

Evaluating International Agreements: The Voluntarist Reply and Its Limits

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On 31 January 2020 the United Kingdom left the European Union. The legal terms of this “Brexit”, and the new relationship between the UK and the EU, were set out in two international agreements, the Withdrawal Agreement, setting out the terms of the UK’s departure from the Union, and the UK–EU Trade and Cooperation Agreement (TCA), governing trading relations and cooperation post-departure. Three and a half years of often acrimonious planning, posturing and negotiations produced texts that were agreed between representatives of the UK and the EU, and ratified by their respective parliaments. Following a transition period (during which the TCA was negotiated), on 31 December 2020, the UK ceased to be a member of the EU customs union and common market.

Yet within months of their entering into force, the UK government (the same one that had negotiated them) began to publicly criticize these agreements, and specifically the difficult compromise agreed in respect of Northern Ireland.¹ This may have reflected genuine misunderstandings within government about the effects of the agreement, or bad faith in the negotiations themselves, or the changing domestic political situation. Regardless, within weeks of celebrating their “great”² and “crack-

¹For an overview, N. von Ondarza, “A shared responsibility for Northern Ireland: why the EU and the UK should work together to find flexible solutions after Brexit”, *SWP Comment*, 51, September 2021, <<https://www.ssoar.info/ssoar/handle/document/76127>>. For one version of the UK’s post-agreement position, see HM Government, *Northern Ireland Protocol: The Way Forward*, CP 502, July 2021, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf>.

²*Irish News*, “Boris Johnson hails ‘great’ Brexit deal that gives Northern Ireland access to the EU single market”, 9 November 2019.

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ing³ deal, UK ministers were directly contradicting its content⁴ and, as time went on, denying that they ever supported it, and branding its content “problematic”,⁵ economically harmful,⁶ and built on a premise that “does not exist in real life”.⁷

Public responses from the EU and its member states (and indeed many UK politicians)⁸ expressed predictable frustration: whatever the merits of re-examining the practical operation of the agreement, the UK could not simply attack, denigrate and potentially disregard an agreement it had itself agreed only a few months earlier.⁹ There might be problems with that agreement, and scope for improvement. There might be other agreements that could have been made, that might have governed matters differently. However, it mattered that the UK had in fact agreed to *this* agreement, and any criticism must be judged accordingly.

Brexit provides a particularly stark example of a state criticizing its own agreement, and the frustrated responses this evokes. However, it is by no means the only such example. It frequently seems important, in evaluating criticism of international treaties or institutions, to observe that the critics themselves agreed to that treaty or institution. As US officials have grown increasingly critical of the WTO in general, and WTO dispute settlement in particular, responses have frequently highlighted that these rules and institutions reflect agreements the US itself accepted (and indeed led).¹⁰ Conversely, development-oriented critiques of the WTO (and especially

³Morris, “Dominic Raab hails ‘cracking’ Brexit deal—but DUP aren’t convinced”, *iNews*, 18 October 2019.

⁴H. Stewart, J. Rankin, and L. O’Carroll, “Johnson accused of misleading public over Brexit deal after NI remarks”, *Guardian*, 8 November 2019.

⁵L. O’Carroll, “Lord Frost: failure to rip up NI protocol would be ‘historic misjudgment’”, *Guardian*, 12 October 2021.

⁶R. Carroll, “The Northern Ireland protocol is said to be a blight on regional economy. That’s just not true.” *Guardian*, 15 May 2022.

⁷J. Elgot, “‘Weakness’ of UK position shaped Northern Ireland protocol negotiations, David Frost says”, *Guardian*, 5 June 2022.

⁸As one Northern Ireland nationalist politician observed: “It is a fact that Lord Frost negotiated the protocol, agreed to its terms and backed Boris Johnson’s campaign to sell it during the last general election. To suggest now that he did not support it is an industrious piece of dissembling”; *Irish Independent*, 12 October 2021. SNP Leader Nicola Sturgeon observed: “If true, this means repudiation by UK govt of a Treaty freely negotiated by it, & described by PM in GE as an ‘oven ready’ deal. This will significantly increase likelihood of no deal, and the resulting damage to the economy will be entirely Tory inflicted. What charlatans!”; <<https://twitter.com/NicolaSturgeon/status/1302711937873121284>>.

⁹Statement of EU Commission Vice-President Maroš Šefčovič, March 2021, <https://ec.europa.eu/commission/press-corner/detail/en/ip_21_1132> (“The EU and the UK agreed the Protocol together. We are also bound to implement it together.”) Joint statement of Irish and German Foreign Ministers, July 2022, quoted in <<https://www.theguardian.com/politics/2022/jul/03/germany-and-ireland-denounce-boris-johnsons-bid-to-ditch-northern-ireland-protocol>> (“Unfortunately, the British government chose not to engage in good faith with these proposals ... There is no legal or political justification for unilaterally breaking an international agreement entered into only two years ago.”)

¹⁰See e.g. G. Schaffer, “Will the US undermine the World Trade Organization?”, *Huffington Post*, 23 May 2016 (“the United States drove the creation of the World Trade Organization and its tribunal, the Appellate Body ... But now the US is threatening to undermine its independence and effectiveness, raising consternation in Geneva and the international trade community”); E. U. Petersmann, How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?, EUL, RSCAS 2018/71 (“Moreover,

the TRIPS agreement) meet invocations of developing countries' voluntary acceptance of the Marrakesh Agreement.¹¹ Criticisms of investment treaties and arbitration are answered by reference to respondent states' consent.¹² Similarly consent, whether to IMF membership or to specific loans, seeks to blunt criticism of loan conditionality.¹³

While there are many differences between these examples, they share a fundamental assumption: that the procedural fact of past consent is relevant to substantive critique of an agreement's content. It is often hard to say how much weight is placed on voluntarism, compared to other arguments. It is rarely the only response offered: defenders of agreements will typically combine invocations of voluntarism with substantive defences of the terms of those agreements. However, it does seem to carry at least some weight in these kinds of debates.

My goal in this article is to examine the moral significance of voluntary consent to treaties by interrogating this style of argument, which I label the "Voluntarist Reply". I ask whether and to what extent the kind of consent invoked by the Voluntarist Reply changes the moral circumstances of the parties, in ways that might give that reply force. I am somewhat sceptical of the Voluntarist Reply, but I do not set out to challenge it directly. Rather, I show that, even if we grant some important premises on which it depends, there remain significant limits on that reply, some going to whether agreement is in fact voluntary in the required sense, and others reflecting deeper concerns not answerable by any appeal to voluntariness. Putting the argument in its simplest terms: for the Voluntarist Reply to have any application, an agreement must meet a very demanding standard of voluntariness; and even when

some of the legal problems (like disregard for the 90 days deadline for appeals) were caused by the USA itself ... by insisting on the insertion of such an unreasonably short ... deadline into the DSU"), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300738>; J. Bacchus and S. Lester, "The rule of precedent and the role of the Appellate Body", *Journal of World Trade* (2020), 54, 183–98 ("...the inadequacies and frustrations of the GATT system that inspired the members of the trading system—led at the time by a quite differently-minded United States—to transform it, in part by creating the Appellate Body").

¹¹M. Turk (2010), "Bargaining and intellectual property treaties: the case for a pro-development interpretation of trips but not trips plus", *NYU Journal of International Law and Politics*, 42 (2010), 981–1029 ("developing countries themselves agreed to these provisions, and agreements are meant to be kept"). Cf. P. M. Gerhart, "Reflections: beyond compliance theory—TRIPS as a substantive issue", *Case Western Reserve Journal of International Law*, 32 (2000), 357–86.

¹²D. J. Cinotti, "How informed is sovereign consent to investor-state arbitration", *Maryland Journal of International Law*, 30 (2015), 105–17 ("Argentina's consent to [dispute settlement under investment treaties] is often invoked in response to complaints about the treatment of Argentina in both fora").

¹³A. Galano, "International monetary fund response to the Brazilian debt crisis: whether the effects of conditionality have undermined Brazil's national sovereignty", *Pace International Law Review*, 6 (1994), 323–52, at p. 346 ("Although the IMF has "forced" Brazil to accept several austerity programs under the auspices of the conditionality requirements, Brazil is a member of the IMF. As a consequence, Brazil may have, in fact, authorized the IMF to infringe upon their domestic policies").

it meets that standard, there remain many complaints that invocations of voluntary consent simply cannot answer.

My principal interest is economic agreements, and at various points I focus on trade agreements in particular. However, the arguments described have much broader relevance, applying to almost any international agreement, and in particular those with distributive effects, whether within or between states.¹⁴

I approach my task in three parts.

Section I seeks to clarify the nature of the Voluntarist Reply, as a procedural answer to substantive concerns, contrasting the role of consent here with its contribution to establishing either the validity or the legitimacy of international law.

Section II asks how the Voluntarist Reply might be motivated, and what this tells us about the sense of voluntariness it requires. While the absence of voluntariness is not the only way that the Voluntarist Reply can fail, it constitutes one important limit on its scope. I argue, in this section, that invocations of the voluntarist reply are undermined where an agreement is made in the context of prior injustices for which a counterparty has some remedial responsibility.

Section III considers other ways that the Voluntarist Reply might fail. It highlights the extent to which the applicability of the Voluntarist Reply, and hence the moral effect of state consent, will vary given different answers to background questions about global economic justice, mapping some of the limits implied by four views on these questions.

I | What the Voluntarist Reply Does (and Does Not) Mean

Before proceeding, it is worth pausing to consider the kind of claim that the Voluntarist Reply makes and to distinguish it from a number of other roles that voluntarism and consent play in international legal discourse.

The most obvious role of consent in international law is as a condition for the validity of a legal norm. Validity here denotes the extent to which the relevant norm forms part of the international legal system.¹⁵ For many positivist international lawyers, state consent is a necessary condition for the validity of international legal norms, whether custom or treaty.¹⁶ Anti-positivists have challenged that view: Dworkin's recent interpretivist account denies consent any fundamental role.¹⁷

¹⁴Much inter-war discourse around the Treaty of Versailles, for example, can be understood in these terms. See E. H. Carr, *The Twenty Years Crisis, 1919–1939*, 2nd edn (London: Macmillan, 1946), ch. 11.

¹⁵J. Gardner, "Legal positivism: 5 ½ myths", *American Journal of Jurisprudence*, 46 (2001), 199–227.

¹⁶S. Hall, "The persistent spectre: natural law, international order and the limits of legal positivism", *European Journal of International Law*, 12 (2001), 269–307.

¹⁷R. Dworkin, "A new philosophy of international law", *Philosophy and Public Affairs*, 41 (2013), 2–30.

Voluntariness may also be relevant to the (related but distinct) question of international law's legitimate authority.¹⁸ It may be relevant to determining not simply “what is the law?” (the question of validity), but also “why should a given agent obey the law?” (the question of legitimate authority). For the analytical positivist, validity alone is morally inert.¹⁹ Knowing that the law requires *x* is not the same as having a good reason to *x*: something more is required.²⁰ Valid law may or may not have legitimate authority, and whether a given agent has consented to that law may play a role in connecting the two.²¹

Fundamental aspects of international legal doctrine, including *pacta sunt servanda* and the duty of good faith, are premised on the moral significance of state consent. While positivist lawyers might hope to work with these legal principles without interrogating their normative basis, it is hard to explain why they are so fundamental unless we think the fact of agreement matters, morally as well as legally.²² When a state stands on its treaty rights, and refuses to countenance renegotiation, it implicitly invokes the political and moral significance of its counterparty's prior consent.

However the Voluntarist Reply has a broader focus than either validity or authority. In the examples noted above, critics are not denying that agreements constitute valid international law. Nor are they necessarily denying that those agreements impose legitimate obligations (although this may also be part of their complaint). Rather, they are complaining about the substantive content of those agreements: that they are unjust, or unfair, or inefficient, or otherwise fail to live up to some relevant standards. They are saying that these are bad agreements; they should not be law; and, to the extent that they are, there are good reasons to change them. The Voluntarist Reply seeks to answer such criticisms, not by engaging with the substantive criticism, but by emphasizing the relationship between the agreement and the agent by, or on whose behalf, the criticism is advanced. It says that, while the agreement might be criticized, *their* standing to criticize it, or the force of their criticisms vis-à-vis a specific *counterparty*, is undetermined by the fact of their having agreed to it.²³ It is a procedural answer to a

¹⁸On the legitimate authority in international law, D. Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge: Cambridge University Press, 2020). On the role of consent, S. Besson, “State consent and disagreement in international law-making: dissolving the paradox”, *Leiden Journal of International Law*, 29 (2016), 289–316.

¹⁹Gardner, “Legal positivism”.

²⁰Of course, in many cases, that “something more” may be simply the threat of sanction, as opposed to any moral legitimacy; but law characteristically claims to be more than simply a system of “orders backed by threats”: H. L. A. Hart, *The Concept of Law*, 3rd edn (Oxford: Oxford University Press, 2012), pp. 6–7.

²¹On the problems of consent as a basis for international law's legitimacy, A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003); A. Buchanan, “The legitimacy of international law”, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010); Dworkin, “A new philosophy of international law”.

²²As Hart, *The Concept of Law*, teaches, the fundamental norm of a legal system (and *pacta sunt servanda* is at least part of international law's fundamental norm) must rest on social, political or moral, rather than merely legal grounds.

²³On the importance of perspective in evaluating political criticism and justification: G. A. Cohen *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

substantive complaint. If the Voluntarist Reply works, then it is as a reply to complaints of this kind, about substantive content (whether articulated in terms of justice, fairness, efficiency or otherwise) rather than simply validity or legitimate authority.

The Voluntarist Reply, as I understand it, is a response to criticism, understood as a negative evaluation by reference to some normative standard, expressed with a specific (negative) illocutionary force. There is an important difference between, for example, “I do not like this agreement” and “this agreement is unfair”. Either might readily explain a proposal for termination or renegotiation, but only the latter is a *criticism* of that agreement.²⁴ The Voluntarist Reply seeks to answer criticism, but it says nothing about proposals for revision or reform that do not also criticize. We might wonder if the distinction here is simply a matter of tone? However, criticism imports significant practical implications that other calls for revision may not: that there are reasons (independent of the complainant's preference) to repeal or renegotiate the agreement; that those who benefit from the agreement are profiting from a moral wrong, while those who are burdened are also wronged; that other parties to those agreements should not strictly enforce their terms. Criticism has a normative force for the addressee that more neutral proposals for revision lack. “I don't like this agreement!” can be answered with “Well, I do!”, but “This agreement is unfair!” or “This agreement is impracticable!” demand answers that go beyond the interests of the counterparty and their power to maintain the status quo. Criticism and complaint call for answers (and actions) in ways mere preferences do not.

So understood, the Voluntarist Reply operates at the level of political morality rather than legal doctrine or practice. It serves to answer political criticisms of, rather than legal challenges to, the content of international agreements. How far we endorse the Voluntarist Reply thus determines how we should feel about and act towards international agreements that are subject to these kinds of criticisms.

II | Getting the Argument Going: “You agreed to this!” or “You gave me no choice!”

The Voluntarist Reply invokes the fact of agreement to answer criticism of an agreement's terms. How, we might wonder, can it do this? That consent might ground validity or legitimacy is a much weaker claim that that it can answer a substantive grievance. What is the moral mechanism that might bring this about?

Two distinct arguments might plausibly underpin the Voluntarist Reply, each applying in somewhat different circumstances:

²⁴For this distinction in the WTO context: R. Howse and R. Teitel, “Global justice, poverty and the international economic order”, in J. Tasioulas and S. Besson (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 437–49.

- Sometimes consent is invoked to answer a charge of injustice. There are many actions that would count as wrongs if done to us without our consent, but that consent renders morally unremarkable. In lawyer's Latin, *volentia non fit injuria*: where I consent to the doing of something that would otherwise be a wrong, my consent cures the wrong, without remainder.²⁵ Where what is at issue is the fairness or justice of an agreement, the Voluntarist Reply presumably trades on this idea. Call this the *no-injustice interpretation*.
- Sometimes consent is invoked to answer complaints of inefficiency, or impracticability, or ambiguity. These kinds of judgements invoke criteria independent of the wills of the parties. Consent cannot (at least directly) affect whether that agreement is economically efficient, or practically unworkable. However, it might undermine an agent's *standing to complain about* that fact. Criticism, recall, is a speech act with a specific illocutionary force: consent that does not negate the content of a criticism might still undermine that force.²⁶ Call this the *no-standing interpretation*.

We might wonder about the moral ontology required to translate either argument to the international case. Is it really “the state” as opposed to “this official”/“this group” doing these things?²⁷ That ontology is fundamental to how we think and talk about international affairs, but I return to consider at points below the importance of the fact that we are here dealing with collective agents rather than human persons.²⁸ The other motivating ideas—that consent can cure a moral wrong and that consistency limits our standing to complain about acts we have ourselves authorized—are widely shared. We can interpret them in various ways but they have sufficient plausibility across a broad range of contexts and views to grant, if only in order to examine the kinds of claims they support.

Assuming the Voluntarist Reply implicitly invokes one or other of these argument structures, this in turn imports a very demanding standard of voluntariness, which many international agreements will not meet.

“Voluntary consent” may mean very different things across different views. For Hobbes, the fact that consent is given at the point of a sword in no way undermines its force,²⁹ a view rejected by many subsequent critics, from Hume's direct critique of Hobbes's social contract view³⁰ to Rawls's denial of the moral significance of “threat advantage”.³¹ To matter, morally, consent typically requires an appropriate context,

²⁵Parmanand traces the idea at least to Aristotle: S. K. Paramand, “Volenti non fit Injuria in Roman Law”, *Tydskrif vir Regswetenskap*, 10 (1985), 34–43. The relevant passages in Aristotle are *Nicomachean Ethics*, bk V, C. 9, 11.

²⁶I take this formulation from G. A. Cohen, “Casting the first stone: who can, and who can't, condemn the terrorists?”, *Royal Institute of Philosophy Supplements* 59 (2006), 113–36, at p. 120.

²⁷Certainly, where it is the same individual, the force of the Voluntarist Reply seems stronger, as the Brexit case illustrates.

²⁸See especially the discussion in III.A below.

²⁹T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge: Cambridge University Press, [1651] 1996), pp. 138–9.

³⁰D. Hume, *A Treatise on Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, [1739–40] 1896), pp. 547–9.

³¹J. Rawls *A Theory of Justice*, rev. edn (Cambridge, MA: Harvard University Press, 1999), p. 116.

which might non-exhaustively include reasonable alternatives, adequate information, and respect for rights. Absent such circumstances, consent is voluntary in only a formal, and morally ineffective, sense.

Beyond this, the criteria for voluntariness will vary, depending both on the moral work it is called on to do, and on the broader moral view against which the appeal to voluntariness is made. The threshold for voluntariness in the Voluntarist Objection may be significantly higher than we would apply to determine whether an agent was morally responsible for an action, or whether a state's consent was legally effective.³² I may be morally responsible for a choice, while still feeling legitimately aggrieved at both the option I have chosen and the fact that I had to choose at all; and we might have good reasons to treat an agreement as legally effective notwithstanding significant defects in the manner of its formation. If the Voluntarist Reply seeks to answer substantive criticism, then we must ask what circumstances must obtain for a party's having consented to an agreement to undermine such criticism? The two interpretations of the underlying argument sketched above help us to do this.

Consider, first, the *no-injustice interpretation*. Robert Nozick's discussion of equality and choice is instructive.³³ While arguing against “patterned principles”, and especially economic equality, Nozick describes a scenario whereby agents move, through a series of free choices, from an initial, *ex hypothesi* fully just, equal distribution, to a subsequent unequal distribution. In Nozick's telling, the lesson is that the second distribution, reached by a series of just steps from an initial position of justice, must itself be just. Choice, he argues, is justice-preserving.³⁴ Whether we accept that claim or not, it is probably the strongest claim that can be made for the power of choice to morally validate an outcome. Yet $[(I) \text{ Justice} + \text{Choice} = \text{Justice}]$ does not imply $[(II) \text{ Injustice} + \text{Choice} = \text{Justice}]$. The fact that I chose some outcome, over one where I was morally wronged, gives no reason to think this chosen outcome respects my rights. At most, it shows I thought it was better than the status quo. If the status quo was morally defective, then the same may be true following my choice, however free. In Rawls's language, it is only in circumstances of “background justice” that the results of agreements freely entered can, in virtue of that fact, claim to themselves be just.³⁵ On the *no-injustice interpretation*, the Voluntarist Reply requires a no-injustice background to generate its no-injustice conclusion.

We might expect the *no-standing interpretation* to be less demanding. After all, this interpretation does not claim that consent remedies the ills of an agreement,

³²The Vienna Convention on the Law of Treaties excludes only consent procured by corruption (Art. 50) or coercion (Art. 51) of a state's representative, or through “threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations” (Art. 52). The reference to violation of Charter principles here is important: treaties imposed on “aggressor states” may be valid notwithstanding their basis in the threat or use of force (Art. 75).

³³R. Nozick *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 160–4.

³⁴*Ibid.*, p. 151.

³⁵J. Rawls, *Political Liberalism*, expanded edn (New York: Columbia University Press, 2005), p. 265.

focusing only on who can complain, and to whom, about that agreement. However, on reflection the same demanding conditions seem to apply.

G. A. Cohen has written helpfully on standing and the ways perspective might preclude specific agents from making specific complaints or offering specific justifications to specific others.³⁶ Moral argument is interpersonal. Claims, criticisms, defences and justifications do not exist in the abstract: it often matters both by whom, and to whom, they are made. I may, on Cohen's account, be precluded from complaining to or criticizing some particular others, not simply because of the objective situation, but because of the ways that I or they may be implicated in that situation.

The *no-standing interpretation* exemplifies this kind of perspectivity. Sometimes, analysing the substance of an agreement may convincingly identify defects, by whatever standard. Nonetheless, it may be difficult for the author of that agreement, or one of its co-authors, to condemn it on that basis. This is an instance of the challenge Cohen labels “You're involved in it yourself!”, which says: “How can you condemn me when you are yourself responsible, or at least co-responsible, for the very thing you are condemning?”³⁷ Many agents might criticize an agreement, but surely not the states party to it, who are after all its authors? Insofar as they have previously endorsed it, they are limited in what they can now say against it without opening themselves to charges of inconsistency, bad faith, or hypocrisy.

However, it is also important to consider the perspective of the counterparty, to whom the substantive criticism is offered, and who invokes the Voluntarist Reply in response. When I invoke the Voluntarist Reply, I assert that my (real or hypothetical) interlocutor has chosen this agreement, instead of an alternative that they could have chosen, and presumably should have chosen, had they wished not to undertake these obligations. This puts in play not only their relationship to the agreement, but also my own, and my relationship to their consent, and how far I am entitled to rely on it. If the reason they entered into an agreement is that I myself violated or threatened to violate their moral rights, leaving them no choice but to agree, then I can hardly invoke that consent to answer their subsequent criticisms. This is another route to Cohen's “you're involved in it yourself” response: “For you are yourself more or less implicated in the act you seek to condemn if you caused the legitimate grievance to which the act is a response.”³⁸ We need not think the fact of prior injustice licenses the making of false promises to recognize that the perpetrator of that prior injustice lacks standing to complain.³⁹

Prior injustice can thus undermine the Voluntarist Reply, whether understood in its *no-injustice* or *no-standing* interpretations. Yet it seems plain that international

³⁶See generally Cohen, *Rescuing Justice and Equality*; Cohen, “Casting the first stone”; G. A. Cohen, “Ways of silencing critics”, in his *Finding Oneself in the Other* (Princeton: Princeton University Press, 2012).

³⁷Cohen, “Casting the first stone”, p. 127.

³⁸*Ibid.*, p. 128.

³⁹Again, rhetoric around Brexit, and specifically UK complaints about EU bullying, can be readily understood in these terms. See e.g. Elgot, “‘Weakness’ of UK position”.

economic relations constitute circumstances of injustice, whether because of contemporary inequalities or because of the historical injustices of colonialism that have so thoroughly shaped contemporary distributions. Does this preclude invoking the Voluntarist Reply to defend any economic agreements?

The answer turns on the relation between injustice and agreement, and on the extent to which the existing injustice is one for which relevant counterparties have correlative duties. I address below some specific ways that existing international economic circumstances might impact the Voluntarist Reply. For now, let me sketch a more general distinction, between injustice that motivates or shapes an agreement, and injustice that is merely contemporaneous with it. The difference lies in how the agreement, or its context, links the making of the agreement with the continuation of that injustice. This is clearest in the case of coercion by threats: in the event of non-agreement, the addressee suffers some unjust harm, whereas if they agree then they do not. It may be harder to discern and adjudicate where one party is, *ex hypothesi* unjustly, in adverse circumstances, and the agreement represents one way they might better their condition, and thereby ameliorate the existing injustice.⁴⁰ However, it is also important how far the injustice is one that the particular counterparty has duties to remedy. If we regard existing economic injustices as ones that all agents have duties to remedy, then many more agreements will be tainted by those injustices, and the relevance of the Voluntarist Reply reduces to the vanishing point. (This is the implication of many critical, including Third World, approaches to international law.) If, on the other hand, we understand responsibility as more narrowly circumscribed, then the Voluntarist Reply has greater potential scope. Perspective matters, both in identifying injustice, and understanding its implications for the criticism and defence of prevailing arrangements.⁴¹ I return to this point below.

This *no-prior-injustice* condition thus imposes significant limits on the scope of the Voluntarist Reply. It is presented here as a minimum necessary condition for that reply to obtain. It seems likely that other conditions will also apply. In particular, there may be full information conditions: insofar as the Voluntarist Reply understands consent as waiving complaints that a party might otherwise make, we would usually expect a waiver to be limited to facts that a party was or should have been

⁴⁰Accounts of exploitation which emphasize benefiting from rights violations without ourselves violating rights may be helpful: e.g. H. Steiner, "Liberalism, neutrality and exploitation" *Politics, Philosophy and Economics*, 12 (2013), 335–44. Moralized accounts of coercion are also instructive: e.g. A. Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987).

⁴¹Cf. Cohen, *Rescuing Justice and Equality*. My discussion at various points has a pair-wise quality, emphasizing duties owed between counterparties. This may be misleading if we understand many duties of economic justice, whether contemporary or historical, as structural, applying to or mediated by the international system as a whole. While the issues here go beyond the scope of this article, Christiano's account of exploitation provides a helpful starting point, and in particular its expansive account of agents' responsibilities and their implications for judgements of exploitation: T. Christiano, "What is wrongful exploitation?", D. Sobel, P. Vallentyne, and S. Wall (eds), *Oxford Studies in Political Philosophy* vol.1 (Oxford: Oxford University Press, 2015), pp. 250–75.

aware of. Certainly, if one party has intentionally concealed information this will undermine the reply's force.⁴²

I examine a number of other potential constraints on the Voluntarist Reply in Section III. For now, let us examine a little further how the *no-prior-injustice* condition might affect specific agreements.

The *no-prior-injustice* condition implies that determining the scope of the Voluntarist Reply requires first identifying the moral rights and duties that apply to and among states in the relevant domain. To judge invocations of the Voluntarist Reply in respect of international economic agreements, we must first know what justice requires in international economic relations, in the absence of those agreements (or, at least, in the absence of the particular agreement under scrutiny). This is plainly a very large question that I cannot hope to answer here.⁴³ Better, therefore, to leave it open, assuming only that there are some duties of international economic justice, and allow readers to fill in for themselves their specific content. This leaves the discussion somewhat schematic, and the conclusions necessarily contingent. However, I hope it also means the analysis may be of use to those with widely varying substantive commitments.

To get things going, it suffices to assume that at least some states have some moral rights and duties in the international economy. Given the centrality of market access to much international economic law, I will focus on moral duties to liberalize trade, mapping the implications of such duties for invocations of the Voluntarist Reply in this context. In what remains of this section, I sketch a number of plausible grounds for such duties, showing how they might affect the availability of the Voluntarist Reply in different contexts.

The first, and most prominent, view regards duties to liberalize trade as responding to defects in the prevailing international economic order. Many scholars identify moral duties on rich states to liberalize their own trade, and to support and contribute to an open, stable, international trading system, whether on egalitarian or sufficientarian grounds.⁴⁴ These duties may be subject to a various limitations: they may

⁴²Unexpected changes of circumstances, and the passage of time more generally, may also be relevant. See discussion in III.A below.

⁴³I have elsewhere defended elements of an answer to this question in the varied contexts of trade (O. Suttle, "Equality in global commerce: towards a political theory of international economic law", *European Journal of International Law*, 25 (2014), 1043–70; O. Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (Cambridge, Cambridge University Press, 2018)); investment (O. Suttle, "Justice and authority in investment protection", *Law and Development Review*, 15 (2022), 257–82); debt (O. Suttle, "Debt, default, and two liberal theories of justice", *German Law Journal*, 15 (2016), 799–834); and market competition (O. Suttle, "The puzzle of competitive fairness", *Politics, Philosophy and Economics*, 2 (2022), 190–227).

⁴⁴E.g. D. Moellendorf, "The World Trade Organization and egalitarian justice", *Metaphilosophy*, 136 (2005), 45–162; A. James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012); F. Garcia, *Justice in International Economic Law: Three Takes* (Cambridge: Cambridge University Press, 2013); O. Suttle, *Distributive Justice and World Trade Law* (Cambridge: Cambridge University Press, 2018); M. Risse and G. Wollner, *On Trade Justice* (Oxford: Oxford University Press, 2019).

be duties to do one's fair share,⁴⁵ or duties of maximum effort;⁴⁶ they may be limited by the needs of, and effects on, one's own citizens;⁴⁷ and there are obviously many open empirical questions about precisely which trade policies are most likely to achieve which morally significant results.⁴⁸ The key point, however, is that states may not be morally free simply to refuse to enter into a trade agreement, or to dictate terms without reference to these moral duties. (Of course, they remain legally free to do both these things, at least on the dominant view.)⁴⁹ Where a state pursues a hard-bargaining strategy, contrary to this duty, then voluntarism provides no reply to criticism of the terms offered or agreed. We might judge the Uruguay Round agreements in these terms.

Even if we deny that concerns for poverty, equality, or economic development directly support duties of justice, historic injustices may give rise to remedial or compensatory duties, and trade agreements may be an appropriate mechanism for vindicating those duties.⁵⁰ The historic wrongs of European colonialism constitute the unavoidable backdrop to the contemporary international economy. To the extent we think that today's rich states have remedial or compensatory duties arising from past colonial activities, we may regard the provision of beneficial trading terms as one way to address this. EU-ACP trade relations have sometimes been conceived in these terms (particularly from an EU perspective). They reflect specific historical connections between these countries, and it is in terms of that specific history that they are typically discussed.⁵¹ To the extent we think that history is duty-generating, we might expect trade arrangements to reflect and in part address this. If we think that responsibilities for historic injustices give rise to remedial duties, and that those duties might be discharged in part through the provision of beneficial trading terms, then responsibility-bearing states cannot invoke the Voluntarist Reply to answer criticisms of the agreements that they ask beneficiary states to enter into.

Duties might also arise where past practices have given rise to legitimate expectations and consequent reliance on the part of counterparties, and the failure to grant market access, whether unilaterally or by agreement, would unjustly

⁴⁵On the problems of such duties: L. Valentini, "The natural duty of justice in non-ideal circumstances: on the moral demands of institution building and reform", *European Journal of Political Theory*, 20 (2021), 45–66.

⁴⁶E.g. P. Singer, "Famine, affluence and morality", *Philosophy and Public Affairs*, 1 (1972), 229–43

⁴⁷E.g. D. Miller, (*National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 9.

⁴⁸E.g. D. Rodrik, *The Global Governance of Trade as if Development Really Mattered*, paper prepared for the United Nations Development Program, 2001, <<https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/global-governance-of-trade.pdf>>.

⁴⁹Arguments for legal, as opposed to moral, duties in developed countries to adopt pro-development economic policies have not generally found support among international lawyers. The shared moral/legal language of human rights has constituted the most plausible bridge for these purposes. See e.g. T. Pogge, "Are we violating the human rights of the world's poor?", *Yale Human Rights and Development Law Journal*, 14 (2011), 1–33.

⁵⁰See e.g. Miller, *National Responsibility and Global Justice*; K.-C. Tan, "National responsibility, reparations and distributive justice", *Critical Review of International Social and Political Philosophy*, 11 (2008), 449–64.

⁵¹See e.g. A. Flint, "The end of a 'Special Relationship'? The new EU-ACP economic partnership agreements", *Review of African Political Economy*, 36 (2009), 79–92.

upset those expectations.⁵² As well as responding to historic injustice, we might understand the EU–ACP case in these terms. Under the Yaoundé, Lomé and Cotonou agreements, ACP states enjoyed preferential access to the European market for a number of decades. Economies adapt to the existence of trade preferences, whether through increasing investment in, or non-diversification from, industries where preferences are offered, so a subsequent loss of market access may leave them not only worse off than they were while preferences were in place, but potentially worse off than they would have been had they never had that preferential access. Having encouraged the ACP's reliance on the EU market, this argument suggests, the EU was not free to unilaterally withdraw that access, and hence could not invoke the Voluntarist Reply to defend the agreements it asked ACP states to accept in order to continue it. (The UK's reliance on EU market access post-Brexit might also be understood in these terms, although the fact that Brexit was a unilateral choice of the UK obviously muddies the waters somewhat.)

III | What work can (and can't) the Voluntarist Reply do?

The *no-prior-injustice* condition establishes one necessary limit on the Voluntarist Reply: it is only available where the party invoking it has themselves acted justly towards the other party. However, even where an agreement meets this quite stringent condition, there remain significant limits on the work that consent can do in answering criticisms of its terms.

The limits canvassed below do not concern whether an agreement is voluntary: rather, they show how the moral force of wholly voluntary agreements runs out along a range of dimensions.⁵³ How we understand these limits depends in part on our other moral commitments and, in the context of international economic relations, those commitments vary widely. As with the previous section, rather than work within one such moral framework, and risk losing the attention of those with different views, the discussion below shows how the moral significance of voluntariness varies, given four quite different sets of such commitments. These move, roughly, from the morally most permissive to the most demanding.

III.I | International Moral Minimalism

The international moral minimalist denies the existence of extensive duties of international economic justice, and in particular rejects any egalitarian duties across borders. Thomas Nagel, for example, defends a view of international justice that limits

⁵²James's account of trade as a practice of mutual market reliance seems particularly relevant here; James, *Fairness in Practice*.

⁵³These find a parallel in the (admittedly much narrower) limits on treaties' legal validity arising from the non-derogable peremptory norms of *ius cogens*.

states' natural duties to non-aggression and non-interference, denying any natural duties of international economic justice (albeit acknowledging a humanitarian concern for absolute poverty).⁵⁴ The agreements that states make are 'bare contracts', binding in their terms, but not subject to or importing any wider sense of socio-economic justice. To the extent we owe economic duties across borders, these are products of those positive agreements and contingent relations. Duties apply to us only where these have been positively assumed.

How might this view understand the Voluntarist Reply? If (almost) all duties arise from agreement, then we might expect the fact of agreement to in turn provide an ironclad justification for the content of those agreements. What other criterion could we have for evaluating them? Further, on such a sparse account of our antecedent moral rights, we will presumably regard as voluntary almost any agreement that meets the minimal legal standards in the VCLT.⁵⁵ The mere fact that a counterparty is economically disadvantaged, even *in extremis*, gives them no basis to demand better economic terms than others are willing to offer.

Yet there remain at least two routes by which even moral minimalism might limit the Voluntarist Reply. These derive, respectively, from the function of agreement in the moral minimalist account, and from the nature of the agent making that agreement.

Taking the first: the moral minimalist characterizes agreement as the basis of international duties. However, the agreement norm, *pacta sunt servanda*, in turn requires some justification.⁵⁶ Its force cannot itself derive from agreement, without locking us in an infinite regress. Rather, the practice of agreement must derive its moral force from its contribution to some other value.

One plausible explanation of the value of agreement lies in its capacity to enlarge the agency of both individuals and states.⁵⁷ As an individual, my capacity to realize my own valued goals is greatly enlarged through the possibility of cooperation with others. A shared institution of agreement or promising makes this possible, building trust among co-operators and allowing each to forgo short-term individual gains and contribute to a shared cooperative scheme. At the international level, each state's

⁵⁴T. Nagel, "The problem of global justice", *Philosophy and Public Affairs*, 33 (2005), 113–47.

⁵⁵n.32 above

⁵⁶For recent statements of this familiar concern, which goes back at least to Hume, see A. Green, "The precarious rationality of international law: critiquing the international rule of recognition", *German Law Journal*, 22 (2021), 1613–34; A. Clapham, *Brierly's Law of Nations*, 7th edn (Oxford: Oxford University Press, 2012), pp. 51–2. Cf. more generally: J. Rawls, "Two concepts of rules", *Philosophical Review*, 64 (1955), 3–32; T. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), ch 7.

⁵⁷See e.g. C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981); J. Raz, "Promises and obligations" in P. M. S. Hacker and J. Raz (eds), *Law, Society and Morality: Essays in Honour of H. L. A. Hart* (Oxford: Oxford University Press, 1977); J. Raz, "Is there a reason to keep a promise?", in G. Klass, G. Letsas, and P. Sapra (eds), *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2012).

This approach is reflected in the PCIJ's analysis of treaties restricting a state's sovereign powers as themselves an exercise of that state's sovereignty: *SS Wimbledon* (1923 P.C.I.J. (ser. A) No. 1).

capacity to realize its goals, and to promote the wellbeing of its citizens, may be substantially enlarged through a practice of binding agreement, allowing each to cooperate to realize shared goals, and to make trade-offs in pursuit of individual ones. It is because agreement is valuable in this way that it can be the source of binding obligations.

If this is what agreement is for, then it in turn implies limits on the morally significant content of agreements. There are plausibly some agreements that, by their nature, cannot contribute to enlarging agency in any valuable sense. Among individuals, slavery contracts are an obvious example.⁵⁸ An agreement under which one agent agrees, comprehensively and permanently, to subordinate themselves to the will of another can almost never serve what is, on this view, the purpose of agreement. To the extent this is the case, there is little reason to regard the voluntariness of such an agreement as morally significant *per se*. It is simply outside the scope of the (morally valuable) practice. Similarly, an international agreement that comprehensively and permanently⁵⁹ subordinates one people to another simply is not an agreement, in this morally valuable sense, and its content cannot be defended by appeal to its voluntariness. A treaty establishing a colonial protectorate,⁶⁰ or merging one state into another,⁶¹ or depriving a state of powers essential to its effective statehood,⁶² might plausibly fall into this category. This need not imply that such treaties are not legally binding, nor indeed that they are not morally justifiable, but only that their justification cannot rest on voluntarist grounds.

How far these considerations are relevant to trade agreements depends on their specific terms.⁶³ The WTO Agreements intrude significantly further into the domestic regulatory affairs of member states than did the GATT 1947; many “deep” bilateral and regional agreements go further still.⁶⁴ Concerns about the restrictiveness and “chilling effects” on policy-making from investment provisions in trade and investment agreements may be especially relevant here.⁶⁵ That these agreements typically include “sunset clauses” allowing obligations to continue for up to twenty

⁵⁸Raz, “Is there a reason to keep a promise?”; S. Freeman, “Illiberal libertarians: why libertarianism is not a liberal view”, *Philosophy and Public Affairs*, 30 (2001), 105–51.

⁵⁹Temporary or periodically renewable arrangements need not raise the same concerns, provided their continuance remains genuinely voluntary. See e.g. the Compacts of Free Association between the United States and Palau, the Federated State of Micronesia and the Republic of the Marshall Islands.

⁶⁰E.g. the Treaty of Fez 1912 (establishing the French protectorate over Morocco).

⁶¹E.g. the Scottish (1707) and Irish (1800) Acts of Union (dissolving the respective independent polities).

⁶²E.g. the demilitarization clauses of the Treaty of Versailles, or the alienation of revenue-raising powers to the (foreign-controlled) Ottoman Public Debt Administration.

⁶³On how this question might shape interpretation: O. Suttle, “What sorts of things are public morals? A liberal cosmopolitan account of Article XX GATT”, *Modern Law Review*, 80 (2017), 569–99.

⁶⁴R. Baldwin, “21st century regionalism: filling the gap between 21st century trade and 20th century trade rules”, *WTO Staff Working Papers*, ERSD-2011-08, World Trade Organization (WTO), Economic Research and Statistics Division.

⁶⁵E.g. C. Moehlecke, “The chilling effect of international investment disputes: limited challenges to state sovereignty”, *International Studies Quarterly*, 64 (2020), 1–12; K. Tienhaara, “Regulatory chill in a warming world: the threat to climate policy posed by investor-state dispute settlement”, *Transnational Environmental Law*, 7 (2018), 229–50.

years after termination raises these issues in especially stark terms. The boundary here is hard to draw, but at a certain point, agreements so restrain the freedom of parties thereto that their content can no longer be plausibly justified on voluntarist grounds.

The moral minimalist can also accommodate concerns arising from states' characters as collective agents. States are comprised of individuals, and states' decisions and actions are in turn the decisions and actions of some subset of those individuals. State action is typically the action of agents—governments—who are only indirectly and periodically (if at all) accountable to their principals—the citizenry. Where state decisions are taken, whether through indirect (elections) or direct (plebiscites) democratic mechanisms, these are typically majoritarian: the decision of the collective agent tracks the preferences of the majority, at the moment of decision. Minority preferences are necessarily disappointed; while those of persons who may subsequently become citizens, whether through birth, migration, or otherwise, are not counted.

These are familiar features of state action, whether domestic or international. They are regularly invoked in domestic political discourse by those eager to dissociate themselves from particular officials (“I voted for the other guy!”) or decisions (“I voted no!”). Internally, political legitimacy constitutes an important backstop to such objections: in order to function, a democratic process must be able to bind those who disagree as well as those who agree.⁶⁶ This includes requiring not only compliance, but also some degree of acceptance of, and support for, the legitimacy—if not the correctness—of a decision. These same considerations preclude a dissenting minority simply disclaiming any moral responsibility for a state's international acts, including its agreements. You may not have supported this government, or this policy; but if your (by assumption legitimate) state has chosen it, then this limits how far you can complain, at least to outsiders.⁶⁷ This can be understood under either interpretation of the Voluntarist Reply: either the legitimate state has the moral power to compromise our individual claims (*no-Injustice*) or participation in / subjection to legitimate (including democratic) politics precludes our denying the outcomes of that politics, especially to outsiders (*no-standing*).

However, there are limits to this kind of argument, both domestically and internationally. Domestically, democracy is generally understood to require revisability. Periodic elections ensure that we can “throw the scoundrels out” if we decide they are not the best government for the job. Laws can be repealed and constitutions amended to reflect changing democratic preferences. Politics is a process rather than a result.

⁶⁶This is democratic legitimacy. See e.g. T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008).

⁶⁷It seems plausible that what counts as a valid complaint about a democratic decision depends both on who is making the complaint, and to whom it is addressed. Cf. Cohen, *Rescuing Justice and Equality*, pp. 65–8.

Dworkin invokes these concerns in rejecting consent as grounding international legal validity;⁶⁸ but they equally imply limits on the Voluntarist Reply, at least vis-à-vis members of dissenting minorities and new citizens. Just as a law having been enacted in the past is no objection to it being criticized or revised today, so the fact that a treaty was agreed in the past, by a different set of citizens, cannot preclude its criticism today. We might disagree about the appropriate time horizons here. Certainly, while the government that agreed or parliament that ratified a particular treaty remains in place, it seems reasonable to hold that their past choice conditions present complaint. (This provides important context for the current UK government's efforts to disclaim the EU Withdrawal Agreement that they themselves negotiated.) However, in circumstances where democracies typically require elections every four to seven years, applying a similar expiry date to the moral force of state consent seems reasonable, at least from the perspective of dissenting minorities and new members. This does not mean that the legal force of such decisions, including treaty accessions, should similarly expire, nor that they are without any continuing moral significance; concerns of stability, transparency, reliance, and the legitimate expectations of other states and agents will all be relevant here. However, it does explain why the Voluntarist Reply seems to lose its force over time.⁶⁹

The foregoing paragraphs focused on democratic states. However the concerns they raise arise *a fortiori* for non-democratic states. We may regard many non-democratic governments as illegitimate tout court, and hence unable to represent or morally bind their citizens. If so, the Voluntarist Reply has little relevance for them, at least in its *no-injustice interpretation*: the fact that an *ex hypothesi* illegitimate government has agreed to certain terms cannot temper any wrong those terms do to the country or citizenry that government illegitimately rules. (Where complaints are made by that self-same illegitimate government, the *no-standing interpretation* may still bite.) But more generally, if and to the extent that we think there are legitimate non-democratic governments, then concerns with how the passage of time affects the Voluntarist Reply will apply, *mutatis mutandis*.

Importantly, none of these limits depends on any natural duties owed to outsiders, whether in the negotiation or the application of international agreements. Rather, they emphasize the point and limits of the practice of agreement, from the state's own perspective, and having regard exclusively to the interests and standing of its own citizens. Even if agreement is the near-exclusive source of international moral rights and obligations, the justified scope of that practice implies limits on the kinds of claims that it can support.

⁶⁸Dworkin, "A new philosophy of international law", pp. 9–10.

⁶⁹How we see that force dissipating may vary between the *no-injustice* and *no-standing* interpretations.

III.II | The Society of States

The arguments canvassed above are distinguished by their non-reliance on any antecedent rights and duties governing economic relations between states: they are outward-facing principles deriving from a wholly inward-facing moral scheme.⁷⁰ However, few readers are likely to endorse such a minimal international moral framework. Rather, for most observers, there are at least some moral constraints, beyond mere non-aggression, on the ways states interact. These in turn imply further limits on the Voluntarist Reply.

John Rawls provides an exemplar of a view that has been labelled the “society of states” approach to international political morality.⁷¹ While rejecting the kind of strongly egalitarian economic duties that he defended within domestic societies, Rawls argues that international relations should be built around principles of mutual respect, self-determination, and non-intervention among free and independent peoples. In Rawls's *Law of Peoples*, states interact as equals, each pursuing their own goals, and respecting other states' pursuit of theirs.

From this we can derive a justification for the practice of treaty-making, analogous to that sketched in the previous section. States can in many cases better pursue their goals through joint action, and treaty-making provides a mechanism for doing this. However we can also derive limits on that practice. In particular, in a framework that prioritizes mutual respect and self-determination, the practice of treaty-making will emphasize the giving of free consent, limiting the kinds of power and pressure that can be brought to bear to achieve agreement on particular terms.⁷² Where a treaty has been procured by such pressure then, notwithstanding its meeting the *no-prior-injustice* condition, the Voluntarist Reply will not be available to defend it.⁷³

It is not especially clear where we should draw the boundary between permissible negotiation and illicit pressure. Some examples will be straightforward. Where one state has sought to influence the representative of another, whether through bribery or threats against their personal (as opposed to political) interests, few will deny that this defeats any moral force their consent might have. They are no longer acting on behalf of the principal, so can no longer bind them. Indeed, this is one way the Vienna Convention anticipates consent being vitiated.⁷⁴

⁷⁰For an example of this structure, see Suttle, “Debt, default and two liberal theories of justice”.

⁷¹J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999). S. Caney, *Justice beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005) uses the label: society of states for Rawls's view, thus highlighting its similarities with English School thinkers, e.g. H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn (Basingstoke: Palgrave, 2002). Liberal nationalist theories also share many elements of this view, e.g. D. Miller, *On Nationality* (Oxford: Oxford University Press, 1995); Miller, *National Responsibility and Global Justice*.

⁷²Rawls, *The Law of Peoples*, p. 43.

⁷³For an analogous analysis, D. P. Harris, “Carrying a good joke too far: TRIPS and treaties of adhesion”, *University of Pennsylvania Journal of International Economic Law*, 27 (2006), 681–755.

⁷⁴See n.32 above.

More difficult are cases where a state applies pressure in one policy domain to achieve agreement in another. Threats to withhold military or development aid, subject to negotiating a satisfactory trade agreement, might readily fit here. Where such aid is required as a matter of justice, then threats to withhold it will fall under the *no-prior-injustice* condition. However, even where this does not apply, beyond a certain point this kind of hard bargaining becomes difficult to reconcile with the kind of self-determination and mutual respect that Rawls's view emphasizes.

There is scope for disagreement about precisely where we draw the line but at some point agreement is no longer serving its proper purpose on this view. However, rather than seek to adjudicate where precisely the line might be (different views will draw it differently), let me sketch what seems like an interesting marginal case for this view.

Consider, first, the ways pressure is commonly applied in international negotiations with an eye to the political interests of principals. The withdrawal of concessions in the context of WTO disputes provides a clear example. Where a respondent, following an adverse finding, fails to bring their measure into compliance, a complainant may respond through 'withdrawal of concessions'—effectively trade sanctions.⁷⁵ These retaliatory sanctions are commonly structured to target specific industries that are politically important for individual law-makers; while Paul Ryan was Speaker of the US House of Representatives, Harley Davidson motorcycles were a focus of retaliatory threats because of their significance in his home district of Wisconsin, while targeting whiskey was viewed as an effective way to put pressure on former Senate Majority Leader Mitch McConnell of Tennessee.⁷⁶ What these examples have in common is that they seek to change the behaviour of a state, the United States, by exerting pressure on the sectional political interests of individual politicians. Designing retaliatory tariffs in this way is a recognized part of the practice of trade governance. Yet it also seems morally suspect, insofar as it involves manipulating the political incentives of individual politicians to support policies preferred by the international counterparty, instead of the *ceteris paribus* nationally preferred policy. We need not assume that there is an obligation on the state to pursue some particular version of the national interest, whether aggregate welfare maximization or otherwise, to understand that an outside agent manipulating specific individuals within the political system is in tension with the ideal of substantive national self-determination.

At the same time, national policies will always reflect the interests of some politically favoured groups over others, and negotiating counterparties must be cognizant of this. It is among the core functions of states to aggregate the disparate interests of their members, resolving conflicts and, in specific instances, preferring the

⁷⁵For an overview, P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, 5th edn (Cambridge: Cambridge University Press, 2022), pp. 210–15

⁷⁶M. Schneider-Petzinger, "US–EU Trade relations in the Trump Era: which way forward?", Chatham House Research Paper, March 2019.

interests of some over others. Not only the outcomes of specific decisions, but also the choice of structures and processes for reaching those decisions, are important aspects of national self-determination.⁷⁷ Yet there is plausibly also a point where legitimately negotiating by appealing to those interest groups with political influence becomes illegitimately suborning consent through convincing a narrow subset of a population to disregard the interests and concerns of the majority, in ways not compatible with respecting the equal status of counterparty states.

III.III | Human Rights and Protected Interests

Beyond self-determination, many identify human rights, including socio-economic rights, as generating moral demands that sound across borders. We might not, on this view, owe outsiders the kinds of egalitarian duties that we find domestically, but we do have duties to respond in various ways to the under-realization of human rights, whether within or beyond our own borders.⁷⁸

These kinds of rights-based views exemplify perhaps the clearest limit on the Voluntarist Reply, which tracks limits on states' moral powers. If there are things that states simply cannot morally do, then their consent cannot defeat a complaint that a treaty does or requires one of those prohibited things. In particular, if—as many people believe—states are morally required to respect, protect, and fulfil the human rights of their citizens (and indeed others) then criticism of a treaty as undermining human rights cannot be answered by pointing out that a state has consented to its terms.

On the *no-injustice interpretation* of the Voluntarist Reply, this seems clear. I cannot authorize the doing (by myself or others) of that which I am not permitted to do.⁷⁹ However, the *no-standing interpretation* is more complicated. The kind of “you're involved in it yourself” logic underpinning the *no-standing interpretation* seems to readily fit a case where two agents jointly agree to do something they are each morally prohibited from doing. If two criminals agree together to rob a bank, their agreement does not cure the injustice of their crime (*no-injustice*); but it does undermine one criminal's standing to criticize the other (*no-standing*). This does not save the Voluntarist Reply in the interstate case, however. When an agreement is criticized as violating human rights, the complaint is made, not on behalf of the state, but on behalf of the individuals whose rights are affected. Their standing is not affected by the state's prior consent.⁸⁰

⁷⁷On the challenges of translating disparate individual preferences into a common will, C. List, “Social Choice Theory”, Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (Spring 2022 edn), <<https://plato.stanford.edu/archives/spr2022/entries/social-choice/>>.

⁷⁸E.g. H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980); T. Pogge, *World Poverty and Human Rights*, 2nd edn (Cambridge: Polity Press, 2008); L. Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford: Oxford University Press, 2020).

⁷⁹See generally Pogge, *World Poverty and Human Rights*, ch. 3.

⁸⁰We might alternatively reconstruct the reasoning here as a special case of the limits of political legitimacy, as sketched in section III.A above.

Human rights, on this view, constitute side-constraints, limiting the ways that states can pursue their goals, whatever those goals may be. However, human rights are not the only plausible moral side-constraints. We might also include the protection of the environment, of non-human animals, of future persons, as well as the interests of Indigenous and minority communities, of women, and of the poorest and most marginalized within particular communities. These diverse examples share a structural similarity: they support complaints on behalf, not of states or peoples, but of other affected constituencies, whether within or outside those states. Indeed, in many cases those complaints are raised against the relevant state, as much as against the agreements those states enter into. Further, we commonly assume that the primary responsibility for vindicating those claims lies with the territorial state: agreements are criticized because they make it harder for the state to do what it has a prior obligation to do.⁸¹ It would be perverse to invoke the voluntary action of the state, as duty bearer, as a response to complaints that these duties are under-fulfilled.

Consider WTO law, which is often criticized in human rights terms, both for restricting states' freedom to adopt certain strategies in pursuit of human rights goals, and for directly and negatively impacting on specific human rights, including rights against poverty and rights to food, health, and culture.⁸² In each case, the critique claims that certain interests should be protected, including from action by the territorial state. While we may disagree about the legal and economic arguments underpinning these critiques, it would seem odd if they were answered simply by invoking the territorial state's consent to WTO law. If the state itself has responsibilities to protect these interests, then its consent to an international agreement limiting their protection smacks of self-dealing, and can carry very little moral significance.

The upshot is that the Voluntarist Reply seems misdirected in this kind of case. The state may have consented, but it is not the state in whose name the complaint is made. In the case of many sub-state groups and interests, we might argue that the state is entitled to trade these off in pursuit of overall national goals; but the distinctive feature of the kinds of protected interests this argument engages is that they are insulated from such trade-offs. They are “trumps”, in the language of Ronald Dworkin, not to be simply balanced against and outweighed by concerns of overall social welfare.⁸³

⁸¹On whether human rights are necessarily linked with state action, J. Tasioulas, “On the nature of human rights”, in G. Ernst and J.-C. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin: De Gruyter, 2012).

⁸²For an overview, see S. Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011). On WTO law and cultural protection, T. Voon, “Culture, human rights and the WTO”, in A. Filipa (ed.), *The Cultural Dimension of Human Rights Law* (Oxford: Oxford University Press, 2013).

⁸³R. Dworkin, “Rights as trumps”, in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984).

III.IV | Substantive Imbalance

The foregoing discussions have emphasized, first, the limits of agreement; second, the importance of process; and third, the perspectives from which complaints are made. However, none of these addresses what is perhaps the most intuitively obvious way we might complain about any economic agreement, namely in terms of the overall distribution of benefits and burdens that it produces. An agreement that raises no concerns under any of the foregoing categories may still be criticized on the basis that its benefits are disproportionately captured, or its costs disproportionately borne, by one party rather than the other. This is the complaint of *substantive imbalance*.

Neither the International Moral Minimalist nor (although this is perhaps less clear) the exponent of the Society of States is likely to find this criticism compelling. In the absence of applicable international distributive principles, the fact that some gain more than others is not, on these views, especially morally important.⁸⁴

By contrast, those who endorse strong global distributive principles will be troubled by such substantive imbalances, but it is not clear how well a focus on the *benefits of agreement* in particular fits with such views. If, as scholars like Beitz and Moellendorf have argued, we have duties to pursue globally egalitarian goals, then those duties presumably obtain independent of any particular trade agreement (although they may be contingent on the existence of a stable institutional scheme / basic structure / association, and so on). Asking how the benefits of a specific agreement are distributed necessarily holds fixed, in ways egalitarian cosmopolitans must reject, the background distributions against which that agreement applies. If we think that persons globally are entitled to equality, whether of opportunities, resources, welfare, or something else, then we must examine the international institutional order as a whole to see whether it is living up to this goal. It makes little sense to isolate one component part, whether a treaty, a judicial decision, a domestic law, or anything else, and ask whether it is achieving a just distribution, since any effects it has will interact with a panoply of other measures in order to produce the result that is actually of moral relevance. Whether the distribution of benefits from an agreement is acceptable will thus depend not just on the agreement itself, but also the overall distribution resulting that agreement and all of the other institutions and actions with which it interacts.⁸⁵

This is not to say, of course, that scholars have not tried to make sense of the intuition that an international agreement's moral evaluation depends in part on how the benefits and burdens it produces are distributed. However, in practice such

⁸⁴Thus Rawls, *A Theory of Justice*, adverts to "standards for fairness in trade" (p. 42), and to the importance of addressing "unjustified distributive effects" (p. 43), but his suggestion that this be done through the duty of assistance, which applies up to a threshold, implies that imbalance of benefits per se need not trouble us.

⁸⁵For this point in another context, L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2004).

critiques generally collapse into either concerns about voluntariness of the relevant agreements (in which case the Voluntarist Reply does not obtain) or concerns with global inequality *simpliciter* (in which case the agreement itself loses much of its moral significance).

Risse and Wollner's exploitation-focused account of trade justice highlights the first of these concerns.⁸⁶ For Risse and Wollner, justice in trade is about avoiding exploitation, understood as unfairness through power, and—more specifically in the trade context—power-induced failure of reciprocity. They seek to avoid collapsing their view into an unrestrained egalitarianism by emphasizing exploitation's procedural (power-based) as well as substantive (unfairness) aspects: “the wrong is joint violation of an interactional and a distributive norm such that violation of the distributive norm results from the violation of the interactional norm”.⁸⁷ Risse and Wollner's account does not depend on prior injustice, rather holding that agreements where power plays a significant role are appropriately evaluated in terms of substantive balance, whereas those that are not power-induced are not. We might wonder whether there were any agreements where power was truly not a factor; certainly, more is required to explain how we can distinguish what is and is not a power-based interaction.⁸⁸ In practice, it seems likely that substantive imbalance is itself a strong indicator that power has played a significant role an agreement, undermining the procedural/substantive distinction they seek to draw. The fact that, absent injustice, power inequalities may still support a judgement of exploitation means that there are at least potentially situations where an agreement will be voluntary but nonetheless exploitative. However, in the overwhelming preponderance of cases (and perhaps all cases, depending on how we understand the antecedent duties that obtain), the procedural requirement means that a judgement of exploitation will follow from, and depend on, a judgment of prior injustice. Either an agreement is truly voluntary and hence, on Risse and Wollner's view, not subject to evaluation in terms of substantive balance; or it is not voluntary, and substantive imbalance may support a judgement of exploitation. But in either case, the Voluntarist Reply has little relevance.

The second concern is exemplified by Christiano's account of fairness in trade negotiations. Christiano understands fairness in exchange in terms of, at the level of an individual exchange, “equal capacities for that exchange” understood as “equal access to cognitive conditions relevant to one's interests and concerns, and equal opportunity for exiting or refusing entry into the arrangement”.⁸⁹ In practice, this requires agreements be made against a substantially egalitarian

⁸⁶Risse and Wollner, *On Trade Justice*.

⁸⁷*Ibid.*, p. 89.

⁸⁸For this concern, see O. Suttle, “On trade justice, power and institutions: some questions for Risse and Wollner”, *Moral Philosophy and Politics*, 9 (2022), 9, 147–71.

⁸⁹T. Christiano, “Legitimacy and the international trade regime”, *San Diego Law Review*, 52 (2015), 981–1012, at p. 996.

background: it is only then that agents have the kind of equal capacities and equal stakes that, for Christiano, make voluntary exchange morally significant.⁹⁰ Concern for voluntary agreement implies, on this view, a concern for global equality *simpliciter*. Absent background equality, agreements must instead be analysed in terms of whether one party has taken unfair advantage of the other.⁹¹ A concern for substantive balance at the level of the agreement thus emerges in the absence of the kind of substantive equality that would give voluntariness its moral force.

The upshot, then, is that the Voluntarist Reply can play little role in answering concerns about substantive imbalance in trade agreements. Either substantive imbalance is not morally important, in which case the Voluntarist Reply is not needed; or substantive imbalance is a problem, in which case the fact of prior injustice precludes invoking that reply.

IV | Conclusion

The Voluntarist Reply is a prominent feature of political discourse around trade agreements, and indeed international agreements more generally. This essay has tried to deflate its role somewhat. Without denying that voluntariness may play an important role in an agreement's moral evaluation, I have sought to show both that “voluntary” for these purposes means something quite demanding; and also that, even where an agreement is voluntary in the required sense, this can never be the end of the matter. Voluntariness cannot cure all moral ills, so we must be attentive to the kinds of critiques made on a given occasion, in order to judge how far voluntariness provides a plausible answer to them.

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⁹⁰Ibid., p. 1012.

⁹¹Ibid., p. 998.

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