosophy and Public Affairs* 5.3 (1976): 274-291, p. 279

Since we are looking to build the sturdiest legal framework, we will take a permissive interpretation of what these conditions require—one that is quite favorable to the authoritarians and oil companies. As applied to our case of a people and a regime, the three conditions require at least the following.

1. An owner who is not informed about sales or their terms cannot approve or disapprove them. Citizens who are unaware that their resources are being sold cannot approve those sales even tacitly. At the very least, reliable general information about which resources the regime intends to sell and who will get the proceeds should be available to the people, and citizens should be able to access this information without practically insurmountable difficulties.

2. In order to acquiesce to resource sales, an owner must have the ability and opportunity to object to these sales without incurring severe costs.⁶¹ Any regime claiming that it has the consent of the people to sell must put some effective mechanisms in place through which it acknowledges the people can say no to the sales. And citizens must be able peacefully to express their dissent inside or outside of these formal mechanisms without fearing exile, imprisonment, torture or death.

3. The decision of the owner to consent must be to some minimal extent independent of the will of the seller. An owner who is hypnotized, brainwashed, or subject to extraordinary psychological manipulation does not validate the sale of his resources even if he remains silent as his resources are sold. North Korea actually has some oil, but the comprehensively dominated and propagandized

⁶⁰ Each of these is a condition that must obtain for a people authorize—even tacitly—the sale of its resources. These conditions map onto the principles of property and contract embedded in commercial law. Any regime that gains control of natural resources through stealth, deception, duress or undue influence must violate one or more of the conditions above. A regime that gains control over resources through stealth or deception will violate condition 1. A regime that gains control over resources through duress will violate condition 2. A regime that acquires control over resources through undue influence will violate condition 3.

⁶¹ An analogy from Simmons: a chairman could not claim even tacit consent from his board members if he finished his proposal by saying: “Anyone with an objection to my proposal will kindly indicate it by lopping off their arm at the elbow.” Simmons, “Tacit consent,” p. 280.

people of North Korea could not now express even tacit approval to the current regime selling their oil abroad, even if the regime were inclined to do this.

In concrete political terms these conditions require that citizens have at least minimal civil liberties and bare-bones political rights. There must be at least some absolutely minimal press freedom if citizens are to have access to information about what the regime is doing. The regime must not be so deeply corrupt that it is nearly impossible for the people to find out what will happen the proceeds 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 political mechanisms in place through which the people can express their unhappiness about resource sales—at least a non-elected consultative legislature that advises the regime, or at the very least occasions on which individuals or civic groups can present petitions. And there must 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 tacit consent. Absent these conditions, the people's silence is just silence. A regime in a country where these conditions are not met cannot claim to be selling natural resources with the people's acquiescence. Outsiders who are on notice that these conditions are not met within a country cannot believe that its citizens are authorizing sales when it is impossible for them to do so. Outsiders who are on notice cannot purchase resources from any regime within the country in good faith.

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

9. *Authoritative Notice* (*)

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

We cannot rely on any mechanisms 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 mechanisms 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.⁶²

Pogge's suggestion is that notice be given by an *authoritative procedure*: the decision-making of an international panel composed of reputable, independent jurists.⁶³ To adapt Pogge's suggestion to the current proposal: this international panel would investigate whether the minimal conditions had been met within suspect countries, and would have sufficient standing that its rulings would carry weight in the international community. The panel's judgment that a certain country did not fulfill the minimal conditions for agency would put all

⁶² Pogge, *World Poverty*, p. 155-58.

⁶³ Pogge, *World Poverty*, p. 156. Pogge's proposal is for a "Democracy Panel," since democracy is his condition for legitimate sales. I am adapting the panel idea for the less demanding minimal conditions discussed here. The Commission for Africa recommends an Expert Panel within the UN to monitor links between resource extraction and violent conflict, which panel could recommend enforcement measures to the UN Security Council. Commission for Africa, *Our Common Interest* (New York, Penguin: 2005), p. 69.

international actors on notice that natural resource purchases 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.

Jayachandran, Kremer and Shafter also opt for a panel model in the parallel context of “odious debt.”⁶⁴ They are not as sanguine as Pogge is about the United Nations: they worry that the inclusiveness of the UN would mean that the panel will be put under pressure by regimes that should be disqualified or that have no compunction about subordinating the panel’s aims to political bargaining.⁶⁵ Their 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.”⁶⁶ However, like Pogge’s proposal, this alternative also runs significant risks. If the member states that supply the panel’s members are mostly rich countries, then the panel may be captured by commercial interests (working through the ministries of the rich countries) that want the resource transfers to go through.

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 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 developed countries through two routes: through the political

⁶⁴ “Odious debt” is debt incurred by a regime for purposes that do not benefit the people. See Christian Barry and Lydia Tomitova, “Fairness in Sovereign Debt” *Social Research* 73.2 (2006) for questions analogous to ones taken up here concerning whether “non-minimally representative regimes” should be able to bind democratic successor regimes, and for proposals to redefine debtor-creditor relationships so that odious debt is less likely to arise.

⁶⁵ Seema Jayachandran, Michael Kremer, and Jonathan Shafter, “Applying the Odious Debt Doctrine while Preserving Legitimate Lending” [2006; forthcoming in *Ethics and International Affairs*]. The authors have similar worries about the UN Security Council filling the role of the panel. See also Seema Jayachandran and Michael Kremer “Odious Debt” in Chris Jochnick and Fraser Preston, eds., *Sovereign Debt at the Crossroads* (Oxford: Oxford University Press, 2006), pp. 215-25.

⁶⁶ Jayachandran et. al., p. 19.

institutions or through the judiciary. Jayachandran et. al. look to the political route.⁶⁷ The panel they posit would have enough standing among rich-country governments that these governments would respect the panel's negative rulings and put their own corporations on notice that the regime in the specified country was not to be dealt with.

This proposal faces obvious difficulties, especially regarding compliance by the United States. The more independent an international panel is (the purer its "input"), the less likely it is that the US government will endorse its rulings. Both the US executive and legislative branches have proved robustly suspicious of international panels that the US does not control.⁶⁸ And this suspicion, it must be admitted, is also widespread within the American people. Yet without American support for its judgments, the effective authority of any panel's decisions will be limited.

It might be thought, then that the output of the international panel could better feed into the judicial systems of developed countries. On this "judicial" route, the negative judgments of the panel would be admissible as evidence in domestic courts in actions charging that some party had illegitimately received extractive resources from a poor country. 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 with considerable jurisprudential bravado to rule that the judgment of an international panel was decisive in allowing an action to proceed, for example, against ExxonMobil for its oil contracts in central Africa.

⁶⁷ Pogge leaves this question open, mentioning both the government and the courts of rich countries. Pogge, *World Poverty*, pp. 164-65.

⁶⁸ 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 (in which the US can veto any resolution).

Until a credible proposal for an international panel has been put forward we should search for other solutions. The second major suggestion for solving the criterial problem for authoritative notice is that we find *authoritative standards* that could be used directly by domestic judges. The idea here is to bring actions in developed countries' courts against parties who have dealt with regimes in countries where it is suspected that the minimal conditions are not met. Here it will be the judges of domestic courts who rule that there were clear indicia of sufficient standing to put all prospective buyers on notice that resources could not legitimately be bought from the regime in question. So, for example, an American judge would be asked to rule that the conditions in Equatorial Guinea were such to give notice that no foreign parties could legally purchase oil through its current president.

The advantage of this direct judicial solution is that it immediately resolves the question of the authority of the judgments. Unlike an international panel, the rulings of domestic judges bind all actors within their court's jurisdiction. The disadvantage of this suggestion is that that domestic judges may not seem to be up to the task that would be assigned to them. Domestic courts are not fact-finding bodies, and their judges cannot be presumed to be experts either in political science or foreign affairs. For judges to rule that the minimal conditions had not been met in some country, the basis of their decision must be given by some external authoritative standards. Yet where could such standards be found?

There are two challenges here. First, domestic judges need *bright-line* standards: the standards must clearly state that the minimal conditions for legitimate sale have or have not been met. Yet the political conditions within any poor country will be complex, and it seems that any country will fall somewhere on a continuum of evaluation on which bright lines will be hard to find.⁶⁹ Second, judges need bright-line standards that are of sufficient *standing* to secure what

⁶⁹ As Jayachandran et. al., p. 17 put this first problem, "There are simply no legal definitions of democracy or dictatorship with sufficient clarity for a judicial forum to rule upon."

will after all be very dramatic judicial decisions. To be of sufficient standing, the standards would have to be recognized by domestic and international agencies at the highest levels. In the ideal case, in ruling against an American oil company an American judge would be able to rely on independent standards that the American government had officially and publicly endorsed. These would be standards that no American corporation could deny had put them on notice.

This ideal case might seem a distant hope, again especially in the American case. However, I will suggest that even the American case is promising for applying the property-based legal framework. There currently exist public, bright-line standards that indicate for every country in the world whether the minimal conditions for resource sales have been met. Moreover, these standards have enough standing to ground secure judgments in American courts. In fact, American courts could tomorrow be presented with standards that are clear enough and decisive enough to support a ruling that all parties bound by American law are on notice that the minimal conditions in particular countries do not obtain. American courts could rule right now that all purchases of natural resources from specific countries are illicit.

10. Authoritative Standards

A good faith purchaser is one who buys without notice of any circumstances that would make a person of ordinary prudence inquire whether the vendor's title to the goods being sold was valid. International resource corporations such as the oil giants and the major mining companies in fact have extremely good information about the conditions in the countries they are buying from and the regimes they deal with. Obtaining detailed and reliable information is a business necessity for corporations that deal in the most repressive and chaotic countries in the world. These corporations pay significant sums for country reportage, and the information they receive often rivals that of state intelligence agencies such as the CIA. If some regime is deceptively or forcefully keeping resource revenues for itself, the corporations that are signing contracts with that regime know this. And indeed general information about the political

conditions in every country is regularly published by government ministries (like the US Departments of State and Energy) that want to help domestic businesses of all sizes to make their investment decisions.

Either corporate intelligence or ministerial publications could be useful in litigation to establish that some country does not meet the minimal conditions, and so that no corporation can buy from a regime in that country in good faith. As far as this kind of information is available it should be used. Fortunately, there is also another source of authoritative notice. The US government has authorized for official use an independent report that provides bright-line measurements of the political conditions in every country in the world.

In 2002 the Bush administration established the Millennium Challenge Account [MCA] as a mechanism for distributing development aid to poor countries. In his speech launching the MCA, President Bush required that it choose countries that would receive aid based on “a set of clear and concrete and objective criteria” on governance that would be applied “rigorously and fairly.”⁷⁰ For the governance criteria concerning civil liberties and political rights, the US government selected the ratings by Freedom House.

Freedom House is an independent NGO established in 1941 by Eleanor Roosevelt and Republican presidential candidate Wendell Wilkie. Its Board of Trustees is filled with business leaders (e.g., Malcolm Forbes Jr.), former senior government officials (e.g., former UN Ambassador Jeanne Kirkpatrick), scholars (e.g., Henry Louis Gates Jr.) and journalists (e.g., P.J. O’Rourke)—well-known figures of the American establishment. The organization is well-funded and expanding, with a regional headquarters in Europe and field offices in several developing countries.

Since 1972 the organization has published *Freedom in the World*, an annual evaluation of the political conditions in countries around the world. The survey uses indicators drawn from the *Universal Declaration of Human Rights* to

⁷⁰ Speech of George W. Bush, March 14, 2002 (<http://www.whitehouse.gov/infocus/developingnations/millennium.html>).

rate each country in two broad categories: civil liberties and political rights. The Freedom House ratings are widely used by journalists, academics, and non-governmental agencies, and even those critical of the ratings conclude that “most scholars of comparative politics consider the Freedom House index to be the best measure available.”⁷¹ The Freedom House ratings are used by the US government not only for the MCA, but also, for example, by the State Department to set official targets for its own performance.⁷²

The Freedom House report assigns each country a rating from 1 (best) to 7 (worst) on political rights and on civil liberties. The index on *civil liberties* measures to what degree citizens are free from arbitrary coercion, violence or manipulation. The report describes countries with the worst two scores on civil liberties in this way:⁷³

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 2006 Freedom House report are Belarus, Congo, Equatorial Guinea, Ivory Coast, Haiti, Iran, and Zimbabwe. Among the countries with a rating of ‘7’ are Burma, Cuba, Libya, North Korea, Somalia, Sudan, and Syria.

⁷¹ 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, p. 31.

⁷² Department of State and U.S. Agency for International Development, “FY 2007 Joint Performance Summary, Strategic Goal 7: Democracy and Human Rights,” (<http://www.state.gov/documents/organization/59177.pdf>).

⁷³ Freedom House, *Freedom in the World 2006*.

The Freedom House index of *political rights* measures how much the people's informed and unforced choices control what the political authorities do. The descriptions of countries that receive the worst scores on political rights are as follows:

Rating of 6 -- Countries and territories with political rights rated 6 have systems ruled by military juntas, one-party dictatorships, religious hierarchies, or autocrats. These regimes may allow only a minimal manifestation of political rights, such as some degree of representation or autonomy for minorities. A few states are traditional monarchies that mitigate their relative lack of political rights through the use of consultation with their subjects, tolerance of political discussion, and acceptance of public petitions.

Rating of 7 -- For countries and territories with a rating of 7, political rights are absent or virtually nonexistent as a result of the extremely oppressive nature of the regime or severe oppression in combination with civil war. States and territories in this group may also be marked by extreme violence or warlord rule that dominates political power in the absence of an authoritative, functioning central government.

Among the countries rated '6' on political rights in the 2006 report are Angola, Cambodia, Chad, Congo, Ivory Coast, Nepal, Pakistan, Rwanda and Somalia. Among the countries rated '7' are Burma, Cuba, Equatorial Guinea, Haiti, Libya, North Korea, Syria, Sudan, and Zimbabwe.

In order to build the strongest legal framework we want to use the least controversial empirical assumptions. Therefore, we will focus only on the clearest cases in which 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 indicating that the people of that country do not have sufficient information about resource sales, or opportunity to dissent from the sales without severe costs, or freedom from extreme political manipulation. A rating of '7' should therefore be conclusive for establishing that all potential buyers within American jurisdictions are on notice that any regime in that country will lack valid

title to the goods it is offering for sale.⁷⁴ These are bright-line standards. And they are standards that have been proclaimed by and are being officially used by the US Government as objective and reliable measures.

A Freedom House rating of '7' should be decisive for establishing authoritative notice for all US companies that no resource sales can be legitimate from any regime in that country. Calculations for American petroleum imports using this criterion show that over 600 million barrels of illicitly transferred oil arrive at American ports annually. This is 12.7% of US oil imports—more than one barrel in eight.⁷⁵ Most of this petroleum is refined for gasoline, the rest is used in making a wide range of consumer products from plastics, inks, and asphalt to clothing, cosmetics and medicines. Even under empirical assumptions that are favorable to the international resource corporations, and even within a

⁷⁴ The Freedom House ratings are useful for countries in which there are civil wars and failed states as well as for countries that have repressive governments. Freedom House does not evaluate government institutions as such; rather it evaluates the conditions of the people within a given country. The question asked is whether the citizens of the country actually enjoy certain civil liberties and political rights. Citizens can lack adequate protection for their liberties and rights either because the nation's government is oppressing them or because there is no genuinely national government that protects them from civil strife and coercion by local militias. The Freedom House ratings signal the *fact* not the *cause* of lack of basic freedoms within a country, so they register civil conflict and failed states as well as repression by a national government. This can be seen from the low ratings of countries like Sudan and Congo. In such places the ratings show that there is no political actor—government or rebel—that can claim to be representing the whole people of that country. So no outsiders can buy from any political actor in such countries in good faith.

⁷⁵ Freedom House has recently begun to release disaggregated data that will enable the property-based legal framework to be tightened even further. Five of the sub-category measures used to calculate the two main scores for each country map extremely well onto the minimal conditions for valid authorization. (These are sub-score categories B, C, D, E, and F; see their descriptions at <http://www.freedomhouse.org/template.cfm?page=35&year=2006>.) Freedom House scores countries in these sub-categories on scales of 0-12 or 0-16 ('0' being the worst). Calculating the percentage of US oil imports from countries that score '0' on one or more of these sub-categories gives us a number similar to the one above: 12.3% of the total.

very permissive construal of the legal rules, it is beyond doubt that the US receives a massive inflow of stolen goods every year.

11. Applying the Legal Framework

The US government has declared that the people of each country own the resources of their country. The US government has said that the citizens of some countries could not possibly be free to agree to their resources being sold. Therefore, according to the US government's own standards, American corporations are buying resources from regimes that could not possibly have the right to sell them. Any consistent pro-market government should prohibit these transactions explicitly. The US government may not presently be inclined to live up to its own standards. Legal action against US corporations within the framework above could stimulate it to do so.

The framework set out above is robust enough to support several different strategies in actual litigation. For example, actions against resource corporations could be taken within criminal law (for the crime of receiving stolen goods) or civil law (for a tort to property) or both. Which strategies will be most effective will be depend on the details of specific statutes and transactions. It is true that strong cases will require lawyers to overcome the resistance of the "might makes right" rule that still lingers in transnational law.⁷⁶ The signs are good, however, that strong civil or criminal cases could be brought.⁷⁷ Cases requiring the US to follow its own principles in enforcing property rights are waiting to be made.

⁷⁶ For example, a working assumption in private international law is the "choice of law" provision which says that a despot and an oil company can choose to apply the law of the despot's own country (as interpreted by the despot's chosen judges) to decide whether the despot has title to goods within the country. This assumption can be defeated on grounds of public policy, but it does need to be defeated for a case to proceed. See Charles Wild, *Conflict of Laws* Rev. ed. (London: Old Bailey, 2003), pp. 24-5, 145.

⁷⁷ Two examples: for criminal law, the Federal statute concerning receipt of stolen goods (18 USC 662) has explicit extraterritorial jurisdiction, obviating the need to pass an "effects and conduct" test (see Congressional Research Service, "Extraterritorial Application of American

12. *Objection: Political Bias of the Standards (*)*

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

Application of the legal framework set out above will be opposed, not least by those whose business deals this threatens. For example, any proposal to use the Freedom House ratings to invalidate a major oil contract between a US oil giant and Libya ('7' on civil liberties, '7' on political rights) is bound to meet resistance.

Some might object that the Freedom House ratings are inappropriate for judicial use because they are politically biased. Freedom House proclaims its independence from governmental institutions in its promotional materials, and highlights the bipartisan character of its Board of Trustees. Yet there is no doubt that the organization is politically conservative in the American sense, and academic studies have shown that its survey tends to rate Marxist-Leninist regimes lower than do similar academic surveys.⁷⁸

Criminal Law," 94-166 A (2006)). For civil law, in addition to the UNOCAL case cited above, a New York court has recently upheld a plaintiff's right to bring action under the Alien Tort Claims Act regarding Shell's activities in Nigeria (*WIWA v. Royal Dutch Petroleum Co. & Shell Transport and Trading Co .*, WL 319887 (S.D.N.Y. 2002)).

⁷⁸ K.A. Bollen and P. Paxton, "Subjective Measures of Liberal Democracy," *Comparative Political Studies* 33 (2000): 58-86.

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

13. Objection: Political Pressure to Change the Ratings ()*

A more serious concern is that Freedom House would come under political pressure to change its ratings should actions be taken in court against large American companies in the extractive industries. Should the current proposal prove feasible, a great deal of money would turn on how different countries fared with regards to meeting the conditions that the standards set out. The difference between a country being rated '6' rather than '7' on the Freedom House scales 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 with poor countries one would suspect that these friends would start requesting that certain countries have their ratings raised.

As we will see below, full implementation of a property-based approach to international trade will generate political counter-pressures to those from the international resource corporations and their supporters in government. However, at a certain point, one can only hope that the director, board, and employees of Freedom House will be able to resist pressures from *all* politicians and stick with the organization's self-image as an independent evaluator.

There is another reason to be optimistic here. One thing we know for certain is that the *current* (2006) Freedom House survey is not warped by 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 rated at '7'. Given that the current ratings are not distorted by the relevant political pressures, and that everyone would know that pressure would be applied on Freedom House to revise its ratings upwards for certain countries, Freedom House would have quite a bit of reputational credibility bound up in proving publicly that future upward revisions of the ratings for those countries were justified. Moreover academics and non-governmental organizations will scrutinize and criticize each new annual survey, increasing the pressures on the organization to resist excessive suasion.

14. Objection: Meddling in the Affairs of Other Countries ()*

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

However compelling this objection might be in other contexts, it has no application here. US courts working within the framework above would not be meddling in the affairs of other countries. To the contrary, they would be *preventing* US corporations from entering certain countries—specifically those countries in which American money is likely to empower repressive regimes, incentivize civil wars and coups, and dampen economic growth. The courts are preventing American entities from “meddling” in the affairs of other countries, where in the past such meddling has proved detrimental to the people.

Nor can the leaders of the regimes in poor countries complain about the standards that the American courts would use in their rulings. No controversial ideal of democracy is applied. Rather, the courts will be evaluating with the best evidence available to them whether the regime is, as it claims it is, selling resources to foreigners with the people's authorization. Moreover courts will

focus only on this specific claim by the regime, without inquiring whether the regime may legitimately enforce domestic laws, defend territorial borders, participate in international organizations, or any such broader issues of sovereignty.

15. Objection: The Happy Subjects ()*

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

Within any given country, these claims might conceivably be true. It could conceivably be true that most citizens in a country are happy to have their resources sold out from under them, and happy for the money from these sales to be used in ways likely to make them worse off. However given the indicators of oppression, corruption and chaos within the country, corporations will not be able to offer any evidence in court that these claims hold true. When conditions in a country are bad enough to rate a Freedom House ‘7,’ whatever facts could be offered to attempt to show that citizens are happily supporting the state will in fact bolster the thesis that they are too frightened or dominated to do otherwise (think again of North Korea, or Burma). Here it is the corporations that will lack bright-line, authoritative evidence for their claims of “happy subjects.”

16. Objection: The Rules are Too Restrictive ()*

The idea that the natural resources of each country belong to the people of that country is intuitively attractive, yet may also be taken to imply more than it does. One misunderstanding would be that popular ownership requires each

country to create nationalized resource companies (for example, national oil or coal companies) like those set up in several developing countries in the 1970s. There is, however, no such requirement. Like any owner, a people may agree for its resources to be managed in any number of ways: for example by a nationalized resource company, or by a minimally decent government that signs contracts directly with foreign firms. Popular ownership only requires that a people be able to consent to their resources being managed in one way rather than another.⁷⁹

Nor does original popular ownership of resources mean that the resources can never be transferred to private ownership. A people can consent to any number of rules for the privatization of its property. In the US, for instance, the dominant law for oil happens to be that oil will belong to whatever private actor first reduces it to physical possession—essentially the law is “grabbers-keepers.” Similarly in the Oklahoma land rush of 1889 federal law transferred title to up to 160 acres of public land to whoever could first occupy it. The idea of popular ownership applies only to the initial, not to the final, ownership of natural resources.

The tight scope of the argument here is important. Our property-based approach to international trade focuses on one particular incident in the property bundle: the right to sell a territory’s resources to foreigners so that these resources are permanently beyond the control of the people. This is the specific right that all regimes claim to hold, and it is the specific right that the arguments here show that certain regimes cannot hold. We wish to highlight and remedy the flaw in international markets that results from this specific right being ascribed to regimes that cannot legitimately claim it. In doing this we can remain uncommitted about the practical implications—if any—of popular ownership for rights over resources that stay within the country. Those are different

⁷⁹ See also Vernon Smith’s proposal for an “Iraqi People’s Fund,” a mutual fund built up by auctioning the country’s resources, and from which any citizen could any time withdraw their proportionate share. “The Iraqi People’s Fund,” *Wall Street Journal* December 22, 2003.

discussions, and nothing we say here restricts their outcomes one way or another.

17. Objection: Peoples are not Actors or Owners

The people of a country own the resources of that country, and so have the right to dissent when a regime tries to sell those resources to foreigners. Because the idea of popular ownership is so deeply embedded in common sense and in international law I have so far simply used it as a premise. This idea does raise philosophical questions that could be discussed further. Can a group like a people really be said to act? And even if peoples act, are peoples really owners of resources? Popular ownership might be thought incompatible with some theory of individualism, either methodological or normative. Yet there are good reasons for theorists from all but the most extreme positions to endorse the proposal here. Moreover, I doubt that there are many theorists who would on reflection reject the idea of popular ownership, instead of only feeling an initial resistance to it because of the newness of the conclusions that follow from it.

Can a collectivity like a people act? As above we commonly speak of peoples as collective actors—we say, for instance, that in 1989 the Polish people decisively rejected the ruling communist government. Such assertions can be true without there being entities beyond individual persons or intentions besides individual intentions. A people acts, we might say, when most of its members act as citizens with the same intention. (Individuals act “as citizens” when they vote, march in protest, go off to war, write letters to the newspaper on political topics, and so on.⁸⁰) So we say that “the Australian people elected a president” after

⁸⁰ This account of collective action is more permissive than those in the literature that require, for example that each member of the collectivity express some form of conditional commitment to act (see Margaret Gilbert, *On Social Facts* (Princeton: Princeton University Press, 1992), p. 7); or require that each member have beliefs about the beliefs of other members regarding everyone doing their part (see Raimo Tuomela, “Actions by Collectives,” *Philosophical Perspectives* 3 (1989): 471-96). On the account sketched here, a people elects candidate C so long as each of a majority of citizens intentionally votes for C (for whatever reasons and with

most Australians vote to elect a president, and that “the Finnish people resisted the Russian invasion” when most Finns engaged in acts of resistance. This type of account allows us to talk quite literally of collective agency while remaining as individualistic as we like in our ontology.⁸¹

As for normative individualists, some libertarians do emphasize pre-political individual ownership in a way that might lead them to suspect any premise of ownership by a political entity like a people. Left-libertarians hold that individuals should own initially equal shares of the world’s resources regardless of their nationality, and some right-libertarians hold that ownership is determined by a historical process of just acquisitions and transfers by individuals stretching back to a pre-political state of nature.⁸²

Simply as a practical matter, all libertarians have good reason to support the property-based approach here. For whoever it is that such theorists say should control natural resources, it will not be the dictators and civil warriors who currently seize these resources by force. Left-libertarians who hold that each individual *should* control an equal share of the world’s resources cannot believe that all individuals currently *do* own an equal share. The approach here will push the present highly unequal pattern of control over resources toward greater individual equality around the world, and so will make progress toward the left-libertarian ideal. Right-libertarians should also object strongly to the current system in which tyrants and civil warriors can gain legal title to these resources

whatever beliefs about what others will do). The sketch here requires elaboration, yet an account that refers to what individuals do as role-bearers appears to track what we say about peoples better than do accounts developed to explain joint actions like two people taking a walk or moving a couch.

⁸¹ See for example the analysis in Philip Pettit, “Rawls’s Peoples” in D. Reidy and R. Martin, *Rawls’s Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006), pp. 38-56, and the literature cited in footnote 13.

⁸² For left-libertarianism, see the two volumes edited by Peter Vallentyne and Hillel Steiner, *The Origins of Left-Libertarianism and Left-Libertarianism and its Critics* (New York: Palgrave, 2004). The most detailed defense of “historical” right-libertarianism is in the work of Jan Narveson; see *The Libertarian Idea* (Peterborough, ON: Broadview, 2001).

simply through force. Individual property rights cannot be secured without institutions to protect individuals from oppression, banditry, and chaos—which is what the proposal here aims to secure.

On theoretical grounds, certain right-libertarians might question the approach here because they hold to some Lockean account of original acquisition of property that might at first appear to conflict with popular ownership. Yet without going into the details of original acquisition theory,⁸³ I doubt that most supporters of strong private property rights would really use this kind of account of pre-political property rights to defend current entitlements to resources. Most partisans of free markets support strong property rights because of the present and future importance of these rights (in advancing, for example, freedom or prosperity). Few support strong property rights because they want to defend specific entitlements that they know (would have) emerged from a distant state of nature through a series of just steps.

Moreover, there is nothing in the thesis of popular ownership hostile to the idea that all natural resources are now or should be privately property. There is nothing here to deny, for example, that entitlements to untapped oil deposits can come to be vested in the individuals who justly acquired the surface area above the deposits (*ad coelum et ad infernos*). Only the unlikely thesis of unaltered individual *pre-political* entitlements is denied here. Two examples should show how reluctant most will be to affirm such a pre-political thesis on reflection.

First, a thought experiment. Say a lone diver discovers oil bubbling through the sea floor a half mile off the coast of France. The diver takes a sample of the oil, and blocks the leak with a large rock. As it happens, the diver has

⁸³ For doubts about backward-looking libertarianism, see Wenar, “Original Acquisition of Private Property,” *Mind* 107, no. 428 (1998): 799-819. Even if these doubts are put aside, popular ownership of natural resources could be the result of an “ideal” right-libertarian history that begins in a state of nature. For example: individual owners in a state of nature might voluntarily cede some incidents of their individual resource entitlements to a people when joining into a national community; and state-sponsored explorers might then acquire virgin territory in the name of that people.

discovered a very large oil deposit. Knowing only this much of the story, do we *already* have enough information to determine that the diver owns all of this oil? Only the most extreme libertarian will say so. Others will want to know what French laws say about the rights of first discoverers of natural resources (for example if there is a “finders-keepers” rule for resources found within the country’s territorial waters). Anyone who wants to know more about French law before passing judgment on property rights already believes in *national* ownership of the natural resources within the country’s territory. This belief in national ownership then resolves into belief in popular ownership through the argument against the “might makes right” rule above.⁸⁴

The second example comes from recent history. A newspaper reports that after the fall of Mobutu’s dictatorial government in the Congo, “Troops from six neighboring countries poured across the borders to plunder minerals.”⁸⁵ What do we need to know in order to credit this paper’s assertion of “plunder” by the foreign troops? Should the story’s author have checked whether these “plundered” minerals (or the land above them) had ever been privately claimed? If invading Ugandan troops had cut through dense brush to find and then mine previously undiscovered coltan deposits, should the paper have qualified its assertion of plunder to exempt this episode? It seems not. We believe *a priori* that Ugandan soldiers extracting minerals from even virgin Congolese territory are engaged in plunder.⁸⁶ And here it is even clearer than usual that it must be

⁸⁴ To review: say country C is ruled by a violently repressive dictator who has issued a decree that all resources discovered under C’s territorial waters become his personal property. The dictator’s decree does not make itself true—these resources of the country still belong to the people, even though the citizens may be too terrified to object.

⁸⁵ “After Congo Vote, Neglect and Scandal Still Reign,” *New York Times* March 28, 2007.

⁸⁶ The International Court of Justice ruled by a vote of 16-1 (without examining claims of individual title) that Ugandan soldiers had been guilty of “looting, plundering and exploitation of Congolese natural resources” when they occupied the Ituri region of the Congo in 1998-99. The Court required Uganda to pay compensation to the DRC. International Court of Justice, “Press Release 2005/26” (2005).

the property of the Congolese people that the Ugandan soldiers are stealing, since there was no Congolese state in the period after Mobutu's government fell.

18. Objection: The Incompetent People

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

A regime might argue as follows. "We in the regime cannot be expected to gain the people's consent for resource sales, because the people is not competent to consent. The citizens of the country are too simple-minded (or too divided by ethnic antagonisms, or too exhausted by the demands of daily survival) to come to a collective decision about the territory's resources. Since the people is not capable of deciding, we cannot possibly act according to the people's *wishes*. We can, however, sell the people's property in a way that furthers their *interests*." Just as a trustee manages a child's estate in its interests until it reaches the age of competence, so (the regime claims) it will manage the people's resources until (and in order to bring it about that) the citizens are competent to make their own choices.⁸⁷

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

⁸⁷ In philosophical terms, the regime here moves from an assertion of having the people's tacit consent to an assertion of having the people's hypothetical consent.

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

Even after a regime makes a plausible declaration that the people is incompetent, it must demonstrate absolute probity in its conduct. A regime that sets itself up as the guardian of an incompetent people is jumping out of the frying pan of property law into the fire of the law of agency. Agents of incompetent principals are bound by the strongest and strictest duties in all of equity, and these duties leave no room for the diversion of revenues that is typical of regimes in resource-rich countries.

The law states that an agent of an incompetent principal must fulfill rigorous fiduciary duties. The primary fiduciary duty is to manage the principal's affairs for the principal's benefit, *not* for any benefit to the agent. The main rule is that an agent must not profit from their fiduciary position. This rule includes all profits from transactions made in the principal's name, and also profits that come about because of opportunities indirectly afforded by the agent's position. All of these profits must be held in trust for the principal.⁸⁸ The same is true of any bribes or secret commissions, which must also be held in trust. An agent is in fact bound by a duty not to be in any situation where their personal interests and

⁸⁸ A competent principal may consent to an agent keeping any profits that the agent reports, but since the regime is alleging that the people is incompetent it cannot keep profits on this basis. The agent of an incompetent principal may at most receive a reasonable fee.

fiduciary duties conflict. The agent's liabilities here are strict. The agent may not offer the defense either that they did not intend to breach their duties, or that their dealings somehow left the principal better off.

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

19. Objection: No Proof of Illicit Sales ()*

The extraordinary strictness of fiduciary duties toward an incompetent principal mean that any hint of improper diversion of revenues is enough to require a reasonable outsider to doubt that the agent is acting solely in the interests of the people. Any number of publicly available indicators of corruption should be sufficient to put potential buyers on notice that they cannot purchase in good faith: the Freedom House reports, the Transparency International country studies, the publications of government ministries, and so on.

However, there is one last move that a regime claiming to be the agent of an incompetent people could try. The regime could assert that it is not diverting resource revenues because it is not receiving resource revenues—it is not selling off any (or many) of the country's resources. Regimes publish their own accountings of their finances, and contracts between regimes and international resource corporations are often kept secret. This leaves room for members of a regime to assert that although they are rich, they are not getting rich from selling oil, gas, or minerals. Such a regime could allege that all of the press stories of huge secret payments from oil companies that end up in Swiss bank accounts

are confabulations of a hostile Western media. Corporations wishing to purchase resources from the regime could claim that they were relying on such statements and so lacked notice of diversion of resource revenues.

Fortunately there is now an internationally authoritative and definitive standard for enabling such regimes to make good on their assertion that they are not receiving resource revenues. The Extractive Industries Transparency Initiative (EITI) was launched by the British Government in 2002, specifically in response to the resource curse:⁸⁹

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

An EITI report is essentially a publicly-accessible external audit of extractive resource sales. Governments that implement the EITI procedures publish verifiable reports of what resources they have sold, to which companies, and for how much. Over 20 countries have committed to the EITI process so far, and two (including one very large country, Nigeria) have actually produced reports.⁹⁰

The EITI is the internationally accepted standard for transparency in sales of extracted natural resources. It is a bright-line standard, in that a country has either produced an annual EITI report or it has not. And it has broad support on the highest governmental and inter-governmental levels. The EITI has been endorsed by the G8, the OECD, and the IMF. The World Bank has not only endorsed the EITI, but (through by an initiative of its head, Paul Wolfowitz) has

⁸⁹ <http://www.eitransparency.org/section/abouteiti>. See also www.publishwhatyoupay.org.

⁹⁰ Other EITI-committed countries include Chad, Kazakhstan, Bolivia, and Peru.

also set up a team to support the Initiative and is administering its trust fund.⁹¹ The EITI is also endorsed by NGOs such as Transparency International, Global Witness, and the Open Society Foundation. It has been endorsed by the American Petroleum Institute, the International Council on Mining and Metals, and the International Organization of Oil and Gas Producers. Finally, it is being supported by some of the largest international resource corporations, including Anglo American, Barrick Gold, BHP Billiton, BP, ChevronTexaco, ExxonMobil, Marathon, Rio Tinto, Shell, Statoil, and TOTAL.

Any regime asserting that it receives no or little revenue from resource sales must complete an EITI report. Without such a report, no corporation can claim to be acting on a good faith conviction that the regime is not diverting resource revenues. Once an EITI report shows that substantial sums are being received by the regime through resource sales, then any credible public reports of corruption of the kind indicated above should disqualify that regime from good faith dealings.

20. Objection: Won't Bad Regimes Sell the Country's Resources to Others?

So far this article has argued that resource purchases from countries with severely repressive regimes should be blocked. The US government has already shown that it agrees with this argument to at least some extent. For example, since 1997 the US government has barred American energy companies from trading with the Sudanese regime in Khartoum, in part because of this regime's grim record on human rights. The property-based approach would only add that American energy companies should be barred from trading with the Sudanese government specifically because this regime is violating the human rights that are property rights.

⁹¹ See Wolfowitz's speech at a plenary conference for the EITI: <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21095412~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

However, imagine that this property-based approach was widely adopted. Imagine that the US, the UK, Holland, France and all other major western powers were to stop their corporations from buying resources from repressive governments and civil warriors. Wouldn't other countries who are less fussy about moral principles or the niceties of property rights just step in and purchase these resources instead? Say that both American and European oil companies were barred from signing contracts for Sudanese oil. Wouldn't the Chinese just buy the oil from the current regime anyway? Would the proposal here really make any difference to the resource curse?⁹²

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

These are important challenges, but they can be overcome. One possible solution again turns on enforcing property rights. Western governments can set up property-enforcement mechanisms to keep their citizens from receiving stolen goods second-hand. And Western governments can do this in a way that will attract the support of very powerful interests.

⁹² Sudan's civil conflict, which has flared up repeatedly since the 1980s, pits the Muslim Arab government in Khartoum against the Christian and animist African tribes in the south of the country. For years the government lacked the means to defeat the resistance movement in the south. However, since the beginning of serious oil production in 1999 the government has received about \$500 million a year from foreign companies, and has spent much of this money on arms that human rights groups say have been used to attack civilians in the south and now also in the west (Darfur). China is a major investor in Sudanese oil, extracting hundreds of thousands of barrels per day from several fields including one in Darfur. China currently meets 7% of its total energy demand with oil from Sudan. "Hu's trip to Sudan tests China-Africa ties," *Christian Science Monitor* February 2, 2007.

Sudan rates a Freedom House '7' on both civil liberties and political rights. So let us imagine that American oil companies continue to be banned from dealing with the regime there. Say that China now buys \$3 billion worth of oil from the Sudanese regime in Khartoum. The correct response on a property rights approach is for the United States government immediately to announce a Clean Hands Trust for the People of Sudan. The government announces that this Clean Hands Trust will be filled until it contains \$3 billion. The money to fill the trust will be raised from tariffs on Chinese imports as they enter the United States. The money in this Clean Hands Trust is to be held for the people of Sudan until the minimal conditions in that country are met. At that point, the money in the trust will be turned over to the Sudanese people.

The Clean Hands Trust will protect the American people from becoming tainted with the oil illegitimately obtained from Sudan. The tariffs extract revenue from the Chinese up to the amount that they should have paid to the Sudanese people for their oil, and the trust holds this money in reserve until it can be given back to the Sudanese. With the trust in place American consumers can buy Chinese goods with clean hands, because the trust subtracts the value of that element of the goods' manufacture that comes from the illicit oil purchases from Sudan. The payments for the tariffs will be extracted from China, which having violated market rules by passing stolen goods has no standing to complain that these violations are being rectified.⁹³ It is true that American consumers will have to pay slightly higher prices for some Chinese imports when these tariffs are in place. But this is just in the same way that consumers always pay more to buy legal commodities—the same way you have to pay more to buy a watch from a department store than you would pay to buy a black market watch on the street.

The Clean Hands Trust protects property rights by retaining the value of the looted property for the owners of that property: the Sudanese people. The

⁹³ The tariffs may have to collect total revenues greater than \$3 billion in order to ensure that it is the Chinese (and not American consumers) who end up contributing \$3 billion to the trust. Where to set tariff levels so that the total sum comes from the Chinese is a technical question in trade economics.

tariffs here are also different from other tariffs: they could be called “anti-theft tariffs” because their justification is to enforce the property entitlements that undergird the system of international trade. The trust-and-tariff mechanism is not a restraint on free trade; rather, it helps to bring all resource sales into the system of enforced market norms. The mechanism extends the market order by pushing a significant portion of the global circulation of resources into the domain of trade, so that it is no longer merely a massive shifting of stolen goods.⁹⁴

This trust-and-tariff mechanism is also incentive-compatible, as it will generate strong motives for a variety of domestic interests to support the property-based approach. The moment that China contracts for the Sudanese oil, American manufacturers will lobby the US government vigorously to set up a Clean Hands Trust. Many American companies (in apparel, electronics, machinery) will want tariffs to protect them against Chinese competition, and will not care where the money from the tariffs goes so long as the tariffs raise prices for Chinese goods in the US. The US banking industry will be enthusiastic about the Clean Hands Trust, as US banks will hold the tariff proceeds in trust until it is returned to the Sudanese. Both the manufacturing and banking sectors will welcome the opportunity publicly to support measures aimed at helping poor people overseas. Moreover once the tariffs and the trust are in place, both manufacturing and banking interests will want these to continue. These industries will therefore provide the political counter-balance (mentioned above) to the pressure from the international resource corporations such as the oil giants to raise the Freedom House ratings for Sudan as quickly as possible.

The Chinese, for their part, will have much less of an incentive to buy more oil from Sudan, knowing that if they buy \$2 billion more oil then the US will impose tariffs worth \$2 billion more on their goods. The tariffs targeting Chinese goods can be imposed regardless of whether it is the Chinese government or rather some (future) private firm headquartered in China that buys the Sudanese

⁹⁴ The trust-and-tariff mechanism can be seen as an operationalization of Nozick’s third basic principle for the legitimacy of capitalist holdings: the principle of rectification of injustice. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 152-53.

oil, so the Chinese government also has an incentive to keep its domestic companies from making such illicit purchases. And the Sudanese people will know that there is a great deal of money waiting to be turned over to them, if they can replace the current regime that is looting their resources with a minimally unified, decent government. The trust gives the Sudanese people an extra incentive to unite in installing a government that will represent the wishes of all the people, while drying up the revenues that support and arm the current Sudanese regime.⁹⁵

With a slight modification, the trust-and-tariff proposal can be implemented in any country. Any government that prohibits its corporations from receiving Sudanese oil may set up a Clean Hands Trust. Once the Chinese contract with the Sudanese government, any country can announce that it is setting up such a trust and will fill it to the amount of the Chinese contract. Each government that sets up such a trust must then continually update its public report of how much money it is currently holding in its trust, and all governments must stop filling their trusts once the combined global total in all of the trusts held by governments has raised the contracted amount from the Chinese (\$3 billion). This gives the “clean” countries a competitive incentive to announce and fill their trusts as quickly as possible, while limiting the amount the Chinese will be penalized to the amount of the original property rights violation.⁹⁶

⁹⁵ The money held in trust for the Sudanese people should be repatriated once the country meets the minimal conditions set out above. Of course as responsible trustees the rich countries that hold the money in trust should not hand this money over to a poor-country government if they reasonably believe that this will enable the government to plunge the country back below the level of legitimacy. Here we must rely on rich governments responsibly carrying out their fiduciary duties as trustees, which duties as it happens line up with these governments’ interests in allowing their resource corporations to gain access to the resource-rich country.

⁹⁶ The WTO would be a natural choice to facilitate coordination among different national Clean Hands Trusts. In any case, the trust-and-tariff proposal will be greatly aided by WTO approval. The tariffs imposed on Chinese imports are a mechanisms that enforce property rights, and so under WTO rules the Chinese should not be able to retaliate against them. The tariffs are in this way analogous to the enforcement mechanisms for intellectual property rights under

The trust-and-tariff policy should also attract popular support in developed countries across the political spectrum. Free market advocates should support the trust and the tariffs because these mechanisms enforce property rights and so strengthen the global market order. Protectionists will back the tariffs because they protect domestic manufacturing and so keep good-paying jobs from moving overseas. Those who prioritize national security will see in the policy an opportunity to strengthen failed states where terrorism can incubate,⁹⁷ and also to weaken the hold on power of potentially hostile “petrocrats.” Environmentalists should also support the property-based approach, as its implementation would inevitably raise the price (and so lower the consumption) of petroleum, leading to lower global carbon emissions. And humanitarians will rightly see the proposal as helping to improve the conditions and opportunities of some of the most impoverished and oppressed people in the world. The policy is not only incentive-compatible for many powerful interests, it should be broadly appealing across the political spectrum from right to left.

21. Objection: Isn't this just Economic Sanctions?()*

The idea of isolating repressive regimes by stopping trade with them may raise concerns that the approach proposed too closely resembles traditional economic sanctions, which have an uncertain record of success. It may be asked whether this sort of strategy isn't just what the West tried with Iraq under Saddam Hussein, and whether we really want to run the whole world like the United

TRIPS, which the WTO oversees. Of course rich countries should not be able to impose non-retaliable sanctions on any ground whatsoever. The US is powerful enough in the WTO that its imposition of tariffs based on its own standards should give the WTO an impetus to settle on common standards for such tariffs.

⁹⁷ White House, *The National Security Strategy Of The United States Of America* (September, 2002), p. 1 “America is now threatened less by conquering states than we are by failing ones.”

Nation's Iraqi sanctions regime, with or without its dubious Oil-For-Food program.⁹⁸

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

Second, the biggest difference between the current proposal and previous international sanctions is that the current proposal creates a better alignment of incentives and so is more likely to work. The problem with previous sanctions regimes is that the sanctions have not been universally observed. Oppressive regimes have sold their countries' resources to their traditional patrons and to other repressive regimes, thereby escaping some of the pressure that sanctions are meant to apply. By contrast, the property-based approach here gives all potential buyers incentives not to trade with an oppressive regime. Those who do trade (e.g., China with Sudan) will face exactly proportionate trade penalties. Unlike traditional sanctions, trade penalties here *track* the looted natural resources—so no one receiving these resources will remain unpenalized.

The current proposal will make life much more difficult for dictators. A dictator who has difficulties selling off his country's resources will have a much harder time maintaining himself in power, especially if it is widely known inside and outside of the country that an alternative, minimally-decent government would be able to sell these resources. Moreover the fact that potential dictators know that they will have a harder time keeping power should they get it will itself

⁹⁸ Global Witness critiques previous UN sanctions regimes (and suggests possibilities for improvements) in *The Sinews of War*, pp. 13ff.

reduce the incentives for potential dictators to try to take power in resource-rich countries in the first place.

22. Objection: The Approach will Hurt the Poor in Resource-Rich Countries

“Even when trade sanctions bite, they can hurt not only the sanctioned regime, but also the people subject to the regime”⁹⁹ The trust-and-tariff mechanism may appear to be better than traditional sanctions at preventing money from flowing into a poor country. However, some may see this as a disadvantage. One thing that the citizens of poor countries need, it might be said, is money coming into the country—yet the current proposal seals off the country from external funds. The approach may appear to double the trouble for these poor citizens—they will not only be tyrannized, they will be more destitute as well.

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

However we can be more positive than this hard-line response allows. For the objection has lost track of the context of the discussion: the resource curse. Poor people do not tend to benefit from resource revenues when the local regime is bad enough to be disqualified by the criteria above. Rather, resource revenues are the curse of the common people. Resource revenues tend to strengthen authoritarian rulers, incentivize coups, and fund civil wars. Further, this money does not make improvements in their standards of living more likely. The point of the resource curse is that the money that flows into the country from resource

⁹⁹ Jayachandran et. al., “Odious Debt,” p. 1.

transfers does not tend to benefit ordinary citizens, but rather tends to make their situations more desperate.

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

The resource curse occurs because foreign money harms the people of a country. The property-based approach proposed here will have the effect of stopping this harmful foreign money from coming in. It will deprive authoritarian rulers and civil warriors of funding that they would otherwise use further to immiserate the country's people. The Clean Hands Trusts will also give the people extra incentives to replace their tyrants and warlords with a minimally decent, unified government. That is perhaps the most we can ask of any realistic scheme.

There is also one last point in favor of the property-based approach. If the only way for ExxonMobil and BP legally to get oil out of Equatorial Guinea is for there to be minimally decent governance in Equatorial Guinea, then there will be minimally decent governance in Equatorial Guinea – at least if there is any way at all for outsiders to help achieve this. The property-based approach reverses the incentives of resource corporations and the governments that support them so that these powerful actors will be strongly motivated to secure the basic rights of citizens in poor countries, instead of being strongly motivated to remain complicit in the violation of these rights.

23. *Objection: Rich Countries Need Poor-Country Resources (*)*

The final objection is that rich countries need natural resources, and cannot be restrained by legal niceties from getting what they need. In the current political climate, the need of rich countries for resources will likely be phrased in terms of strategic and security interests. For example, the US Assistant Secretary of State for Africa, Walter Kanteiner, stated in 2002 that “African oil is of strategic national interest to us... [and] it will increase and become more important as we go forward.”¹⁰⁰ Ed Royce, the Chairman of the US House of Representatives Subcommittee on Africa, declared that “African oil should be treated as a priority for U.S. national security post 9-11.”¹⁰¹

It is not entirely clear what these kinds of pronouncements are meant to justify, or indeed how seriously they are to be taken. If the US has vital strategic and security interests in African oil, then certainly it will be important for the US to buy African oil from its real owners at a fair price. But any attempt to justify *taking* natural resources from the people of poor countries on the grounds of “strategic national interest” or “national security” should be treated with the greatest suspicion. A declaration of “security” can no more be the justification for one people to take another people’s natural resources than it can be for one people to take another people’s territory. A country that believes it needs more *Lebensstoff* must not try to obtain it by violating the basic rules of international conduct, any more than a country that believes it needs more *Lebensraum*.

24. *Conclusion*

The old Westphalian settlement among the great powers legitimized two moral anomalies. First, under these rules states could legally acquire foreign territory through violent conquest. Second, in this system rulers could legally

¹⁰⁰ Quoted in Michael Klare and Daniel Volman, “The African ‘Oil Rush’ and US National Security,” *Third World Quarterly* 27.4 (2006): 609-628, p. 616.

¹⁰¹ <http://www.iasps.org/strategic/africawhitepaper.pdf>.

abuse their own citizens for almost any reason. A double revolution in international affairs in the twentieth century swept away both of these anomalies. The first revolution was the universal acceptance of a doctrine of territorial non-aggression. This doctrine says that no regime may seize a foreign people's greatest resource—its territory—by force.¹⁰² The second revolution was the establishment of human rights. The doctrine of human rights insists that every regime must secure citizens' most fundamental entitlements to control their own lives.

The right of each people to its natural resources lies at the overlap of these two revolutionary doctrines. No regime, within a country or outside it, should gain the right to control a country's resources merely because it can terrorize the population. The "might makes right" provision that grants the resource right within a country to any sufficiently violent regime is the last major remnant of the old Westphalian settlement in international practice. This is a major flaw in the international system. The powerful actors that gain the most from this ancient provision—the international resource corporations—wish to divert attention from it because it contradicts the principles of control over resources that make them rich: the principles of property and contract. As we have seen above, US corporations are right now "buying" resources from regimes that the US government says cannot rightly sell them.

Pulling the "might makes right" provision into the light reveals both its inherent injustice and why so much injustice flows from it. As in neighborhoods where property rules are regularly breached by protection rackets and robbery,

¹⁰² See the *Charter of the United Nations*, article 2(4); Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* 2nd edition (Cambridge: Polity Press, 2006), pp. 1-10; Christine Gray, *International Law and the Use of Force* (Oxford, Oxford University Press, 2001), p. 51. The doctrine of territorial non-aggression has been remarkably successful as a revision in system of international norms. Since World War II there has only been one attempt by a UN member state to incorporate the territory of another member state into its own—the 1990 Iraqi invasion of Kuwait, which was quickly reversed with UN Security Council approval. Christine Gray, "From Unity to Polarization: International Law and the Use of Force Against Iraq," *European Journal of International Law* 13.1 (2002), p. 2.

the failure to enforce property rights of poor peoples creates misery for those whose rights are violated. This is the resource curse. On the other end of these transactions, consumers dirty their hands daily by purchasing goods that are not only stolen, but that have often been stolen from impoverished people using weapons paid for with money gained from previous sales of stolen goods.

The priority in reforming the system of international trade must be to bring this system in line with the norms that define the modern international order. The first step in improving the prospects of poor people is to enforce the entitlements they already have. Peoples have rights, and there are things no person or group may do to them (without violating their rights).¹⁰³ Trafficking in a country's valuable natural resources without the people's consent certainly crosses that line.

¹⁰³ See Nozick, *Anarchy, State, and Utopia*, p. ix.