

Häußermann, Johann Jakob

Preprint

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Suggested Citation: Häußermann, Johann Jakob (2017) : Fairness in International Trade Policy: Equality and Differential Treatment in Theory and Practice, ZBW - Deutsche Zentralbibliothek für Wirtschaftswissenschaften, Leibniz-Informationszentrum Wirtschaft, Kiel und Hamburg

This Version is available at:

<https://hdl.handle.net/10419/170695>

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Fairness in International Trade Policy: Equality and Differential Treatment in Theory and Practice (WORKING PAPER)

Johann Jakob Häußermann (FU Berlin)¹

October 2017

Abstract: In *Fairness in Practice – A Social Contract for a Global Economy* (2012) Aaron James proposes a substantial normative framework for a theory of fairness in the global economy. Based on a distinctive methodology of interpretive constructivism, James argues for an internal justification of fairness requirements in the field of international trade, and consequently defends three basic egalitarian principles of fairness. However, Mathias Risse and Gabriel Wollner, among others, have criticized James's view for multiple reasons. In the following article, I will first engage with their critique, contending that their arguments do not prove that James's view should be dismissed. Instead, I will introduce a new proposal, arguing that it is rather by a notion of differential treatment of countries that James's account should be complemented. Taking into account all the relevant differences between countries, the concept of differential treatment allows for the provision and establishment of equal participation as a basis for considerations of fairness. To this end, I shall therefore propose an additional fourth principle of fairness called *Equal Participation*. I argue that it is necessary to significantly expand James's contractualist and practice-dependent foundations, in order to reconcile crucial methodological concerns and to render James's formulations applicable to current debates on free trade agreements. The article will conclude with an exploration of the applicability of this new approach to current trade policy issues, illustrating not only its practicability but also the urgent need for normative considerations in the context of international trade agreements.

Keywords: *International Trade; Free Trade Agreements; Fairness; Special and Differential Treatment; Constructivism; Aaron James*

¹ johann.jakob.haeussermann@posteo.de

I Introduction

In today's global economy, fairness in international trade is a crucial and complex problem. Concerns around fair trade are invoked both by those who campaign for rules of international trade that would be more favourable to the disadvantaged, poor and adversely affected people in developing countries, as well as by those who want greater protection for established industries in affluent societies. However it is the relationship of conditions of fair and free trade in particular which is the origin of much controversy (Miller 2016). Also, some may argue that fair trade presents a better response to global poverty and to issues of international development than other measures such as development aid or charity. Moreover, considerations of fairness in international trade can be seen as part of broader debates on international or global justice. Thus the central question is how to find a basic normative perspective on fairness in international trade. How does fairness apply in international trade, what does it require, and how can a conception of fairness be justified?

In *Fairness in Practice - A Social Contract for a Global Economy* (2012) Aaron James tackles each of these questions and derives from them a comprehensive theory of fairness in international trade. It is hardly surprising that having established a thorough philosophical approach to international trade, James's account has been subject to many reviews and criticisms (e.g. Barry 2014; Beitz 2014; Brandt 2014; Christensen 2013; Cotton 2014; Julius 2014; Miller 2014; Moellendorf 2013; Olson 2014; Risse and Wollner 2014, 2013; Walton 2014; Wollner 2012), some of which he replied to (James 2014b; 2014a).

In the following article I will discuss some of the most pertinent objections, focusing on those brought forward by Mathias Risse and Gabriel Wollner (2013; 2014; Wollner 2012). While some criticisms have focused on particular principles (Barry 2014), or on the implications of James's concept of autarky (Olson 2014), or even radically queried whether moral duties arise from the practice of trade at all (Walton 2014), others have primarily addressed methodological concerns (Beitz 2014; Julius 2014; Risse and Wollner 2013; 2014). As I am interested in how fairness considerations could be applied to current debates and policy issues, I will engage with the latter branch of objections in order to develop a valid and robust framework of fairness in international trade. I therefore engage Risse and Wollner's critique, as the most relevant and, in this respect, most comprehensive approach. Arguing that their critique fails to refute James's theory, I defend James's concept of fairness, proposing a modified version of it, which significantly expands its contractualist and practice-dependent foundation. My argument is that egalitarian fairness considerations based on participation in a mutual practice must go beyond equal gain division, and must include the requirement that each affected member is made a full and equal participant of that practice. Furthermore, I claim that equitable participation can be achieved by measures of differential treatment of countries, rather than through formal equality. I will proceed as follows: First, I will briefly outline James's theory of fairness in international trade (II). Following this, I

will discuss those of Risse's and Wollner's methodological concerns which prove to be pertinent to the matter at hand (III). Then, in a third step, I will propose what I will call a procedural complementation of James's theory, arguing that it is precisely against the background of James's participation-based approach that fairness requires a supplementary concept of differential treatment for poor and developing countries in the international trade regime (IV). Expanding on this, I will discuss how an application of the proposed fairness reformulation relates to current policy debates on free trade agreements such as the Trans-Pacific Partnership (TPP), the Comprehensive Economic and Trade Agreement (CETA) or the Transatlantic Trade and Investment Partnership (TTIP). I thereby aim to expose a pivotal blind spot in current policy debates on international trade (V). Finally, I will identify further prospects of fairness considerations in the context of international trade (VI).

II Practice-Dependency, Constructivism, and Structural Equity

James presents an encompassing theory of fairness in international trade (James 2012). It is precisely through his practice-dependent and constructivist methodology that James provides the basis for normative fairness considerations arising from the practice of international trade. Therefore, it seems necessary to analyse and spell out the normative demands which inevitably arise from James's methodology, and to build upon his argument. In what follows, I will briefly delineate its most important features, as they prove relevant to my later proposed expansion.

James's account of fairness in international trade pursues a third way between what he calls *parochial egalitarianism* and *cosmopolitan* concepts of fairness. Given the political reality of a global economy, James argues that only an essentially international account is capable of integrating fairness considerations into international trade. Parochial egalitarianism (or related nationalist positions) confine concerns of socioeconomic distribution within domestic societies and restrict international or global issues of fairness to the minimum necessary to meet humanitarian or human rights obligations. Cosmopolitanism, on the other hand, aims to forward principles of relative distributive fairness across societies up to and including the global level. Whereas the nationalist account does not support arguments for fairness principles across borders, and thereby neglects the global character of the economy, the cosmopolitan approach fails to grasp the particular *international* reality of the economy by assuming a global basic structure of one sort or another (James 2012, 6-14).

James considers the global economic reality to be partly integrated and the global political reality to be decentralized as well as fundamentally interdependent. He tries to avoid both widely established strands in political philosophy in order to more effectively interrogate the complicated political and socioeconomic realities of today's globalized world. Hence, to James, it is countries as primary participants that form the basis for fairness considerations in international trade. The subject of fairness is thus provided by an *international market reliance practice*; that is, by a

general social practice of states mutually relying on common markets for the sake of augmenting their national income (James 2012, 37; 2014a, 178). It is precisely this general social practice, constituting and organizing the global economy, that lays the ground work for considerations of fairness. The recognition of a social practice which coordinates the reliance on and the expectations of common markets can be justified by the following conditions: i) coordinated behaviour of agents over time; ii) this coordination maintaining generally understood behavioural expectations; iii) governed expectations; and iv) adjusted expectations according to a shared organizing purpose (James 2012, 37–41). Based on Adam Smith’s theory of national income and David Ricardo’s thoughts on comparative advantage, international trade provides a model for mutually beneficial relationships.

As a social practice or special social relationship between states, international trade is subject to basic normative requirements, most profoundly of *structural equity*. This most basic egalitarian normative concern requires that international trade be structured according to principles nobody can reasonably complain of; more specifically, it demands a structure of international trade according to which the benefits and burdens are distributed fairly to every country and class affected (James 2014a, 179; 2012, 131–135). Thus one could argue that the general social practice of international mutual reliance on common markets establishes the political responsibility for structural equity; that is, for a reasonably acceptable distribution of benefits among those who are participating and affected. In this way, structural equity as a basic normative requirement of the social practice of international trade generates fundamental egalitarian principles concerning the distribution of benefits and burdens. As a result, the aggregate gains of international trade must be distributed equally among all countries participating in the practice of international trade.

Consequently, James advocates three essential principles. The first is *Collective Due Care*, which is concerned with the socioeconomic harms of trade against which trading nations are to protect people, so that no person’s life prospects are worsened (James 2012, 203; 2014a, 180). The second principle, *International Relative Gains*, claims that national income gains due to specifically international trade are to be distributed equally, unless unequal gains flow to poor countries (James 2012, 203; 2014a, 181). And lastly, *Domestic Relative Gains* requires the equal distribution of gains of trade within a society among its affected members, unless an unequal distribution is reasonably justifiable to all of them (James 2012, 203–204; 2014a, 181). These principles of structural equity distribute the respective benefits of trade based on the normative egalitarian assumption that the gains of international trade are a product of social cooperation on the basis of participation in the joint practice of international market reliance (James 2012, 165, 221–226; 2014a, 182).

Furthermore, these fairness requirements of distribution can be seen in the context of James’s larger contractualist framework following John Rawls (1971) and T.M. Scanlon (1998). According to Scanlon’s argument from *What We Owe to Each Other*, the general principles of structural

equity are those no one could reasonably reject, given the relevant interests and claims in the context of international trade. This minimal egalitarian concern leading to equality of distribution is thus based firstly on the equal moral status of the participants – that is, of the participating countries in the international market reliance practice. It is based secondly on the symmetry of their interests, meaning that each of them has a relevantly similar interest in greater rather than in lesser shares of the gains of trade. Thirdly, it is based on the absence of special entitlements for any particular trading country (James 2012, 168; 2014a, 184). Under these conditions, the moral default is equality in the division of the gains of international trade as products of international social cooperation, adjusted to the particular background endowments (land, labour, capital, technology, etc.) (James 2012, 168–169).

It is in this sense that James tries to make a lot from modest means and seeks to filter out those normative or moral requirements that arise only from the practice of international trade on its own (James 2014b, 287). Hence, egalitarian principles of structural equity are justified *for* the particular social practice of international trade and, in part, *from* the implicit understanding of that practice (James 2012, 29). It is the practice-sensitivity of James's distinctive justificatory methodology, i.e. his practice-dependent constructivism, which allows one to recognise the specific internal normative requirements and moral principles of a social practice such as international trade.² Explicitly avoiding paths of pure moralism on the one side and pure interpretivism on the other, James follows the middle way of a three-step constructivist methodology (James 2012, 25–27; 2014a, 185). In addition to Rawls and Scanlon he is particularly indebted to Ronald Dworkin's *legal interpretivism* (1986), a process that involves identifying a social practice, following a moralized characterization of its general purposes and aims, and engaging in substantive moral reasoning about a structural organization reasonably acceptable to each affected participant of that practice (James 2012, 28).

Overall, it is precisely by virtue of his distinctive practice-dependent methodology that James derives his three principles of fairness for international trade, requiring an egalitarian division of gains for countries' mutual reliance on common markets. What James and his distinct methodology reveal is that the practice of international trade on its own establishes substantial fairness requirements which entail practice-dependent concerns of structural equity. In this way, James provides a valuable point of departure to develop a concept of fairness in international trade.

² For the term of practice dependency cf. especially Julius (2014) and James (2014a), but also Beitz (2014), Christensen (2013) and James (2005, 2013).

III Two Objections, or: Does James's Approach Generate Inchoate Theorizing?

Although Risse and Wollner (2013; 2014; Wollner 2012) submit a variety of objections to James's view, all of them, I contend, fall back on two main arguments. First, there are questions concerning James's methodology which encapsulate not only issues of constructivist interpretation, but also problems relating to the isolation of trade, and to trade as a ground of justice and of structural equity. Secondly, the topic of autarky which, although it touches on questions of methodological isolation or distinction, nevertheless presents an independent and substantial objection. The latter objection can be rebutted insofar as James's proposed principles require no positive entitlement to the gains or benefits of autarky, but only a negative entitlement in the sense of no established duty to share trade independent benefits (James 2014a, 195). Therefore, it is rather their fundamental methodological concern which proves relevant for the present argument.

However, a brief argument on the issue of autarky may be required before we explore the methodological objection. Whether or not the decline of trade in the interwar years is temporary (Risse and Wollner 2014, 206–207), the assumption of an *international* and *partly integrated* global economy presupposes a baseline of national income, compared to which gains caused specifically by international social cooperation can be identified. Thus, if, as James explains, (i) the fairness considerations are appropriate under conditions of partial integration and (ii) the such conditions apply to the global economy as we know it (James 2014a, 188), then the equal distribution of gains flowing from the cooperative practice of international trade is reasonable. But, however important the issue of autarky may seem, the application of James's fairness principles would eventually be valid without referring to any notion of autarky (2014a, 194).

At one point Risse and Wollner worry that James's methodology yields to what they call *inchoate theorizing* (2014, 208). They argue that he fails to build the bridge from a general understanding of the global economy to a substantial conception of fairness (2013, 388). More precisely, they question the plausibility of James proceeding from the second step of his methodology, *moralized characterization*, to the third step of *moral assessment* (James 2012, 28). However, as I will show hereinafter, their assumption of *inchoate theorizing* should be rejected, as they misinterpret James's distinct constructive-interpretive reasoning. Consequently, each of their invoked arguments in favour of the alleged methodological defectiveness fails.

Initially, they argue that James's rejection of David Gauthier's (1986) contribution-based proposal of gain distribution would leave the relevant interpretive work unfinished and solely dependent on moral argument, though in order for his methodology to actually be effective both interpretive

and moral reasons would be required (2013, 388). The moral argument seems, as they admit, rather persuasive indeed. According to Gauthier, each participating country would try to claim as much of the gains of international trade as possible, and the distribution would eventually be settled by rationally self-interested bargaining. This way of distribution seems morally inadmissible, since no country has a morally relevant interest in the whole of the gains, but each participating country's interest in greater rather than lesser shares at most amounts to a presumptive claim to equal gains. Further explanatory moral argument notwithstanding, what Risse and Wollner query is the lack of relevant *interpretive* reasons supporting James's case, such as depiction of the global economy as partly integrated and interdependent. However, James's argument as part of the larger search for reflective equilibrium seems to be no less clear and convincing here. As participation in the international reliance practice provides the grounds for considerations of fairness, a system of partially non-voluntary participation cannot justify ideas of contributory fairness. Thus, the interpretive reason is provided by the socioeconomic and political condition of the international trading system not being based on full voluntariness, since the international trade relationship proves to be rather *relatively unavoidable* (James 2012, 173). Diverging from Risse and Wollner's claim, James's rebuttal of Gauthier's contribution-based distribution of gains, therefore builds upon moral *and* interpretive reasoning – for it is precisely the constructive interpretation of the particular existing social practice of international trade as well as the consequently resulting moral argument which justify James's case. So even though we always need to know more about the particular practice at stake in order to strengthen each interpretive step (Risse and Wollner 2013, 388), for the matter at hand we do have sufficient knowledge to make a coherent interpretive argument according to James's practice-sensitive methodology. It is in this respect that Risse and Wollner's conclusion – that James's methodology is doing less work than it presumably should (2013, 388, 400) – might be premature.

Risse and Wollner have a second general concern regarding James's methodology, which pertains to the problem of interpretive disagreement (2013, 388). However, taking James's methodology seriously, the standards of a method relying on social interpretation can only be granted by final coherence with the larger framework of judgments, eventually framed by the holistic search for reflective equilibrium (James 2014a, 196). Thus it seems that their demand for more determinate results (Risse and Wollner 2013, 389) and their charge of inchoate theorizing (Risse and Wollner 2014, 208) are only validated by the general and, in this sense, biased rejection of James's practice-dependent constructivist methodology. They reject his methodological approach without providing conclusive arguments as to whether and why it could be flawed. Their subsequent objections to James's theory of fairness rely on this unjustified rejection.

These subsequent objections concern, first and foremost, the issue of the isolation of trade. Risse and Wollner argue that theorizing about international trade in isolation from other grounds of justice is at best highly incomplete (2013, 400, 389–392). Since other grounds of justice establish fairness requirements that substantially extend to the field of international trade, those fairness

concerns cannot reasonably be treated separately. Yet James establishes the egalitarian distribution principles of fairness strictly from his contractualist and practice-dependent approach. Thus his perspective is inherently limited to the socially created gains of international trade. Therefore, Risse and Wollner's objection to the illegitimate isolation of trade as a matter of fairness seems to fail, again by virtue of their misinterpretation of James's methodology. James's position does not imply that other considerations of justice or fairness are less important or more difficult to justify. He simply asks which principles of fairness arise purely from the practice of international trade on its own, other concerns notwithstanding. Consequently, Risse and Wollner's second objection regarding trade as a ground of fairness likewise collapses (2013, 392–393). Merely asking how norms would be generated and what would be special about the structure of international trade (2013, 393) reveals, once again, that they cannot fully reconstruct and comprehend James's distinctive procedure. Risse and Wollner argue that James fails to reject a contributory approach to international trade since the international trade system is less cooperative and exercises a thinner form of coercion compared to the domestic case where contributory fairness is implausible due to the intensively cooperative nature of shared membership (2013, 393). But in fact, and based on a Rawlsian account, the unfairness of contributory fairness relies on the arbitrariness and involuntariness and, thus, the irrelevance of membership, natural talents and endowments. That is why, in this respect, the domestic case is similar to the case of international trade, and contributory fairness is ruled out for the very same reasons (James 2012, 173–174). Through this argument, Risse and Wollner admittedly emphasize the crucial difference between the domestic case and the issue of international trade, but they ignore the relevant similarities, thus misconceiving James's argument for the rejection of contributory fairness. Again, what they apparently fail to grasp is James's distinctive methodological approach to international trade, on which fairness requirements – trade as a ground of justice – are established. Additionally, they raise a third objection to James's proposal in close relation to their methodological concern. Questioning James's attempt to establish structural equity as a benchmark for dividing endowment-adjusted gains of trade, Risse and Wollner argue for a distribution somewhat proportionate to countries' relevant contributions (2013, 393–396). Claiming that James's account of equal division of the surplus would be unfair to those countries, greatly enabling others to trade to their overall comparative advantage, they hold that equality in gain division does not apply. But once more, their underlying objection appears to be a methodological one. James's conception excludes neither (bilateral) compensation nor special treatment of poorer or developing states. Instead the latter is explicitly part of the principle of *International Relative Gains*. Hence the enabling of one country by another does not constitute a vital objection, but might rather be demanded by the normative requirement of structural equity, perhaps even with regard to some participation baseline. Instead, based on the substantial threshold of (partial) integration, it is the roughly equal distribution of gains of international trade which *is* roughly proportionate to what each country contributes (James 2014b, 302–303). Put differently, it is the participation in the mutual international market reliance practice which, by cooperatively producing the gains of trade,

presents the case of a contribution as upholding (that practice) (Brandi 2014, 233). Thus, Risse and Wollner seem to oppose the practice-dependent approach of internal demands of fairness altogether, yet a substantial argument against structural equity does not follow from their case of countries' mutually enabling trade to their comparative advantage.

I have so far delineated each of the three arguments presented by Risse and Wollner: the first regarding the isolation of trade, the second concerning international trade as a ground of justice, and the last one related with structural equity. I contend that each of these objections falls back upon their preceding elementary methodological concerns. But crucially, the methodological argument on which those subsequent issues rely fails, since Risse and Wollner ignore James's constructive-interpretive reasoning which does not succumb to *inchoate theorizing*. Instead, I defend James's approach, arguing that it provides a reasonable methodological basis for establishing egalitarian fairness principles in the context of international trade.

IV Equal Participation and Differential Treatment

While in the first part I refuted objections to James's theory of fairness in international trade, I will now, in the second part of the paper, propose a new approach of special and differential treatment (SDT) in international trade, using James's work as a foundation. To begin with, it may be important to note that from a normative point of view, notions such as 'special', 'preferential', or 'favourable' treatment for developing countries may prove to be problematic as they may suggest that countries enjoying 'special', 'preferential', or 'favourable' treatment are receiving an unfair advantage. But as it resides at the core of the concept of differential treatment, it is precisely by considerations of fairness that different parties with different capabilities and needs are given differential treatment (cf. Brandi 2008).³ I shall argue that the idea of differential treatment provides a necessary complement to the substantive egalitarian fairness principles of equal gain division as proposed by James. To this end, I will give an account of how an argument for SDT could reasonably connect to James's theory of fairness and his substantial egalitarian principles of equity, and why it should be complemented by a more procedural perspective. In this way, I will show why it is differential treatment rather than formal equality which provides an appropriate basis for a more comprehensive image of fairness in international trade.

First of all, it is important to note that I do not claim to present an objection to James's theory but, rather, I aim to show why and how it may be used to provide a new and even more reasonable concept to promote fairness in international trade, given the current state of the global economy. James's argument for equal gain division as required by the normative demand for structural equity is based on countries' participation in a social practice of mutual reliance. As it is this participation which generates internal fairness requirements as set forth by James, it is here that

³This is why in the following, I will use the term *differential treatment* when referring to the concept of 'special and differential treatment' (SDT).

an additional fairness claim should be attached. To begin with, in order for the practice of international trade to be fair, negative externalities to the disadvantages of third parties need to be precluded, especially if the disadvantage accrues to developing or least-developed countries. This claim is based on the cosmopolitan assumption that a no-harm obligation cannot reasonably be confined to (full) participants of the international trading practice, but needs to encompass all parties *affected* in order to be justified to the international community and its individual members. James's first principle of equity, *Collective Due Care*, requires that no person's life prospects should be worse than they would have been, had his or her society been a closed society. Thus, trading nations are to protect people against the harms of trade (James 2012, 17; 203-215; 2014a, 180), and this harm-related equity principle should explicitly include those harmed by the practice of international trade without (fully) participating in that practice. Unless compensation is awarded or is considered reasonable since rich and developed countries are concerned, harms and burdens to third parties arising from international trade practices seem unjustifiable and hence unfair. With regard to bilateral trade agreements such as TPP, CETA or TTIP, fairness requires a thorough inquiry of possible harms to third countries before implementation, particularly if poor and developing countries are concerned.

Moreover, as those harms arise precisely due to the social practice of international trade, the fairness demand of not harming anyone by that practice can likewise be seen as meeting James's internality criterion. While this may be taken as the 'negative' side of my participation-based complementation of James's theory, the more substantial and crucial part is presented by its 'positive' equivalent.

The thrust of my argument is that, insofar as participation is the condition for being entitled to an equal share of the gains of trade, and no country can afford not to join the international trading system, the general practice entails the obligation to make every country a full and equal member of that practice. As the current system of international trade cannot reasonably be regarded as fully voluntary and every country of the world is, to differing degrees, affected by the international economic system, no country can justifiably be excluded (James 2012, 173, 191, 232-233).⁴ But this claim goes beyond a mere no-harm-obligation. The normative ground of (involuntary) participation in the international mutual reliance practice of the global trading system establishes the demand for differential treatment in order to make every participant a full and equal member of that practice. While James provides a scheme for egalitarian fairness considerations in international trade based on countries' participation in the international trading practice, his view needs to be complemented by an argument for differential treatment of those countries which are currently not full and equal members of the international trading practice. This concerns first and foremost developing and least-developed countries, and differential treatment may

⁴ With regard to bilateral agreements this is emphasized by, for example, the sheer size of the TTIP between the United States of America and the European Union, which covers approximately forty percent of global trade. Neither would it seem reasonable to assume that a country could not be affected nor that it could justifiably be excluded from such an amount of global trading volume.

particularly encompass improved market access for developing countries, the implementation of World Trade Organization (WTO) rules supporting development, and increased measures of 'Aid for Trade' (AfT) (cf. Brandi 2008; Hoekman, Michalopoulos, and Winter 2004; Hoekman 2005; Keck and Low 2004; Stiglitz and Charlton 2005 (esp. ch. 5-6)). Thus, as fairness requires the equal division of gains among the participants of international trade, members of the international trade system equally bear the responsibility to assist those countries that are either not a full and equal participant, or that are completely excluded from an active role in international trade.

As formal equality is often seen as being entailed by fair trade, an ideal of formal equality is endorsed by the WTO's assumption that all member states are to receive and offer equal, or uniform, treatment (Christensen 2015, 505).⁵ See, for example, principles such as the Most Favoured Nation rule (MFN) as a principle of non-discrimination, the National Treatment rule, the principle of reciprocity, but also the WTO's egalitarian and majoritarian voting system. However, formal equality as currently applied in the context of trade does not provide an appropriate framework of fairness, particularly not against the background of the normative demand of structural equity as advocated by the present account, at least so I argue. Pragmatic arguments for formal equality often claim that expectations would be easier to identify if they are applied uniformly to all countries, that administration and enforcement would be easier, and that trade liberalization processes would be generally facilitated. Most notably, though, formal equality might also be vindicated on grounds of equity. Against this background, deviations from the default of formal equality imply advantages for some parties, but as all parties are considered equal this appears to be unfair. Yet what this reasoning is missing is that applied to the context of trade, it seems hard to defend the claim that affected countries are alike in all relevant aspects. To claim that different levels of economic development and thus existing socioeconomic background inequalities do not constitute a relevant difference is, to say the least, implausible. Rather, the existing significant differences among the members of the international trade regime may be considered as providing a strong *prima facie* reason to depart from formal equality and to argue for differential treatment for poorer countries.

Thus, by differential treatment least-developed and developing countries may eventually become equal members of the international mutual market reliance practice, on which basis equal gain entitlements may be legitimately raised. As indicated by the concept of differential treatment itself, full and equal participation is not accomplished by a mere formal right to participate. Rather, countries must enjoy the appropriate economic, political and social means allowing them to effectively exercise that right. Therefore, insofar as participation establishes the claim of equal gain division as the moral default, the participation in the practice of international trade equally establishes the requirement of differential treatment enabling the members who are currently not

⁵ This paragraph draws on Christensen (2015): *Fair Trade, Formal Equality, and Preferential Treatment*.

full or equal to reach that state of membership. Hence, this approach aims at expanding James's theory of fairness by a more procedural argument for a concept of differential treatment that allows integrating fairness considerations into international trade relations on a bi-, multilateral and global level. Responding to current trade relations and corresponding inequalities, the framework of differential treatment then provides an appropriate approach to implementing and realizing fairness issues by considering how different countries involved are being treated differently through particular trade practices.

Beyond that, differential treatment can be justified by a variety of rationales (Christensen 2015). One might, for instance, argue that developed countries and the citizens of affluent countries have positive duties to alleviate global poverty and unfair inequalities, and that measures of differential treatment may provide a suitable opportunity to discharge those duties.⁶ Also, one can defend differential treatment for reasons of rectificatory duties to compensate for the harm caused by affluent countries. Therefore, developed and wealthy countries might not have positive duties to help the poor, but negative duties to cease harming them.⁷ Overall, however, in order to justify these arguments one needs to show that there are no alternatives to discharging positive or rectificatory duties through differential treatment, which do not depart from formal equality. A third line of reasoning is that in order to guarantee an equitable distribution of benefits and burdens based on participation in the trade practice, differential treatment may provide the appropriate approach to ensure genuine equality for participating countries differing in significant and relevant respects. Thus, it is rather by differential treatment than by formal equality that an equitable distribution of benefits of burdens can be established, and, accordingly, fairness in trade can be achieved.

Therefore, in addition to James's three principles of fairness, my approach could well be encapsulated by a complementary fourth principle called *Equal Participation*. According to

Equal Participation, the practice of international trade establishes not only the responsibility to protect people against the harms of trade (*Collective Due Care*), but also requires that each (affected) country be made a full and equal member of this practice by measures of differential treatment (SDT).

The supplementation by measures of differential treatment appears to be implicitly set up by James's reasoning concerning the priority of the less well-off and corresponding special trade privileges for developing countries (James 2012, 221–226), and by the discussion of fairness issues

⁶ The best known defense of such a position of positive duties is Peter Singer's (1972): *Famine, Affluence, and Morality*.

⁷ Similar arguments have been offered by Thomas W. Pogge, see, for example, (2002): *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* or Thomas W. Pogge (2005), but they have also been dismissed by Mathias Risse (2005a, 2005b, 2005c).

concerning intellectual property in the third part of his book (James 2012, 285–303). While James’s considerations are narrowed down to the benefits and special arrangements for poor or developing countries with respect to the distribution of gains once countries are participating in the international practice of trade, the claim for differential treatment may constitute the reverse side of the argument by establishing the responsibility to make every country a full and equal member of that practice. This argument, which is responsive to background inequalities, is thus internal to the practice of international trade and is built on countries’ participation or non-participation in the social practice of international trade.⁸

Given that structural equity and equal gain division provide the moral default for a fair distribution of the benefits and burdens of international trade, a procedural approach of differential treatment presents the appropriate answer to existing background inequalities which constitute unfair exclusions and degrees of participation. Thus, the moral default for the social practice of international trade as mutual market reliance may reasonably be complemented by the requirement of full and equal participation of each affected country, most likely of almost every (sovereign) country around the world. In order to rule out unjustified deviations and to eventually establish full and equal participation, measures of differential treatment among the international (*global*) trade community thus need to be implemented.

As a consequence, my expanded account holds that it is by a combination of both principles of substantive as well as procedural fairness that a comprehensive image of fairness in international trade may be achieved. In amending James’s principles, I claim that based on the practice-dependent approach, differential treatment of (developing) countries is morally required in addition to the equal distribution of the gains of international trade.

V International Trade Agreements: Applying the Egalitarian Fairness Principles

One might argue that while establishing a social practice of collective governance, states should divide the gains of trade generated by multilateral trading agreements concluded under the auspices of the GATT/WTO since 1947, on the basis of egalitarian fairness considerations as introduced by James (Brandi 2014, 231). While differing in normatively relevant ways, a politico-institutional adaption of an autarky baseline may appear as more realistic application of an egalitarian fairness account to policy.⁹ As Brandi (2014) demonstrates, a baseline as provided by

⁸ At this point it seems important to note that although an argument for a procedural approach seems to follow the reasoning of Risse and Wollner rather than that of James, the proposed complementation is procedural based on explicit substantive principles, namely James’s egalitarian theory of fairness in trade. Risse’s and Wollner’s procedural approach, by contrast, emerges as being rather formal than procedural: As already indicated above, their claim of providing a procedural account without reference to any substantive principle whatsoever seems at least arguable.

⁹ The normative difference resides in the different justification, of which trade gains are normative, relevant and distinct. While James argues for a justification based on a joint practice, Brandi refers to the multilateral trading system. Significant implications notwithstanding, in the following I assume that Brandi (2014) proposes a somewhat modest version of James’s approach.

the institutionalized multilateral trading regime can offer a justifiable foundation for developing a feasible adaptation of James's approach to fairness in international trade.

In the absence of successful objections, James's account may indeed grant an useful normative framework for approaching considerations of fairness in the current international trading system. Yet the context of recent negotiations and current policy debates on bilateral trade agreements such as TPP, CETA, or TTIP may render Brandi's institutionalist version of James's theory more plausible, since membership in the decision making bodies of institutionalized multilateral trading system (such as the WTO) could diminish the disadvantages and harms to third parties and less well-off countries. However, membership in such organisations would not be sufficient for fairness since presumably not every affected country would be included; nor would a fair trading system be guaranteed at all. Moreover, aspects of, for instance, bargaining power in multilateral negotiations then seem to become even more crucial. Thus, the aforementioned normative requirements are relevant both to the institutionalized multilateral regime as well as to bilateral agreements. Still, it may be especially bilateral trade agreements which grant an effective opportunity of raising and implementing fairness issues in international trade policy, as they are not only much more direct, flexible, variable, and – to an extent – more open, but they have recently become a critical factor of international trade policy, given the complexity and difficulty of multilateral negotiations under the auspices of the WTO (one need only think of the course of the Doha Development Agenda (DDA)).

Other relevant considerations notwithstanding, in application of the proposed approach a cosmopolitan objection against current bilateral trade agreements such as CETA or TTIP might demand that for such a bilateral agreement to be justifiable, it must not worsen the life prospects of the already worst-off in the world. Hence, in order to achieve fairness in international trade, the duty of well-off countries to assist less-advantaged countries to fully participate in the multilateral trading regime as institutionalized by the WTO (Brandi 2014), or to achieve full and equal participation in the social practice of international trade (James 2012), might establish a reasonable demand for currently negotiated agreements. To achieve fairness in international trade, the requirements for a fair distribution of benefits and burdens therefore may similarly entail duties to respond to background inequalities by assisting and enabling those countries currently excluded and unable to fully and equally engage in the particular practice of trade. This could, for instance, imply that in order for TPP, CETA, or TTIP to be fair, a careful and rigorous analysis of whether privileges to contracting parties involve harms and disadvantages to third parties, of whether they are adequately compensated, and of whether their initial exclusion is even justifiable is required. Does, for example, a bilateral trade agreement between the United States of America (USA) and the European Union (EU) imply detriments for other affected countries without adequate compensation? Further, are those third countries affected by an agreement between the USA and the EU able to equally participate in the negotiation process? If not, did

they voluntarily renounce equal participation or did both the USA and the EU adopt sufficient measures to make them equal participants?

Along these lines, consider the effects of, say the TTIP, on third countries. It may involve negative economic consequences such as (1) discriminatory trade diversion including regulatory diversion with respect to, for example, technical, sanitary and phytosanitary standards, (2) new, increased or even stricter import restrictions not only in terms of tariff barriers, but especially concerning non-tariff barriers (NTBs) and (3) higher production costs due to new regulations (cf. Akman, Evenett, and Low 2015; Francois, Hoekman, and Nelson 2015; Berger, Brandi, and Kubny 2013; Berger and Brandi 2013; Fabry and Strickland 2015; Schmieg 2015; Reiter 2015; Felbermayr and Aichele 2015; Manrique Gil and Lerch 2015). As an example, Bangladesh textile producers strongly rely on exporting to the United States. However, due to the TTIP, more competitive producers from eastern Europe may gain market shares to the detriment of firms from Bangladesh (Aichele and Felbermayr 2015; Schmieg 2015). Or, similarly, reduced tariffs for American fish exporters to the European Union might damage Ghana's fishing industry as tariffs in the agricultural sector still tend to be comparatively high (Reiter 2015). While third countries might benefit from the harmonization of contracting parties' standards and regulations, it is rather the mutual recognition of standards which seems to result from (current) bilateral agreements (Akman, Evenett, and Low 2015). This could alternatively lead to negative net results for third parties, who would have to continue dealing with different sets of standards, whereas producers from contracting countries would benefit from the stipulated mutual recognition (Reiter 2015; Manrique Gil and Lerch 2015; Schmieg 2015).¹⁰ In order to reduce such negative effects, and for third country producers to be able to enjoy the benefits of international trade, the extension of mutual recognition to third parties is necessary. Furthermore, the simplification of rules of origin, such that domestic origin standards are more easily met, would help to significantly reduce the negative effects on third countries. Most notably, though, the inclusion of an accession clause – that is the possibility for third parties to join the agreement – is necessary to enable third countries to become an equal party of the trading agreement. However, as an accession clause would allow new countries to 'dock' into existing agreements and thus open up established partnerships, new members would have to be considered as rule-takers instead of equal rule-setters. Therefore, the accession clause must include the possibility for renegotiations and according adaptations for each new member, in line with the concept of differential treatment based on different national requirements, preconditions and needs. Based on the concept of differential treatment, the

¹⁰ This reveals a further interesting point as it appears that particularly by raising standards as often demanded by (critical) voices of free trade agreements for the cause of (domestic) fairness or justice, third and especially developing and poor countries would be harmed. In other words, postulating higher standards or even opposing lower standards in the name of justice crucially ignores the claims, entitlements or needs of outsiders such as developing and poor countries.

accession clause would allow the determination and definition of differentiated accession requirements in order to enable equal participation.

It is precisely these concerns that are addressed by my expanded version of James's theory of fairness and the principle of *Equal Participation*. Given the international, interdependent and unequal nature of the global economy, a practice-dependent account of fairness in international trade must engage in multidimensional aspects and factors of participation. This means that fairness entails not only obligations not to harm by trade nor to worsen the life prospects of the already worst-off in the world, but also correspondingly encompasses duties to make each affected country an equal member of the practice of international trade, that is of international trade agreements. Equal participation might, in return, reduce the probability of harm and other detriments. Along these lines, the advocacy of measures of differential treatment is required to do justice to the normative foundation of structural equity and the according egalitarian fairness principles. Therefore, as in the case of TTIP, CETA, and other mega-regional trade agreements, the regionalisation of trade policy through bilateral or regional agreements must not only respect multilateral agreements and policies as provided by and within the WTO, they must also take into account potential consequences for third parties such as poor and developing countries.¹¹ While the United States and the European Union intend to counterbalance increasing economic influence of other world regions, not least of China, through the TTIP, this competition must not be carried out at the expense of the poor, developing, or marginalised countries of the world community. Moreover, as bilateral agreements must go beyond existing multilateral commitments in order to comply with current WTO rules, they put an even higher pressure on developing countries to liberalise in order not to fall even further behind. Thus, simply joining the 'mega-regionals' is not a reasonable option for developing countries, since demands for liberalisation would far exceed their capacities. Indeed, it is by differential treatment – namely by an asymmetric opening – that such agreements could integrate developing countries' demands for development and meet their normative entitlement to equal participation (cf. Weinhardt and Bohnenberger 2015). What my expanded fairness account thus requires is an accession clause as an asymmetric opening which would enable affected countries' equal participation based on the concept of differential treatment. In other words, international trade agreements need to consider the mutual market reliance practice based on which each affected country should be able to become an equal member of a particular trade agreement. However, as countries' preconditions vary widely, agreements cannot settle for a simple accession clause but must pursue an asymmetric opening which enables equal participation based on countries' differential treatment. That way, international trade agreements may comply with the duties of avoiding of harm and the equal

¹¹ Note that I do not discuss the effects of bilateral agreements on the multilateral trade system itself. But, the geopolitical implications and consequences for the multilateral system as well as for the WTO may well be quite significant. This seems even more important if bilateral agreements do not pave the way for multilateral agreements as often alleged, but in fact lead to a more fragmented trading system dominated by few very powerful trading blocs which could have major negative effects for poor and developing countries. On the relationship of mega-regional agreements, effects on third countries and global trade governance in general, see also Bohnenberger (2016).

division of benefits and burdens by empowering poor and developing countries' participation in international trade agreements such that they are not merely 'rule-takers' or non-participating third parties.

Finally, differential treatment provides the condition for the possibility of a fair distribution of the benefits and burdens of bilateral trade agreements, i.e. the equal division of the gains of international trade. As a result, my expanded account opens up a new and broader perspective on fairness issues in 'mega-regionals' such as TPP, CETA, and TTIP. Providing an additional argument against them in their current form, I tried to show how concerns of equal participation enter the issue of fairness in international trade agreements. For such trade agreements to be fair they must not only avoid harms and divide gains equally, but must also respect the principle of *Equal Participation*, which requires that each affected country be made an equal member of the agreement by measures of differential treatment. In this way, free and fair trade may prove to be less mutually-exclusive than is often alleged. With certain forms of supplementation they may even become mutually-reinforcing fairness conditions of international trade policy.

VI Conclusion

The purpose of this paper has been twofold: First, I have set out and rebutted Risse and Wollner's objections against James's theory of fairness in international trade. This then provided the basis for the second step, whereby I proposed a new approach to fairness. Building on James's practice-dependent reasoning for structural equity and his egalitarian framework for the equal distribution of gains, I submitted a fourth fairness principle called *Equal Participation*, according to which equal participation must be enabled for each country affected, by means of differential treatment. Subsequently, this expanded account has been discussed and substantiated in light of a first application to current issues of international trade policy, especially with regard to recent bilateral trade agreements. For such agreements to be considered fair, I argued that they must enable third countries' equal participation by an asymmetric opening based on differential treatment.

Certainly, an exhaustive account of all normative aspects of international trade *in relation to policy issues* has not been the subject of this paper. Instead, I intended to establish a coherent *philosophical* concept for fairness in international trade, the application of which to particular trade policies may require much more extensive discussion. Firstly, more elaborate work on normative issues of international trade is needed, and secondly, thorough inquiries into the application of these normative principles to concrete policy issues are necessary in order to eventually achieve fairness in international trade.

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