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## ARTICLES

### THE NEW POOR AT OUR GATES: GLOBAL JUSTICE IMPLICATIONS FOR INTERNATIONAL TRADE AND TAX LAW

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*This Article explains why international trade and tax arrangements should advance global wealth redistribution in a world of enhanced economic integration. Despite the indisputable importance of global poverty and inequality, contemporary political philosophy stagnates in the attempt to determine whether distributive justice obligations should extend beyond the political framework of the nation-state. This results from the difficulty of reconciling liberal impartiality with notions of state sovereignty and accountability. This Article offers an alternative approach that bypasses the controversy of the current debate. It argues that international trade creates “relational-distributive” duties when domestic parties engage in transactions with foreign parties that suffer from an endowed vulnerability, such as the extreme poverty prevalent in the developing world. These relational duties differ from*

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“traditional” distributive justice claims because they rely on actual economic relationships rather than hypothetical social-contract scenarios. In a competitive market, however, private parties cannot address these relational-distributive duties by themselves because doing so would put them at a competitive disadvantage. This Article therefore argues that the only collective action solution to this systemic problem in the current geopolitical setting is the transfer of wealth among states.

This Article then suggests some policy implications of this normative analysis in the field of international tax law. It points out that the allocation of taxing rights is a form of wealth allocation that divides globalization’s revenue proceeds among nations. As such, tax allocation arrangements should help “correct” international trade relationships that fail to meet relational-distributive standards. This discussion stresses a point frequently neglected in both the tax and political philosophy literature: Real-world attempts to promote a more just distribution of global wealth could benefit greatly from the integration of distributive considerations and tax allocation arrangements.

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#### INTRODUCTION

If there be among you a needy man of one of thy brethren within any of thy gates, in thy land . . . thou shalt not make thy heart obstinate, nor close thine hand from thy needy brother.

—*Deuteronomy*<sup>1</sup>

“If there be among you a needy man”—[this means that] [t]he *most needy has preference*; . . . “[within any of] thy gates”—this implies that the *poor of thine own city have preference* over the poor of another city.

—Rashi<sup>2</sup>

Since its nascence, moral philosophy has been haunted by the difficulty of prioritizing between aiding those in the greatest need and fulfilling the needs of those most closely related to us. This dilemma is even more important today, as global commercial relationships shrink our world into a global village where the answer to the question “Who is thy neighbor?” is more significant than ever before. This Article offers a new approach to addressing the question of how developed countries should prioritize between their distributive obligations to foreigners and the duties owed to their own citizens and residents. It offers a concrete prescription for policymakers through the use of international trade policy—international tax policy in particular.

Startlingly, even though global markets operate in a world characterized by tremendous poverty and inequality—a world where nearly half of the population lives on less than \$2.00 a day<sup>3</sup>—the legal literature dealing with international taxation rarely addresses issues of global wealth distribution directly. Although legal scholars perceive the tax system as the key policy tool with which to promote redistribu-

<sup>1</sup> *Deuteronomy* 15:7 (M. Rosenbaum & A.M. Silbermann trans., Hebrew Publishing Co. 1965).

<sup>2</sup> *Id.* (Rashi’s commentary) (emphasis added) (second brackets in original).

<sup>3</sup> See *infra* note 15 and accompanying text.

tion on the domestic front,<sup>4</sup> legal scholarship hardly ever addresses the tax system's role in international redistribution.<sup>5</sup> This silence is alarming because developed countries have designed and advanced international tax arrangements to promote their own interests. From a global distributive standpoint, the set of rules underlying the current international tax system is anything but neutral.

The primary reason for this lack of scholarship derives from a broader unresolved conflict in liberal political philosophy over the scope of distributive justice claims. For the last four decades, philosophers have engaged in an essentially stagnated debate over whether considerations of distributive justice should be limited to the realm of the nation-state. However, globalization—the growth of economic interconnectedness and interdependence among peoples—has forced this question out of the ivory tower.

Real-world dilemmas regarding our moral obligations to the distant poor and questions of global inequality are increasingly becoming part of our everyday experience. We encounter them when we buy cheap consumer goods made abroad, when we invest our pension funds in multinational corporate enterprises (MNEs), and when we watch the news. All of these daily experiences illustrate the need for moral political philosophy to devise the structure and guidelines for a global economic regime that will balance our moral obligations to nearby compatriots with our obligations to needy foreigners. Plainly put, globalization has placed the distant poor at our city gates, such that turning a blind eye to the consequences of global poverty and inequality is no longer morally acceptable.<sup>6</sup>

There are two general approaches in contemporary liberal political philosophy to questions of global distributive justice: cosmopolitanism and statism. Cosmopolitans, such as Charles Beitz and Thomas Pogge, argue that because all humans are equal and because national

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<sup>4</sup> See, e.g., Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–25 (2000) (discussing advantages of tax system over legal system as means of redistribution).

<sup>5</sup> The political science literature has been a little better in addressing these issues. See generally Alexander W. Cappelen, *The Moral Rationale for International Fiscal Law*, 15 ETHICS & INT'L AFF. 97 (2001) (surveying how current international fiscal law arrangements do not fit well with either cosmopolitan or entitlement theories of distributive justice); Thomas Rixen, *Tax Competition and Inequality* (unpublished manuscript, on file with the *New York University Law Review*), available at [http://ssrn.com/abstract\\_id=1488066](http://ssrn.com/abstract_id=1488066) (exploring relationship between international taxation and theories of social contract with regard to inter-nation and intra-nation inequality).

<sup>6</sup> Cf. Amos 5:12, translated in JAMES LUTHER MAYS, AMOS: A COMMENTARY 96 (1969) (“For I know how many are your crimes, how numerous your sins[, you who] . . . turn[ ] away the poor in the gate.”).

endowment is a matter of pure luck, considerations of distributive justice should not be limited to the domestic realm.<sup>7</sup> Since every individual is a subject of equal moral concern, it is our liberal duty to establish political institutions that allow every individual the opportunity to lead a decent, autonomous life.<sup>8</sup> In sharp contrast, statist, such as Thomas Nagel, David Miller, and most notably John Rawls, argue that the claim for distributive justice is not based on common humanity but on the special associative relationship among compatriots.<sup>9</sup> Individuals' reciprocal and cooperative long-term political engagement with their compatriots within the structure of the state makes their shared national identity coincidental but not morally arbitrary. Whereas the intimate and coercive nature of this arrangement justifies the claim for distributive justice, the bonds of common humanity justify claims of humanitarian assistance only in times of crisis.

The conflict between the two approaches centers on the inherent clash within liberalism between the notions of impartiality and (democratic) national sovereignty. Nationality is something that most do not choose but rather are born into; favoring compatriots in this system therefore requires biased rules that are antithetical to the common liberal intuition that fair moral standards should be impartial and universal. However, because each sovereign is accountable only to its own people, acts independently from others, and may even act against others, global redistribution is impossible without an effective global political institution that coordinates and governs how different peoples compete with each other. Simply put, in a world where North Korea can spend money without asking Japan for any authorization

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<sup>7</sup> See THOMAS W. POGGE, *REALIZING RAWLS* 240–73 (1989) (arguing that “globalizing” Rawlsian concepts of distributive justice is not incompatible with “the essential elements of Rawls’s work”); Charles R. Beitz, *Justice and International Relations*, 4 *PHIL. & PUB. AFF.* 360, 369–83 (1975) (arguing that interdependence among countries makes Rawlsian notions of justice incomplete and that distributive justice principles should apply globally).

<sup>8</sup> See KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* 6–7 (2004) (arguing that any conception of justice “has to take a cosmopolitan form, and must apply to individuals and not only to citizens in a single society”).

<sup>9</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 3–15 (1999) [hereinafter RAWLS, *A THEORY OF JUSTICE*] (outlining conception of justice but limiting inquiry to domestic sphere); JOHN RAWLS, *THE LAW OF PEOPLES* 113–20 (1999) [hereinafter RAWLS, *THE LAW OF PEOPLES*] (contrasting his theory with cosmopolitan view); David Miller, *Against Global Egalitarianism*, 9 *J. ETHICS* 55, 56, 70 (2005) (arguing that global equality is not requirement of justice); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 126–30 (2005) (developing statist conception). See generally Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667 (2003) (identifying “theoretical, practical, and moral” limitations of cosmopolitan conception of duty).

and can even use it to prepare for a war against Japan, the Japanese will not be willing to engage in any cross-border redistribution of wealth, regardless of North Korean poverty and the reasons for it. The dichotomous nature of the cosmopolitan and statist positions means that the conflict over the scope of distributive justice claims is likely to remain intractable.

Both cosmopolitanism and statism fail to provide much useful guidance to policymakers operating in the current global system. This system aligns with neither the cosmopolitan approach, given that state-level political entities continue to operate independently, nor the statist approach, given the enhanced interconnectedness of the global market. In the absence of such normative guidance, policymakers have only vague ideas of what political morality actually requires them to do.

This Article does what the cosmopolitans and statist have thus far failed to do: It provides a realistic framework to guide policymakers in achieving a more just global wealth distribution. It offers an institutional analysis that evaluates how existing state-based international trade and tax institutions could operate to achieve a just global wealth distribution. It does not aim to “solve the world” by inventing alternative political institutions to replace those that already exist. This Article advances the argument that it is not necessary to resolve the cosmopolitan-versus-statist debate in order to start thinking about what a more just allocation of global resources requires. This debate can and should be bypassed by focusing on the way in which cross-border trade relationships affect our moral duties toward foreigners: International trade brings peoples from different countries materially closer to one another and allows them to establish long-term economic relationships that were once limited to the domestic setting. Once these relationships are established, they give rise to what I coin “relational-distributive” claims and duties, which can help us better calculate our relative obligations toward compatriots and foreigners. Although obligations toward one’s compatriots are generally stronger than relational-distributive duties toward the foreigners that produce the consumer goods one purchases, I suggest that the accelerated integration of the global economy makes these latter obligations increasingly more tangible.

This Article’s main theoretical contribution is thus the claim that the relational duties caused by actual commercial relationships trigger distributive obligations toward foreigners and that these duties should affect the structure of international and supranational institutions governing global trade. I establish this claim by demonstrating that commercial relationships between peoples living in developed and

developing countries frequently take the form of a pattern in which the former benefit from the poverty of the latter by way of the frequent unfairness in the market transactions between them.

Rather than elaborating a full theory of transactional fairness, I explain in simple terms why these market transactions fall into categories that most people typically regard as immoral. Although both parties arguably benefit from voluntary transactions, even voluntary transactions may be regarded as unfair if their benefits are skewed toward one party as a result of the endowed vulnerability and consequent low bargaining power of the other party.

The potential for such an unfair pattern should not lead us to conclude that engaging in global trade with developing countries is morally wrong per se or that all global trade necessarily harms individuals in developing countries. An unfair pattern is not an indicator of moral fault but rather a symptom of a systemic problem. In a competitive market, individuals from developed countries have no alternative but to reduce their costs as much as they legally can. This is a classic collective action problem, which justifies a political response to ensure that relational duties are met or compensated for when breached.

Addressing these relational duties requires restructuring the rules and institutions governing international trade. As such, the second objective of this Article is to advance an institutional framework through which relational-distributive duties could be met. Put differently, the first objective is to identify the source of the relational-distributive duty; the second is to suggest some concrete measures to aid policymakers in quantifying and balancing this duty with other considerations. In this context, I suggest that international tax allocation arrangements are one appropriate way to address these global relational-distributive duties.

This proposal captures two important (and realistic) conceptual insights about what would be required from an effective and politically sustainable international distributive scheme. First, it would require transfers among states and could not rely on the private or nongovernmental organization (NGO) sectors. Second, it would require some type of commercial relationship to trigger distributive claims and duties among peoples. Accordingly, in the international context, the international tax regime (ITR)—the set of conventions that allocate the right to levy tax from commercial activities involving locations and/or residents from more than one jurisdiction—should be understood as a “macro” price-correction mechanism that relies on the volume of trade between developed and developing countries as a proxy for the intensity of the relational duties between their peoples. I contextualize the analysis by briefly discussing a few examples. I fur-

ther point out that analysis of relational-distributive duties has significant bearing on the most important ITR allocation challenge today: allocating income taxes derived from the activities of MNEs.

An examination of both the legal-economic literature dealing with the ITR and the liberal philosophy literature dealing with international wealth distribution reveals that, with very few exceptions,<sup>10</sup> scholars have neglected the underlying relationship between ITR arrangements and different theories of global distributive justice. The enormous complexity of tax laws may explain the failure of normative theories to include international tax policy in their analyses. Understanding ITR rules and conventions involves exceptionally high learning costs because they are far less intuitive than the conventions underlying international trade law. Tax scholars, on the other hand, find it difficult to engage in a normative discussion about the ITR given the multiple standards of welfare and redistribution that could be employed.<sup>11</sup>

This Article's approach to the issue of global wealth distribution deviates significantly from the traditional cosmopolitan-versus-statist debate. It provides a normative framework that aligns well with the prevalent moral intuition that global inequality and poverty in the developing world matter but do not prevail over duties to compatriots. Although it offers no resolution to the moral dilemmas associated with the global distributive justice debate, it does offer a set of normative conclusions that can be used to develop and implement realistic policy solutions. By keeping within the boundaries of a geopolitical

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<sup>10</sup> See, e.g., Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1537, 1648–51 (2000) (arguing that “a concept of inter-nation equity can be given practical meaning in the design of international tax rules if it is interpreted as embodying explicit redistributive goals”); Brian Barry, *Humanity and Justice in Global Perspective*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 219, 241–43 (J. Roland Pennock & John W. Chapman eds., 1982) (discussing approaches to international taxation and justice); Cappelen, *supra* note 5 (examining how allocation of international tax rights affects distributional justice); Alexander W. Cappelen, *National and International Distributive Justice in Bilateral Tax Treaties*, 56 FINANZARCHIV 424 (1999) (arguing that choice of international tax principle is choice between national and global inequality); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 277–82, 300–01 (2001) (probing why evaluation of tax burdens must be national in scope); Charles R. Irish, *International Double Taxation Agreements and Income Taxation at Source*, 23 INT'L & COMP. L.Q. 292, 296–99 (1974) (discussing impact of international tax system on developing countries); Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 LAW & POL'Y INT'L BUS. 145, 156 (1998) (“International equity, not interindividual equity, must provide the foundation for an equitable international tax system.”).

<sup>11</sup> See, e.g., Daniel N. Shaviro, *Does More Sophisticated Mean Better? A Critique of Alternative Approaches to Sourcing the Interest Expense of U.S. Multinationals*, 54 TAX L. REV. 353, 397 (2001) (discussing difficulty of determining appropriate welfare benchmark given competing worldwide and national standards).



status quo, in which interaction among sovereign states is the underlying dynamic shaping global order, this Article thus offers policymakers the pragmatic guidance that contemporary political philosophy has been unable to provide. Rather than perpetuating a stagnant cosmopolitan-versus-statist debate, it urges philosophers and policymakers to establish a new discourse for determining which attributes of global trade trigger relational-distributive duties among peoples. Such discourse is a necessary foundation for any future reform in the political structure governing international trade and the ITR.

Part I describes the current cosmopolitan-versus-statist debate on global redistribution. Part II explains the concept of relational duties and delineates the scope of this Article's inquiry. Part III explains why international trade results in relational duties between peoples living in developed and developing countries. It then discusses why the inability of the parties themselves to address these relational duties invokes redistributive political justice questions. Part IV briefly explains the current operation and structure of the ITR and analyzes how the "right to tax" should be allocated between developed (capital-exporting) and developing (capital-importing) countries. It then argues that the ITR could be a viable mechanism for discharging relational-distributive duties. Finally, this Article closes with several brief conclusions.

## I

### THE (DEADLOCKED) STATE OF THE LIBERAL DEBATE

The controversy in liberal theory over the international scope of distributive justice is decades old.<sup>12</sup> While cosmopolitanism stresses the importance of global redistribution across borders, statism argues that wealth redistribution should be limited to the politically accountable unit of the nation-state.<sup>13</sup> Rather than exploring each of these positions in great depth, this Part explains why no convincing theory has been able to reconcile these opposing views as of yet. Independently, cosmopolitanism and statism are each appealing and intuitive in some respects but materially deficient in others. An inability to

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<sup>12</sup> Although drawing a dividing line for when an intellectual debate has started is always difficult, one could mark the beginning of this debate with the publishing of Charles Beitz's influential book in 1979. See CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 127–76 (1979) (outlining argument that "persons of diverse citizenship have distributive obligations to one another analogous to those of citizens of the same state").

<sup>13</sup> See *supra* notes 7–9 and accompanying text (describing basic conflict between cosmopolitans and statist).

bridge the two sides has incapacitated further evolution of the debate. As a result, liberal political philosophy has not equipped policymakers with the tools necessary to address global redistribution, even though there is a general sense that global poverty and inequality are a source of great moral concern. Indeed, clarifying the normative debate over global redistribution is the most important challenge faced by contemporary political philosophy today because doing so would allow distributive considerations to influence the development of international and supranational institutions.

### A. *Two Worlds on One Planet*

Information about third world poverty and global inequality is readily available in the information-bombarded developed world. The details themselves, whether conveyed in sensational coverage of dire human tragedies or statistical figures, are shocking and reveal enormous human suffering.<sup>14</sup> In 2005, about 47% of the world's population lived on less than \$2 per day,<sup>15</sup> child mortality in sub-Saharan countries was about twenty-five times higher than in industrialized countries,<sup>16</sup> and the maternal mortality rate was fifty times higher in the developing world than in the developed world.<sup>17</sup> Statistics like these can only give us, the privileged residents of the developed world, a

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<sup>14</sup> See, e.g., Shaohua Chen & Martin Ravallion, *Absolute Poverty Measures for the Developing World, 1981–2004*, 140 PROC. NAT'L ACAD. SCI. 16,757, 16,759–62 (2007) (discussing estimates of aggregate global poverty and finding limited reduction in number of global poor).

<sup>15</sup> The World Bank Group, PovcalNet, <http://iresearch.worldbank.org/PovcalNet/povDuplic.html> (select "2005" in "STEP 1" and enter "60.8" (corresponding to approximately \$2 per day) in "STEP 2"; then click "Submit" button) (last visited Jan. 31, 2010).

Note that the data presented in this Article collected from the websites of the World Bank and World Health Organization (WHO) reflect figures for the year 2005 except where noted. This means that they do not reflect the potentially large impact of rising food and fuel prices in 2008, which have most likely increased poverty measures in the developing world. See The World Bank, *Poverty Analysis—Overview*, <http://go.worldbank.org/K7LWQUT9L0> (follow "Measuring Poverty" hyperlink) (last visited Jan. 31, 2010).

<sup>16</sup> See UNICEF, *Statistics and Monitoring*, [http://www.unicef.org/statistics/index\\_step1.php](http://www.unicef.org/statistics/index_step1.php) (select "Sub-Saharan Africa" and "Industrialized countries" and follow "Next"; then select "Under-5 mortality rate, 2007" and follow "Add Selected to list"; then follow "Create Table") (last visited Jan. 31, 2010) (showing 6 deaths in Industrialized countries and 148 deaths in Sub-Saharan Africa); see also The World Bank, *HNPStats—HNP MDGs*, <http://go.worldbank.org/H9UC4943A0> (follow "Under-five mortality rate" hyperlink) (last visited Jan. 31, 2010) (listing 2007 U.S. mortality rate as 8 per 1000 and Sub-Saharan Africa mortality rate as 146 per 1000).

<sup>17</sup> WHO, *MATERNAL MORTALITY IN 2005: ESTIMATES DEVELOPED BY WHO, UNICEF, UNFPA, AND THE WORLD BANK 16* (2007), available at [http://www.who.int/whosis/mme\\_2005.pdf](http://www.who.int/whosis/mme_2005.pdf) (noting 9 deaths per 100,000 births in developed countries but 450 deaths proportionally in developed countries).

vague idea of the pervasiveness of extreme poverty and the imminent hardships associated with it.

That the above figures are (or at least should be) a source of moral discomfort to affluent individuals in developed countries is uncontested. Moreover, it is not relevant to this analysis whether this discomfort originates in the fact that much of the human suffering is a direct result of past injustices (e.g., colonization, slavery), in the fact that much suffering could easily be avoided (e.g., as could infant mortality from preventable diseases), or in the “feeling” that all human beings are equal in some important ways and should not be born into a life of misery. What is relevant, however, is that this moral discomfort is real and widespread.

Human poverty is hardly new; in fact, in relative terms it has declined during the last decade.<sup>18</sup> What is new, however, is the socio-political framework in which global poverty and inequality exist. The cumulative effect of a number of recent socio-political changes warrants a renewed assessment of the moral duties that individuals living in different countries owe one another.

The first such change was the post-Cold War emergence of open and liberalized global markets, which appeared to be the ultimate triumph of Western ideology. But this change also has created the impression that nation-states are losing their power as a result of global markets’ growing role in domestic economies. Increased competition for capital investments, coupled with increasingly mobile capital, has pressured governments to make their economic and legal regulatory frameworks more business-friendly. This has in turn triggered the concern that in striving to remain competitive with other nations, governments will lose sight of their sometimes conflicting responsibility to take care of their poor citizens.

The second such change is the accelerated pace at which world markets operate, as technological advancement allows for ever more rapid and reliable transfer of commodities, capital, and information. One underappreciated consequence of improved technology is the fact that today, perhaps for the first time in history, it may be feasible to distribute commodity surpluses and wealth effectively among nations and peoples. The unprecedented developed-world wealth produced by global markets only highlights how little has been done (in comparison to what could be done) to use this wealth to reduce human misery in the developing world.

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<sup>18</sup> The proportion of people living in extreme poverty on less than \$1.25 a day dropped by almost half between 1981 and 2001, from 52% to 26% of the global population. The World Bank, *Poverty Analysis—Overview*, <http://go.worldbank.org/K7LWQUT9L0> (follow “Poverty Trends” hyperlink) (last visited Jan. 31, 2010).

Although widespread moral discomfort with global poverty and inequality has not led to any consensus on how to address them, the technological possibility of materially mitigating global poverty and inequality has intensified the debate in contemporary liberal political philosophy about these issues.<sup>19</sup>

Liberalism emerged from Kantian moral philosophy, which considers all individuals equal moral agents. In the political context, the notion of equal moral worthiness prescribes that individuals should not be treated differently by political institutions because of factors that they do not control (e.g., gender, race) or attributes that are part of their personal lives (e.g., religion, sexual orientation). In the second half of the twentieth century, liberal philosophers extended this idea to argue that the notion of equal moral worthiness requires that individuals should not be put at a relative disadvantage because of circumstances beyond their control.<sup>20</sup> As equal moral agents, individuals should have a fair opportunity to lead decent and autonomous lives regardless of the race, class, or religious group into which they were born.<sup>21</sup>

From these common goals emerged two different liberal approaches to global distributive justice: cosmopolitanism and statism. The next two Sections describe these approaches in turn.

### B. *Cosmopolitanism*

Contemporary cosmopolitan philosophers argue that policy-makers should abandon current state-centered redistributive schemes in favor of a position that does not distinguish among individuals by their nationality.<sup>22</sup> Regardless of whether these cosmopolitan philosophers are trailblazing vanguards or prisoners of their ivory towers,

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<sup>19</sup> As the references below reveal, the vast majority of the literature dealing with this issue has been written in the last ten years. See sources cited *infra* notes 20–68.

<sup>20</sup> There is, of course, great controversy over what comprises acts of will and what is pure luck, and over whether the state should be responsible for offering equal opportunity or just sufficient opportunities to all, but the basic idea is relatively appealing and intuitive. See Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 476–85 (2007) (providing thoughtful summary of this literature); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) (providing leading article on equality of resources). See generally Harry Frankfurt, *Equality as a Moral Idea*, 98 ETHICS 21 (1987) (arguing that sufficiency rather than equality should be main concern of distributive theories).

<sup>21</sup> Of course, nationality, religion, and even sex are mutable categories. But because changing these categories is not a viable option for the vast majority of humanity, this Article will treat these categories as immutable.

<sup>22</sup> For some examples of recent influential cosmopolitan work, see Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT'L AFF. 1 (2005), and TAN, *supra* note 8.

their monist claims—that the only units of moral concern are human beings and that all human beings are morally equal and should be treated accordingly<sup>23</sup>—are forceful and deserve consideration.

Cosmopolitans evaluate political institutions on the basis of how they promote the welfare and living conditions of all human beings.<sup>24</sup> Contemporary cosmopolitan philosophy developed in two stages, each triggered by a work of the influential philosopher John Rawls and the belief among cosmopolitans that his work had insufficiently accounted for issues of global inequality and poverty. In his landmark book *A Theory of Justice*, Rawls reshaped liberal thought, claiming that just institutions are those that would be agreed upon by rational representatives positioned behind a “veil of ignorance.”<sup>25</sup> The veil of ignorance is a thought experiment in which individuals have no information about their position in society, the possible positions available, or the probability of their ending up in any particular position. Designed to shield the process of determining political institutions from the influence of self-interest, it relies on the reasoning of hypothetical agents whose ignorance of their own station in life guarantees their impartiality. From this thought experiment, Rawls derived his two general principles of justice, the liberty principle and the difference principle, each of which requires the protection of basic liberties and the equitable provision of five primary goods.<sup>26</sup> Although a deep analysis and critique of the Rawlsian theory goes well beyond the scope of this inquiry, it is important to note that in *A Theory of Justice*, Rawls constrains his principles of justice to the political unit of the nation-state—and remains brief and vague as to why.<sup>27</sup>

The first stage of cosmopolitanism challenged this confinement of the Rawlsian analysis to the nation-state.<sup>28</sup> Philosophers such as Charles Beitz and Thomas Pogge challenged the Rawlsian assumption

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<sup>23</sup> See Charles R. Beitz, *Cosmopolitanism and Global Justice*, 9 J. ETHICS 11, 17 (2005) (discussing Pogge’s theory of every human being as “unit of moral concern”); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3, 3 (2007) (discussing cosmopolitan belief that “[h]uman beings are *ultimate* units of moral concern”).

<sup>24</sup> Cosmopolitans do not, however, explicitly tie the cosmopolitan ideal to the existence of a global state. See TAN, *supra* note 8, at 4–5 (noting that cosmopolitan justice is not tied to notions of “a world state and global citizenship”).

<sup>25</sup> RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 47–168.

<sup>26</sup> Rawls defines the primary goods as goods “every rational [person] is presumed to want,” including liberty, opportunities, wealth, income, and the social bases for self-respect. *Id.* at 54.

<sup>27</sup> See *id.* at 7–8 (“I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies.”).

<sup>28</sup> For the constitutive works of cosmopolitans at this stage, see BEITZ, *supra* note 12, and POGGE, *supra* note 7.

that domestic political institutions operate as a closed system that distributes fundamental rights and duties. They argued that interaction among states, market forces, and international mechanisms over which the state may have little or no influence (e.g., supranational institutions or foreigners participating in the domestic economy as investors) also affect individuals' access to fundamental rights.<sup>29</sup> Accordingly, they argued that to be faithful to its own principles, Rawls's theory should adhere to a liberal individualistic framework. Such a framework would disregard national borders as arbitrary and concern itself only with the moral unit of the individual.<sup>30</sup> Because individuals are born into their nationality, their "national endowments" are morally arbitrary, so rational decisionmakers operating behind the veil of ignorance would not be aware of such endowments.<sup>31</sup> Thus unaware, these decisionmakers would by Rawls's own logic select political institutions that applied the two principles of justice to all human beings.<sup>32</sup> This cosmopolitan extension of Rawlsian distributive theory would therefore set a high universal standard and require mass transfers of resources from wealthier to poorer countries.

The second stage of cosmopolitan thought emerged as a reaction to Rawls's later book *The Law of Peoples*, in which he explicitly addressed and rejected an extension of his distributive theory to the international arena.<sup>33</sup> In this book, Rawls acknowledged that all individuals are entitled to have their basic humanitarian needs met, especially in times of crisis, in which a state may not be able to supply its nationals with even a minimally acceptable level of basic provisions. However, the humanitarian duty to rescue other peoples, which Rawls called "the duty of assistance," differs from the domestic distributive obligations triggered by inequality.<sup>34</sup>

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<sup>29</sup> BEITZ, *supra* note 12, at 144–47 (noting that growth of international trade and investment has widened gap between rich and poor countries and that, in some cases, participation in world economy produces political inequality); POGGE, *supra* note 7, at 218–47 (arguing that international competition may lead to sacrifice of human needs and welfare).

<sup>30</sup> BEITZ, *supra* note 12, at 53–55; POGGE, *supra* note 7, at 246–47.

<sup>31</sup> CHARLES JONES, GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM 1–2 (1999).

<sup>32</sup> BEITZ, *supra* note 12, at 138–40, 150–52; POGGE, *supra* note 7, at 240–44.

<sup>33</sup> RAWLS, THE LAW OF PEOPLES, *supra* note 9, at 116–17. Rawls argues that the underlying motivation behind this position is his notion of tolerance and the idea that peoples should not be required to adopt a liberal regime. Once different types of legitimate regimes are present in the international arena, each regime should be allowed to pursue its own objectives and should be held accountable to them. *See id.* at 113–20.

<sup>34</sup> *See id.* at 105–20 (explaining what duty of assistance is and how it should be distinguished from cosmopolitan approach to distributive justice).

In response, Pogge published a collection of essays in which he rearticulated the notion of the global redistributive duty,<sup>35</sup> making it more accessible and more broadly appealing than the initial cosmopolitan articulation. He argued that even from a minimalistic libertarian perspective, peoples of developed nations have a duty not to harm those in developing nations.<sup>36</sup> He then demonstrated how existing international arrangements actually harm peoples of developing countries.<sup>37</sup> These include anti-dumping arrangements, agricultural subsidies, and intellectual property regulatory regimes, all of which favor the interests of developed countries while perpetuating the poverty of less-developed countries, thus reducing the welfare of their citizens.<sup>38</sup> From an empirical perspective, many of Pogge's claims are counterfactual and have been persuasively criticized as speculative.<sup>39</sup>

Yet some of his more intuitive claims have become well-established: for example, that the international legal system harms people of developing countries when it protects the resources and borrowing privileges of tyrannical and corrupt governments or when it holds successor governments liable to agreements made by such governments. The willingness of Western political and business entities to cooperate with corrupt governments directly contributes to the misery of the people living under—and even in the aftermath of—those governments.<sup>40</sup>

It is difficult, however, to draw a cause-and-effect connection between the privileges of developed countries and the actual harm that they inflict on developing countries.<sup>41</sup> For example, were the citi-

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<sup>35</sup> THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2002) [hereinafter POGGE, *WORLD POVERTY*]. For a summary of the arguments made in the book, see Thomas Pogge, *Real World Justice*, 9 J. ETHICS 29 (2005) [hereinafter Pogge, *Real World Justice*].

<sup>36</sup> POGGE, *WORLD POVERTY*, *supra* note 35, at 12–13.

<sup>37</sup> *Id.* at 15–20.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> See, e.g., Mathias Risse, *How Does the Global Order Harm the Poor?*, 33 PHIL. & PUB. AFF. 349, 367–76 (2005) (critiquing Pogge's argument for "not making any claims about specific mechanisms" and questioning his use of statistics).

<sup>40</sup> See Joseph Hanlon, *Dictators and Debt*, JUBILEE RESEARCH, NOV. 1998, <http://www.jubileeresearch.org/analysis/reports/dictatorsreport.htm> (discussing fallout of "massive loans" provided to dictators even as they "committed gross human rights violations, were notoriously corrupt, and blatantly transferred money to Swiss banks").

<sup>41</sup> See generally Alan Patten, *Should We Stop Thinking About Poverty in Terms of Helping the Poor?*, 19 ETHICS & INT'L AFF. 19, 21–22 (2005) (arguing that measuring cause of harm requires some type of baseline, which is difficult to establish); Mathias Risse, *Do We Owe the Global Poor Assistance or Rectification?*, 19 ETHICS & INT'L AFF. 9 (2005) (pointing out that recent changes in global order and liberalization of markets have in many cases improved living standards of many people living in poor countries).

zens of the United States, Britain, Ireland, Israel, and Finland preventing or causing harm when the International Monetary Fund (IMF) (along with several financial conglomerates) agreed to bail out South Korea during the 1998 East Asia financial crisis but refused to do the same with Argentina in 2001? Are Western financial institutions harming the peoples of developing countries when they lend them money or when they refuse to do so? Are Western banks causing or preventing harm when they forgive some, but not all, of the debt owed to them by developing countries? These questions demonstrate how limited Pogge's theory is in providing guidelines to construct actual global redistributive policies. In other words, Pogge's ideas of rectification fail to provide any practical guidance as to how much redistribution there should be; more importantly, they do not help identify what occurrences trigger a distributive duty.

Pogge made clear that he regarded his later proposal—that there is a minimal duty not to harm—as a second-best alternative for explaining distributive duties.<sup>42</sup> The best alternative, in his opinion, was still the original argument: The ultimate duty to redistribute wealth from developed to developing nations is anchored in a positive duty to account for the equal moral importance of individuals.<sup>43</sup> This duality in Pogge's position—i.e., that distributive duties can stem from *either* positive *or* negative obligations—highlights the main contribution of his normative innovation. In his later work, Pogge shifted the cosmopolitan ambition to avenues more compatible with individuals' ordinary perceptions: Rather than advocating an all-or-nothing solution that stressed complete moral equality between compatriots and foreigners, he emphasized the presence of a preliminary duty not to harm other humans (or to compensate for the harm one has inflicted). I believe that by focusing on the alleged harm inflicted by the current system on peoples of developing countries, Pogge reframed the obligations toward them as negative duties (duties not to harm) and, by doing so, attempted to appeal to a broader audience. For Pogge, a devoted cosmopolitan, this reframing came at the cost of significantly narrowing peoples' duties only to include remedying disadvantages causally linked to his somewhat amorphous and overinclusive notion

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<sup>42</sup> See Thomas Pogge, *A Cosmopolitan Perspective on the Global Economic Order*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 92, 93–95 (Gillian Brock & Harry Brighouse eds., 2005) (clarifying argument that “world poverty manifests violations of . . . negative duties, our duties not to harm”); cf. Debra Satz, *What Do We Owe the Global Poor?*, 19 *ETHICS & INT'L AFF.* 47, 53 (2005) (critiquing Pogge's advocacy of negative duty over positive duty).

<sup>43</sup> See Pogge, *supra* note 42, at 95 (arguing that citizens in wealthy countries “surely have positive duties” to alleviate “the immense deprivations we affluent are now inflicting upon the global poor”).



of harm.<sup>44</sup> He therefore paved the way for a new non-utopian philosophical discourse of global distributive justice that promotes arguments other than the merits of complete and unconditional equality between foreigners and compatriots. Moreover, by trying to win broader appeal, Pogge opened a discourse that takes common perceptions into account as a relevant consideration in the debate over global distributive justice.

For cosmopolitans, globalization did not change anything—it only made the attempt to assign moral value to states more evidently absurd. Given the strong commitment of liberal scholarship to notions of moral equality, impartiality, and adequate opportunity for all, how could any liberal possibly differentiate between individuals according to their nationality? How could a liberal political arrangement possibly excuse itself from addressing tremendous human suffering and lack of meaningful opportunities simply because the individuals affected happen to have been born in foreign nations?

The notion that moral equality gives rise to the belief that all humans are entitled to some equal provision of certain basic goods cannot, however, be separated from the question of what global political regime should enforce and supervise this provision. Most cosmopolitans try to avoid linking the cosmopolitan ideal to the global state concept.<sup>45</sup> Even though they do not call for the abolition of states,

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<sup>44</sup> Pogge's analysis of the World Trade Organization (WTO) Agreement reveals how overinclusive his notion of harm is. Pogge convincingly argues that the skewed and asymmetric liberalization of trade resulted in the increased poverty of some people in the developing world. This argument is not controversial. He claims, however, that developed countries have harmed developing countries, even though the latter voluntarily chose to opt in to those arrangements by acceding to the WTO Agreement. He asserts further that the governments of developed countries have harmed poor people in developing countries even if more individuals in developing countries would have died from poverty-related causes without the WTO Agreement. See POGGE, *WORLD POVERTY*, *supra* note 35, at 18–19 (“But our governments [could not] use this benefit to justify the harm they caused, because they could have avoided most of this harm, without losing the benefit, by making the WTO Treaty less burdensome on the developing countries.”). Although this Article agrees that WTO arrangements are unfair, Pogge's argument that they actively are harming the poor in developing countries means that every change in the status quo that makes some people poorer is an active act of harming. To understand how overinclusive this definition is, it is useful to think about it in the domestic setting: What would be the consequences if we considered it a breach of one's moral duty every time a democratically elected government changed a rule in a way that made someone worse off? What type of role can such an expansive definition of harm have in political moral reasoning? In the same vein, imagine a situation where a democratically elected government of a developing country chooses to accede to the WTO Agreement to improve the living standards of its people. By doing so, the government reduces the poverty of two million and increases the poverty of one million. Are the developed parties to the WTO Agreement actively violating the negative duty not to harm the people of the developing country?

<sup>45</sup> See TAN, *supra* note 8, at 93–96 (making this point with reference to Pogge and Beitz).

they remain suspiciously vague about the actual mechanism with which they would enforce global distribution.<sup>46</sup> This, undoubtedly, is cosmopolitanism's Achilles' heel.

### C. Statism

Statists are at an inherent philosophical disadvantage when confronted with cosmopolitans' critique. Given liberalism's strong commitment to moral equality, impartiality, and every individual's right to the opportunity to live a meaningful life, how could a liberal thinker justify the political structure of nation-states and the bias in favor of compatriots?

Most statist philosophers agree that a moral political structure must account for foreigners' common humanity.<sup>47</sup> They contend, however, that common humanity only can justify wealth transfers and interventions on a rescue basis—that is, when foreigners suffer from absolute deprivation of human autonomy and dignity.<sup>48</sup> This common humanity, however, is insufficient to trigger robust redistributive obligations aimed at reducing relative deprivation caused by inequality. Statists argue that the existence of collaborative political institutions with the coercive power to force actions on their members fundamentally alters the connection among individuals and that distributive justice claims only arise in the context of this unique association, which is based on mutual commitment.<sup>49</sup> A detailed inquiry into the subtleties of the above position is unnecessary because all of us experience it on a daily basis. For example, we are aware of famines in Africa but endorse the political reality in which providing costly medication to Medicaid recipients has priority over providing food to distant foreigners.

<sup>46</sup> See, e.g., TAN, *supra* note 8, at 200–01 (discussing in vague terms how UN and WTO could “provide the basis for a democratic global governance that cosmopolitan justice would need”).

<sup>47</sup> Cf. Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 257 (2001) (noting that uneasiness with “an almost feudal notion of birth-right privilege [in] the heart of liberal theory” has led “many philosophers to argue that some revision of liberal theory is necessary”).

<sup>48</sup> See, e.g., *id.* (discussing concept of absolute deprivation); Miller, *supra* note 9, at 69–70 (“[W]hat justice requires us to do for other people depends crucially on the relationships in which we stand to them . . . [b]ut it does not follow that we should run straight into the arms of global egalitarianism.”); Nagel, *supra* note 9, at 131–32 (“Th[e] minimal humanitarian morality . . . require[s] us . . . to relieve them from extreme threats and obstacles to such freedom if we can do so without serious sacrifice of our own ends.”); Sangiovanni, *supra* note 23, at 4 n.5 (“[D]istributive justice . . . must at least require raising all human beings to a minimal threshold . . . [S]uch a humanitarian minimum is less controversial among philosophers . . .”).

<sup>49</sup> See, e.g., Blake, *supra* note 47, at 258 (arguing that distributive duties are “not demanded by liberal principles [when] individuals do not share such links of citizenship”).

Thinking of nationality in terms of commitment is appealing but problematic. Nationality is formalistic and, in most cases, an involuntary association. Why should a first-generation Mexican American living north of the Rio Grande be committed to help finance wealth transfers and government services to American citizens that live on the other side of the Mississippi River or the Atlantic Ocean? Based on her stronger familial ties to Mexico, might this particular American citizen logically have a stronger commitment to her Mexican neighbors on the south bank of the river?

Statists have a number of replies to this critique. First, they point out that in many instances national group memberships correlate relatively well with other group memberships based on similar historic, ethnic, cultural, and linguistic backgrounds. Second, the notion that all individuals are entitled to certain universal rights does not mean that the burden of the positive duty to assure those rights falls equally on all human beings.<sup>50</sup> Any reasonable political theory would have to account for the fact that individuals have stronger obligations toward those who have reciprocal obligations toward them. Even though the act of entry into a nation may be happenstance, once membership is established, it is accompanied by reciprocal rights and obligations. Most individuals live their lives in ways that suggest they accept that the reciprocal relationship between them and their fellow compatriots carries significant moral weight.<sup>51</sup> Regardless of whether cosmopolitans consider this acceptance misguided, it is a tendency that any responsible, non-utopian political philosophy must take into account.

More importantly, despite the recent trend toward globalization, world markets and the international organizations that help coordinate and regulate their operations have not come close to replacing the role of the state. Although this may change over time, contemporary international markets and international organizations do not exercise the same level of control over individuals' lives as states do; they lack coercive power and have no effective mechanism to directly assign personal claims or duties.

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<sup>50</sup> David Miller, *Cosmopolitanism: A Critique*, 5 CRITICAL REV. INT'L SOC. & POL. PHIL. 80, 82 (2002) (“[S]lid[ing] from saying that every human being has equal moral worth to saying that *therefore* we are required to treat all human beings equally, in the sense that we have the same duties to each[,] . . . is simply a *non sequitur*.”); Henry Shue, *Mediating Duties*, 98 ETHICS 687, 689–91 (1988) (“One should not, in any case, leap from universal rights to universal duties.”); see also Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427, 445–47 (1997) (arguing that intrinsic values of citizenship justify these obligations).

<sup>51</sup> Cf. David Miller, *National Responsibility and International Justice*, in THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY 123, 124–25, (Deen K. Chatterjee ed., 2004) (describing great significance citizens place upon their cultural identities).

Each country has to consider the policies of other governments but is accountable only to its own people; thus it *determines for itself* which policies it wants to pursue. In this type of political setting, the attempt to establish a global safety net through cross-national redistribution is bound to be ineffective and, in many cases, will lead to politically absurd and unsustainable results. It is important to keep two points in mind about cooperative redistributive enterprises formulated and executed at the nation-state level. First, to be effective, a redistributive enterprise requires cooperation among participating governments and a minimal level of competence in the governments receiving aid.<sup>52</sup> Second, and more importantly, the notion of national self-government and accountability is inconsistent with the ideals of cosmopolitan egalitarianism.<sup>53</sup> This inconsistency arises because government policies reflect, to a certain extent, the preferences of their peoples—so each people should bear the consequences of its government's policies. Cosmopolitan egalitarianism thus undermines national accountability because it requires one group of people to transfer funds to a second group that is subject to political institutions over which the first group has no influence.<sup>54</sup>

This concern is not only a theoretical deficiency but also a fundamental political obstacle that makes any international redistribution inherently unsustainable. For example, Israel, Saudi Arabia, and Syria are countries in conflict with each other. Suppose, solely for the purpose of this example, that all three nations have democratically elected governments that reflect their peoples' will. Any claim for cosmopolitan distributive justice would require disregarding that conflict and having Israel and Saudi Arabia transfer funds to Syria, which is by far the poorest of the three countries. Even if Syria were required to use these funds only to improve its provision of healthcare services, the transfers from Israel and Saudi Arabia would still leave Syria with more resources to better prepare for a future armed conflict with them. This situation is politically unsustainable. No Israeli or Saudi government could persuade their voters to support such a redistributive scheme, and no Syrian government could enforce this claim. Significantly, this problem is inherent in any cosmopolitan redistributive scheme: Because money is fungible, having Israel and Saudi Arabia

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<sup>52</sup> See Mathias Risse, *What We Owe to the Global Poor*, 9 J. ETHICS 81, 90 n.19 (2005) (discussing institutional deficiencies in developing countries that have hampered aid efforts).

<sup>53</sup> See Miller, *supra* note 9, at 56–57 (discussing difficulty of reconciling global equality with nation-states).

<sup>54</sup> Cf. SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 103, 111–13 (2004) (discussing democratic deficits of international institutions).

transfer money to an international organization that would allocate it to Syria and other less-developed countries would not correct the problem. Accordingly, if developed countries were forced to make transfers to such an organization, the United States and the United Kingdom could end up indirectly helping countries such as North Korea, Belarus, and Zimbabwe. By doing so, the United States and United Kingdom would inadvertently alleviate some of the economic burden from those governments and, in a sense, indirectly subsidize their policies.

Cosmopolitans might argue that (relatively) affluent Israelis have a duty to distribute wealth to (relatively) poor Syrians. While they might concede that Israelis are not required to transfer funds to Syrians, they would argue that this is only because the cosmopolitan duty is trumped by national and personal security considerations—not because the cosmopolitan duties do not exist in the first place.<sup>55</sup> Although there is no controversy that Syrians and Israelis owe humanitarian duties to each other by virtue of their common humanity,<sup>56</sup> the notion that they have redistributive duties toward one another is not only politically infeasible but also counterintuitive. By the same token, those cosmopolitans would have to endorse that (relatively) affluent American Jews had distributive duties toward (relatively) poor Germans in 1944 and that (relatively) rich Tutsis living in Burundi had distributive duties toward poorer Hutus living in neighboring Rwanda during the 1994 genocide. In these scenarios, however, it seems odd to argue that there were any cosmopolitan distributive duties at all.

These two admittedly extreme and provocative examples illustrate a deeper point. Statists' objection to global redistribution is deeply rooted in the well-established notion within contemporary liberal political philosophy that questions of distributive justice can be meaningfully addressed only in a society that is not in a state of crisis.<sup>57</sup> Only a society that assures a sustainable level of personal safety and political stability and in which no large-scale conflict or famine exists can “afford” to develop just political institutions.<sup>58</sup>

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<sup>55</sup> I thank David Pozen for bringing this forceful cosmopolitan objection to my attention.

<sup>56</sup> For example, countries owe those duties imposed under the Geneva Conventions, which provide citizens and soldiers of enemy countries with some minimal set of rights under the law of war. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>57</sup> *See* RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 5–6 (describing “fundamental social problems . . . of coordination, efficiency, and stability” and their connection to “achievement of social ends . . . that are efficient and consistent with justice”).

<sup>58</sup> *See id.*

Accordingly, states' sovereignty and accountability to their own peoples undermine the notion of long-term international stability, and, indeed, the international arena has for many years been considered a Hobbesian "state of nature."<sup>59</sup> Although the world may, hopefully, be progressing to a more peaceful era, state sovereignty still imposes a challenge to cross-border redistribution. For example, many Germans living west of the Berlin wall probably felt very close to those living on its east side, but mass redistribution between them became possible only after the conflict between East and West Germany ended.

The above examples demonstrate why redistribution on the international level differs from domestic redistribution. Even in the case of countries like the United States, which is comprised of fifty smaller semiautonomous political units, federal supervision helps to overcome problems of competence, cooperation, and conflict. People in Massachusetts may have very different opinions than those living in Texas, and this difference may lead them to structure their local and political affairs differently. Despite all their differences, however, wealthy individuals living in Massachusetts would likely be much more willing to comply with a federal redistributive program benefiting poor Texans than Israelis would be willing to comply with a program benefiting Syrians. It is not only that Texas will not use this money to disadvantage Massachusetts in the way that Syria might use it against Israel, but also that people in Massachusetts know that in a time of national crisis, Texans would be responsible for cooperating with them to alleviate the crisis. It is therefore apparent that mere common humanity is not enough to trigger a viable political distributive justice claim in a multistate political reality; some long-term reciprocal commitment is required.

Given the above, many statist would agree that the cosmopolitan vision is a utopian ideal—desirable, yet unachievable. In a world divided into different national units, no cosmopolitan egalitarian scheme is possible. Although cosmopolitans might acknowledge the force of this proposition, they can respond with their own forceful questions: What does it mean to be liberal and to recognize that all human beings are of equal moral worth if, *de facto*, significant numbers of human beings are not given any material consideration simply because they are foreigners? If, by virtue of their humanity, those foreigners are entitled to some rights that their own state fails to provide, who has the duty to assure that they receive these rights? How can foreigners' rights be meaningful if no one has an effective correlative

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<sup>59</sup> See generally THOMAS HOBBS, *LEVIATHAN* 82–86 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651) (describing natural state of "war of every man against every man").

duty to assure they are provided? How can a bias in favor of compatriots be reconciled with the Kantian position that all humans are of equal moral worth? How can we justify the moral waste that occurs when developed countries invest enormous amounts in their own citizens even though it would be much cheaper to alleviate deficiencies in foreigners' rights?<sup>60</sup>

*D. Identifying the Problem: Global Poverty at the Crossroads of Two Conflicting Liberal Intuitions*

Rather than adding another argument to the cosmopolitan-versus-statist debate, this Article tries to identify the source of the controversy. The controversy originates from two conflicting intuitions of liberal thought: that rules should be impartial and that the liberal ideal can be achieved reasonably only within the framework of the nation-state.<sup>61</sup> These two intuitions are crucial to understanding how political institutions and moral arguments are framed in liberal democracies.

Modern liberal theory requires political arrangements to be just, such that all reasonable individuals would assent to them.<sup>62</sup> This requires liberal arguments to be impartial. Impartiality, as a methodological tool, validates the legitimacy of rules because it ensures that their application is general and not contingent on morally arbitrary factors (e.g., race, gender, or religion).<sup>63</sup> For this reason, partiality is often considered a proxy for injustice because individuals should be held accountable for their actions and, to a certain degree, their preferences should not be disadvantaged due to things beyond their control. Thus, there is a strong bias in liberal thought against any distinction based on endowment that is considered partial and unjust.

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<sup>60</sup> These questions demonstrate how the cosmopolitan-versus-statist debate within liberalism echoes another fundamental debate within liberalism between equality and autonomy. Sovereignty could be seen as a form of autonomy, and therefore, there is an inherent conflict between it and arguments for equality. I thank Alon Harel for sharing this insight with me.

<sup>61</sup> This claim, that the international arena cannot provide a stable political framework, traces back to Hobbes. See HOBBS, *supra* note 59, at 85 (“[Y]et in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators . . .”).

<sup>62</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 10–11 (“[T]he principles of justice . . . are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”).

<sup>63</sup> See ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 1–9 (1985) (discussing problems of partiality and social justice philosophy).

Although liberalism is committed to impartiality, it is also inherently related to the notion of democratic sovereignty. In liberalism, the premise that all humans carry equal moral weight suggests that democracy, in which every person has an equal opportunity to vote and influence public policy, is the practical political structure according to which individuals' claims from society and responsibilities to it should be determined. There is also a historical connection between liberalism and democracy: In Western Europe, liberalism developed during roughly the same period as national ideologies and nation-states.<sup>64</sup> Thus, to date, democratic sovereignty has been exercised effectively only within the political framework of the nation-state—that is, only democratic nation-states have been able to execute policies that embody liberal values, such as legal regimes that protect human rights and tax-spending policies that sponsor welfare state provisions.<sup>65</sup> This may explain why very few cosmopolitans argue that a world democracy would be an optimal arrangement: because they believe that only nation-state frameworks can achieve these characteristics.<sup>66</sup>

The cleft between these intuitions is straightforward and inevitable because nationality, like race, is in many ways an arbitrary category. When liberals restrict the obligation for justice on the basis of nationality, they undertake a partial position based on national endowment.<sup>67</sup> This partiality would be morally insignificant in a world where every national entity was able to supply its members with an adequate set of minimal resources to lead a meaningful autonomous

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<sup>64</sup> See Yael Tamir, *Liberal Nationalism* 140–45 (1993) (“[M]any nineteenth-century liberals believed that ‘individual liberty and national independence or unity would go together,’ and that liberal principles could best be implemented within a homogenous nation-state.” (quoting Hugh Seton-Watson, *Nations & States* 443 (1977))).

<sup>65</sup> See Wilfred L. David, *The Humanitarian Development Paradigm: Search for Global Justice* 241 (2004) (identifying belief that nation-states are best suited to enact liberal values); David Miller, *The Ethical Significance of Nationality*, 98 *Ethics* 647, 661 (1988) (“The universalist case for nationality, therefore, is that it creates communities with the widest feasible membership, and therefore with the greatest scope for redistribution in favor of the needy.”); Mark Beeson, *Globalisation, the State and Economic Justice* 9 (July 3–4, 2003) (unpublished manuscript, on file with the *New York University Law Review*), available at <http://espace.library.uq.edu.au/eserv/UQ:10915/mb-gsej-03.pdf> (arguing that successful economic development has always been accompanied by strong nation-states).

<sup>66</sup> There is a general fear that a global world regime would not be able to produce efficient decisionmaking mechanisms and would oppress minority groups. *Cf.* Goldsmith, *supra* note 9, at 1669–70 (“Cosmopolitan argument must be bounded by institutional and moral constraints that arise in the domestic-democratic sphere.”).

<sup>67</sup> See Alasdair MacIntyre, *Is Patriotism a Virtue?*, in *Debates in Contemporary Political Philosophy* 286, 291–93 (Derek Matravers & Jon Pike eds., 2003) (describing account of morality particular to nationality).



life.<sup>68</sup> It has enormous consequences, however, in our world, in which sovereigns vary considerably in their capacity and willingness to provide for all of their citizens. In this world, partiality toward compatriots means that developed countries primarily devote their resources to promoting the welfare of the poor living within their own boundaries. This leaves the poor living in developing countries in a heavily constrained position.

### E. *Why Deadlock?*

The difficulty in finding a middle ground between the cosmopolitan and statist positions is crucial because it leads to a policy deadlock. This conclusion may surprise some readers, given the recent flood of philosophical literature dealing with issues of global distributive justice and given that political philosophy is not a field in which one would often expect to find unanimity.

To understand the deadlock claim, one does not need to determine the relative persuasiveness of the cosmopolitan and statist positions. One need only recognize that the conflict between their underlying liberal intuitions—of, on the one hand, impartiality, and on the other, national democratic sovereignty—is a fundamental one, making reconciliation unlikely. Moreover, neither the cosmopolitan nor the statist approach is capable of informing policies at all sensitive to current practices of international relations and commerce. The dichotomous debate is largely irrelevant to policymakers who need to operate within a global arena that is both multistate and economically integrated.

For example, statist may feel that current World Trade Organization (WTO) trade liberalization initiatives unfairly disadvantage developing countries by excluding agriculture. Given their state-centric position, however, they would be unable to ground their criticism in any obligation that requires developed countries to give up their superior bargaining positions to better promote the interests of developing countries. Nor would cosmopolitans be able to provide policymakers with any guidance on *how* to design those political institutions. Cosmopolitans would be happy with any type of redistributive scheme—whether lump-sum payments between sovereigns, trade agreements, or tying \$100 bills to migrating birds—so long as it was politically feasible and promised substantial global wealth redistribution. Accordingly, cosmopolitan theory does little to inform policy-

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<sup>68</sup> See Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 *ETHICS* 663, 681–82 (1988) (arguing that restricting special duties to national sphere is justified when perceived as geographic division of labor).

makers about how actually to structure global redistributive arrangements in a multistate reality, or whether a certain scheme is preferable over another.

One cannot underestimate the significance of the disconnect between the discourse of political philosophy and what is actually at stake. Both philosophical approaches engage in speculative normative theory while remaining relatively mute about the evolving institutional framework of international and supranational institutions. The silence of both approaches with regard to current policy issues suggests that they have the ambition of providing the perfect solution. Given this type of discourse, it is no wonder that many issues associated with the construction of current arrangements fly under the radar of moral-political scrutiny. Without undermining the role of ideal theory, the inability of political philosophy to seize this window of opportunity to impact the actual construction of global arrangements creates a troubling deadlock.

Rather than embracing or rejecting either the cosmopolitan or statist approach, this Article seeks an alternative approach to global redistribution capable of synthesizing the liberal intuitions of impartiality and the necessity of the nation-state.

## II

### CHANGING THE FRAMEWORK: FROM IMPARTIAL JUSTICE TO RELATIONAL DUTIES

This Article suggests a different approach to evaluating the commitments of peoples living in developed countries to those living in developing countries. In presenting this approach, this Part first explains and distinguishes two additional concepts: impartial justice and relational duties. Impartial justice is the set of claims and duties that bear on individuals independent of their actual relationships. Relational duties are partial and based on particular obligations that agents owe to those with whom they choose to associate. The framework of this Article relies on a novel concept of relational-distributive duties. To best understand this concept, one has to examine carefully how it stands apart from the global distributive justice debate reviewed in Part I.

#### *A. Impartial Distributive Justice*

The controversy between cosmopolitans and statist is best understood as a controversy about the scope of impartial distributive justice. Standards of distributive justice typically are impartial in that they apply to all members of a designated group and do not depend

on the existence of actual relationships among group members. These standards may even require individuals to transfer resources to complete strangers. In the context of impartial distributive justice, actual relationships do not weaken or strengthen the distributive duty or claim.<sup>69</sup>

Hence, the cosmopolitan-versus-statist debate is about impartial distributive justice because it revolves around the question of on what community or communities justice considerations should be imposed. While cosmopolitans argue that the relevant community is the entire human race, statist consider the relevant community to be the citizens of (or residents in) a particular state.<sup>70</sup> Put differently, cosmopolitans and statist agree that distributive justice claims and duties should be imposed equally on all members of a certain community; they just do not agree on what the relevant community is.

The stagnated liberal debate over global distributive justice is largely a result of the implicit assumption that the proper standard is an impartial justice standard that would apply to an agreed-upon group. The inadequacy of the current global distributive justice debate suggests that a partial standard may offer some useful insights.

### *B. Relational (Partial) Distributive Duties*

In contrast to an impartial framework for evaluating distributive justice, this Article offers a new relational framework. While impartial justice claims try to determine what intrinsic attributes trigger distributive obligations among individuals, this new framework tries both to determine what relational attributes trigger distributive obligations and to correlate the levels of such obligations with the nature and intensity of these relationships. It also tries to elucidate whether (and which) voluntary relationships carry with them any redistributive obligations.

Unlike endowed relationships, such as relationships between compatriots, real-world relationships require actual connections among specific individuals and groups.<sup>71</sup> The rights and obligations emerging from these relationships are always agent-dependent, and

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<sup>69</sup> These impartial distributive justice claims manifest in the domestic tax-spending systems of liberal democracies. In those systems, high income taxpayers must pay taxes that indirectly finance transfers to low income taxpayers—regardless of whether they are the poor family relatives or the worst high school enemies of the high income taxpayers.

<sup>70</sup> See *supra* Parts I.B and I.C.

<sup>71</sup> Thus, mother-child relationships do not fit well into this framework because they are not entirely voluntary. Relationships between adult family members may be more appropriate.

therefore partial,<sup>72</sup> because they require agents to prefer allocating their scarce resources to those with whom they choose to engage. The relational framework thus seeks to correlate levels of obligations among people to the nature of their relationships with one another.

This notion of relational duties is intuitive and straightforward.<sup>73</sup> Individuals determine their obligations to other people according to the nature of their relationships. The degree of obligation may vary, but most people will probably agree that I have some special obligation toward my cousin, another soldier in my reserve platoon unit, and a fellow member of my faculty—even if I am not especially friendly with any of them. The questions of whether one possesses a right, and whether that right is of the (stronger) negative nature of not to be harmed, or of the (weaker) positive nature to receive assistance, seem arbitrary and futile. For example, consider the question of whether my brother and I have an obligation to treat each other respectfully. I claim that most people would find the question irrelevant, given our binding long-term relationship, which requires us to act decently to each other. Additionally, if I talk to a close friend with vicious sarcasm, how important is the question of whether I am violating one of his negative rights (not to be harmed) or a positive right (to be treated with respect)? Consider also the situation of a small lifeboat filled with twenty strangers, one of whom possesses all the food.<sup>74</sup> If that passenger refuses to share it with the others, do the nineteen other passengers have any claim against the food-endowed passenger, who they have just met for the first time on the lifeboat? If they do, is the food-endowed passenger denying their negative or positive rights by denying them food?

The answer may be that most people regard common philosophical classifications of rights as futile because the distinction among those amorphous categories tends to blur in ongoing relationships. Moreover, these classifications have little to do with human experience, especially in close settings. Human moral reaction tends to respond to the fact that there are many potential agents that have duties to satisfy the rights of a specific individual and that those obligations correlate with the intensity of the relationship and the capacity of the duty-holder.

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<sup>72</sup> See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 164–66 (1986) (drawing distinction between what he defines as agent-neutral and agent-relative obligations).

<sup>73</sup> See GOODIN, *supra* note 63, at 24 (noting commonplace belief that duty increases with relation).

<sup>74</sup> Onora O'Neill, *Lifeboat Earth*, in *INTERNATIONAL ETHICS* 262, 265–67, (Charles R. Beitz et al. eds., 1985) (suggesting this example).

A number of factors shape our moral intuitions about whether a certain relationship gives rise to relational duties. Relationships based on reciprocity and cooperation trigger some sense of duty, even if entered into voluntarily. This is especially true for long-term relationships with costly exit options. The special vulnerability of one party may also establish a moral duty in the other party. For example, a professor may feel a different moral duty when interacting with another professor than with an eighteen-year-old college freshman, even though legally they are both adults. Sometimes, just the capacity to help, which arbitrary geographic proximity may determine, is enough to trigger or to intensify materially a duty toward another party. Additionally, although arbitrary from an impartial-justice philosophical perspective, people tend to form small interdependent relationships with individuals with whom they share something in common.<sup>75</sup>

It is important to point out that, so far, my argument has been modest in scope. While I demonstrated that most people recognize the existence of moral relational duties through their deeds, I have not yet claimed that these relational duties require any institutional response by the state or explained how they should relate to (non-relational) impartial-justice duties in a world of scarce resources.

Relational duties are in fact typically recognized as an issue of ethics—the moral values that should govern human behavior—which is different from the question of what principles should govern the structure and operation of political institutions. The philosophical inquiry of whether one can distinguish ethics from justice goes well beyond the scope of this paper.<sup>76</sup> From a practical, legal perspective, it is important to note that liberal legal regimes have a default presumption that favors freedom of contract, which dictates that individuals not be subject to any exogenous relational duties when voluntarily structuring their relationships.<sup>77</sup> This “voluntarist” default, however, is subject to many exceptions. Many branches of law in liberal states, such as family law, labor law, consumer protection law, and utility regulation, tend to intervene in long-term relationships with inherently high exit costs or when one party is consistently vulnerable.

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<sup>75</sup> The factors that can trigger these intuitive relational duties include biological endowment, historic and religious background, hobbies, and economic activities. See Soran Reader, *Distance, Relationship and Moral Obligation*, 86 *MONIST* 367, 371 (2003).

<sup>76</sup> See generally Liam B. Murphy, *Institutions and the Demands of Justice*, 27 *PHIL. & PUB. AFF.* 251 (1998) (arguing against this distinction).

<sup>77</sup> Samuel Scheffler, *Relationships and Responsibilities*, 26 *PHIL. & PUB. AFF.* 189, 191 (1997) (discussing “voluntarists,” who “believe that all genuine special responsibilities must be based on consent or on some other voluntary act”).

Political philosophers tend to avoid the discourse of relational duties when examining issues of justice. This is because relational duties require a bottom-up “reconstructionist” approach, which tries to elicit conclusions about moral behavior from observing and comparing actual human practices. This methodology differs from a top-down impartial-justice approach, which assesses the morality of political institutions by means of logic—first by assuming certain premises, then by logically questioning those premises’ validity and implications. In the context of relational duties, this latter methodology cannot yield any clear results about what duties are owed through which relationships and, more importantly, how to divide the responsibility for fulfilling the duties owed to a specific individual among a group of different agents with whom he or she shares relationships.

The inherent ambiguity about the proper standards of relational duties can be understood as the primary reason for liberal political philosophy’s adherence to impartiality. As mentioned, impartial arguments establish general rules that are applicable to all. Because of that universality, even though it is unreasonable to reject the existence and moral validity of relational duties, political philosophers tend to assert that general normative duties of justice should have priority over relational ones. Hence, relational duties are integrated with universal duties, but they are considered secondary and supplemental in nature.

This concept is well embedded in the practice of the liberal state. Although the state intervenes via regulation in many types of relations, the main reallocation of wealth occurs through the state’s tax-spending mechanism. Therefore, even though I am morally required to support my poor relatives, I am only allowed to do so using my after-tax money—meaning, after I have fulfilled the impartial distributive justice duties to my compatriots.

### *C. Limitations and Assumptions of the New Framework*

Up to this point, this Article has primarily discussed the cosmopolitan-versus-statist debate and commented on the limited relevance of this debate to actual decisionmaking about the design of international political institutions. Furthermore, it has explained the difference between impartial justice claims, which philosophers use to analyze the way political institutions should function, and relational duties, which govern personal relationships. It now turns to combine two distinct fields of thought: distributive political philosophy and international trade and tax policymaking. Integrating the disciplines—so as to make normative theory more applicable and international

trade and tax policy more just—is a challenge that requires a new framework.

This framework first requires separating the question of what the proper role of impartial justice should be from the questions I address: whether in a multistate reality relational duties shape our global obligations and whether these obligations require any institutional arrangement. This separation requires accepting both the existence of the multistate political structure and the inability of the current political structure of international institutions to support the cosmopolitan ideal. The approach I propose, however, does not draw directly on either the statist or cosmopolitan approaches. Not relying on either of these approaches allows both cosmopolitans and statistes to consider this Article's approach without disposing of their respective positions.

### 1. *A Realistically Utopian Agenda*

This Article asks how we should promote considerations of global distributive justice within the existing multistate political framework. This process requires a normative institutional analysis, which reconsiders the operation of existing political institutions.

This approach differs from that of other inquiries, such as Rawls's *A Theory of Justice*,<sup>78</sup> which start by examining moral principles and then try to conclude what a just society should look like if it were designed from scratch. Instead, this institutional analysis begins with the status quo and decides which parts of it to embrace and which to challenge. This process requires deciding what the acceptable limits of practical political considerations are and designating them as the boundaries of the analysis. Because these boundaries depend on dynamic human practices, they are inherently contestable. Thus, a normative theory that aims to deal with and reshape the status quo must also explicitly address these boundaries.<sup>79</sup> This Article's "realistic utopia" is bottomed on three assumptions, each of which I consider straightforward and conservative, though not beyond challenge.<sup>80</sup> The ambition of this Part therefore is not to engage in a normative discussion about the desirability of the below assumptions but to use these quasi-descriptive assumptions as an Archimedean point to develop the realistically utopian normative analysis.

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<sup>78</sup> See *supra* notes 25–27 and accompanying text (discussing Rawls's philosophical method).

<sup>79</sup> See Sanjay Reddy, *The Role of Apparent Constraints in Normative Reasoning: A Methodological Statement and Application to Global Justice*, 9 J. ETHICS 119, 121 (2005) ("The identification of certain features of the world as constraints, and others as changeable, is a task that is central to debates on global distributive justice.").

<sup>80</sup> See RAWLS, *THE LAW OF PEOPLES*, *supra* note 9, at 11 (defining "realistic utopia").

The first assumption is that wide-scale global redistribution cannot be based on principles of rectification. Correcting past harms is an appealing notion and is indeed possible in a few clear-cut cases.<sup>81</sup> The complexity of human history<sup>82</sup> and the difficulty of determining causality,<sup>83</sup> however, make rectification an arduous and potentially impossible task. As such, the attempt to integrate large-scale distributive considerations into international institutions should not be based upon corrective justice.

This assumption, that real-world justice entails synchronic rather than diachronic justice, is crucial to the analysis. In this framework, developing countries such as Algeria, Rwanda, and Pakistan have no special claims against their former European colonizers—France, Belgium, and the United Kingdom—for correction of the past wrongs done to them. Colonialism was anything but benevolent, but it is hard to determine whether it left countries in an absolute worse position than where they would otherwise have been. Would peoples in the above countries have better or worse political institutions absent colonialism? Would child mortality rates in those developing countries be higher or lower?

Some people in the developed world, however, may not realize that synchronic justice cuts both ways. Developed countries may not categorically reject distributive claims by arguing that they result directly from developing countries' inability to establish adequate political and legal institutions. To be sure, questions of developing countries' institutional competence will bear significantly on how to satisfy any distributive claims. To determine whether these claims exist and their nature, however, the assumption that international distributive justice does not involve corrective justice requires us to focus on current relationships among peoples and look at actual measurements of poverty and inequality.

Second, this Article assumes that global institutions will not replace states in the near future. Therefore, any suggestion for an

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<sup>81</sup> Examples of such cases include the past harms of slavery and the genocide of indigenous people by colonial powers. Even in these cases, however, it is difficult to say who should compensate—is the Chilean Indian entitled to compensation from Spain or from fellow Chileans of Spanish origin?

<sup>82</sup> For example, trying to determine the duty of rectification between countries such as Poland, Russia, and Germany would be very difficult if one takes a broad historic perspective.

<sup>83</sup> As mentioned, even in the case of clear exploitive relationships (e.g., colonization), it may be difficult to determine whether the problems we see in developing countries today are a result of such past exploitation. For example, would it be right to assume that high rates of children's mortality from preventable diseases in these countries are a result of colonization or would these rates be the same or even higher absent colonization?



institutional redistributive scheme should account for the existence of the multistate, multisovereign international arena. Although states may increasingly influence each other, state-based political institutions will retain the ability to determine most aspects of their tax-spending and foreign relations policies. The implication of this assumption is that any cosmopolitan distributive scheme would not be able to overcome problems of accountability and of explicit conflicts among various sovereigns. This assumption also entails that any stable global order will continue to depend on each nation-state's ability to provide legal, financial, and administrative infrastructures to support it. Hence, in the absence of dominant supranational or international players, cooperative efforts of nation-states have the best chance of successfully establishing a sustainable scheme of large scale cross-border redistribution.

This assumption is a factual one and not a normative claim about the morality (or immorality) of nation-states.<sup>84</sup> In other words, I do not assume that states are *just* but merely that they *are*. I ask the reader to accept that states are currently the only dominant players in the global political arena and that they currently make up the only framework in which schemes promoting notions of impartial distributive justice are viable.<sup>85</sup> The following analysis draws only on the existence of this state of affairs and remains mute on the question of whether it is morally just.

The third assumption is that individuals care about foreigners' human suffering and violations of their rights. Even though individuals feel stronger sentiments toward their compatriots, they do not

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<sup>84</sup> This differs significantly from any claim that states themselves are moral units and that the international system should be treated as an "international community" or as a "society of nations" in which each nation has certain rights and obligations. For a description of what this "internationalist" position would entail, see Ethan B. Kapstein, *Models of International Economic Justice*, 18 *ETHICS & INT'L AFF.* 79, 85–87 (2004).

<sup>85</sup> With the minor exception of the European Union—and the recent rejection of the EU Constitution is a reminder of how fragile this exception is, see generally John F. McManus, *Irish Voters Say "No" to EU Treaty*, *NEW AM.*, July 7, 2008, at 44—recent history informs us that peoples are reluctant to concede nation-state powers to global or international institutions, possibly because they have biased preferences toward their compatriots and want political institutions that reflect those preferences. See Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 *V.A. J. INT'L L.* 155, 177–79 (2008) ("Domestic control enables each state to promote and serve the goals, values, and ideals of its own community."). For example, Medicaid is a relatively expensive domestic redistributive program that provides low-income compatriots with costly health insurance. The argument that it is moral to spend money on Medicaid until all humanity has been guaranteed a certain minimum baseline of health coverage would strike almost all residents of developed countries as wrong. Whether correct or not, nation-states are strong and are bound to shape political arrangements in the foreseeable future.

reject foreigners' misfortunes categorically from their moral concern.<sup>86</sup> This assumption suggests that even though institutional considerations of democratic accountability may prevent liberal democracies from engaging in cosmopolitan action,<sup>87</sup> the foreign policy of liberal democracies is not categorically barred from addressing normative claims associated with foreigners' needs and suffering. Recent phenomena, such as the growing popularity of the fair trade movement<sup>88</sup> and of NGOs involved in international development, indicate the validity of this assumption.<sup>89</sup> These phenomena suggest that a state's social welfare function includes the condition of foreigners at least to some extent. Bluntly put, although statisticians such as Miller and Nagel may not think that the political obligations for equality extend beyond the nation-state, they probably nevertheless feel that global poverty is wrong and that to disregard it would be, in a sense, immoral.

## 2. *Integrating Relational Duties into International Political Arrangements*

Global trade may result in relational-distributive duties between peoples. Unlike relational duties between individuals, these relational duties require an institutional response, and international taxation may offer a plausible avenue to facilitate such a response. A careful analysis is needed to clarify the scope of this Article because questions of wealth redistribution are always complicated and multilayered—especially when dealing with global redistribution. Hence, this Article limits its analysis to address the following three questions:

- 1) What, if anything, is the source of a global distributive duty?
- 2) Once the redistributive rights of certain individuals are clear, how should those that must transfer some of their resources share the relative distributive burden?
- 3) What institutional scheme should govern those redistributive transfers?

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<sup>86</sup> See generally Richard J. Arneson, *Do Patriotic Ties Limit Global Justice Duties?*, 9 J. ETHICS 127, 128–30 (2005) (rejecting assumption of “Patriotic Priority Thesis” that compatriots are naturally inclined to experience special feelings of solidarity toward each other); cf. Allen Buchanan, *In the National Interest*, in THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM, *supra* note 42, at 110 (discussing and rejecting view that national interests may always trump concern for well-being of foreigners).

<sup>87</sup> See Goldsmith, *supra* note 9, at 1679–81 (describing U.S. reluctance to engage in certain cosmopolitan acts).

<sup>88</sup> See generally LAURA T. RAYNOLDS ET AL., FAIR TRADE: THE CHALLENGES OF TRANSFORMING GLOBALIZATION (2007) (describing growth and development of fair trade movements).

<sup>89</sup> See JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 9 (2007) (listing concerns of globalization opponents).

In more concrete terms, the following Parts proceed by answering three questions: Why does (voluntary) international trade result in relational-distributive duties between peoples? Why do these duties require a political response? Finally, why might the international tax regime (ITR) be an appropriate institutional arrangement to accommodate these distributional concerns?

Note that this Article does not discuss in depth the following questions concerning global distributive justice:

- 1) What should be the “currency” of justice? There is strong disagreement among scholars about what a proper benchmark to measure and remedy distributive justice disadvantages should be. Scholars have suggested a number of such currencies, including opportunities,<sup>90</sup> primary goods,<sup>91</sup> and capabilities.<sup>92</sup>
- 2) How much should be contributed in order to satisfy the distributive claim? Does the answer to this question depend on the situation of the potential transfer recipient, or on the capacity of the transferors to sacrifice? How does another agent’s noncompliance affect one’s distributive duties?<sup>93</sup>

These questions are related to, but not central to, this Article’s core inquiries, which concern the source of the global distributive duty and the institutional framework through which it could be realized.<sup>94</sup>

The integration of relational duties into global political institutions offers a promising avenue for achieving real-world progress on issues of global wealth redistribution. The introduction of this new

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<sup>90</sup> See generally Dworkin, *supra* note 20 (discussing equality of resources).

<sup>91</sup> RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 54 (arguing that justice requires equal distribution of primary goods such as rights, liberties, income, and wealth).

<sup>92</sup> For the leading texts on capabilities, see generally MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>93</sup> Suppose, for example, that both Singapore and Australia compete against each other and need to invest in their infrastructure to do so successfully. Both have a distributive duty to transfer funds to Indonesia, but Singapore refrains from meeting its obligation. As a result, the situation in Indonesia becomes worse. The question therefore is whether Singapore’s refusal to comply affects Australia (which has the capacity to donate more). On the one hand, the situation in Indonesia is worsened—so that more money is required to allow the basic provisions which justice entails. On the other hand, Singapore’s refusal places Australia at a competitive disadvantage because it is unable to match Singapore’s infrastructure investments. One would expect this question to be most relevant in the international arena due to the lack of a central authoritative enforcement mechanism. See generally LIAM B. MURPHY, MORAL DEMANDS IN NONIDEAL THEORY (2000) (engaging in detailed inquiry about what obligations individuals have assuming noncompliance of other individuals).

<sup>94</sup> I feel comfortable addressing “just” the first three questions given that the global justice debate is still in its preliminary stages, and given that no theory has yet articulated how real-world policies should address the question of the scope of international redistribution.

framework calls for a brief elaboration of the relationships between relational duties and impartial justice claims. The framework that I propose neither nullifies nor affirms the moral desirability of the statist or cosmopolitan justice ideals. I do not discuss the role of relational duties in the intrastate context at all. In the international context, I argue that relational duties exist in parallel to questions of whether impartial-justice claims should be validated. Simply put, although this Article focuses on relational duties, it acknowledges that other (cosmopolitan or humanitarian) duties may arise in the international context.

It is clear that relational-distributive duties among peoples matter more when institutions promoting impartial justice do not exist. Even when those institutions do exist, however, relational duties are still important, because there is a potential political tradeoff between how broad the group of rights holders is and the amount of rights allocated. If impartial justice concerns are implemented on a broad global basis, political reality dictates that there would be pressures to provide only the very minimum amount of rights to every person. Education and health are essential services, but “good” education and healthcare require funding well beyond “the minimum” provided by the impartial global justice guarantee. It is therefore easy to see how relational duties still may be potentially significant even if there is a political structure that guarantees a certain minimum to all human beings.

For example, suppose that I have a relational duty to help my brother when he is sick. I argue that this duty is independent from whether we live in a country that provides universal health insurance to all its citizens. Obviously, my relational duty would be affected by the health benefits provided by the state as part of its impartial justice commitment to its citizens. If my brother and I live in a state with no universal health insurance, my duty to him may be substantial. If my brother needs more assistance than provided by the state, however, I would have a relational duty toward him even if we lived in Sweden, which has a generous and universal state-funded health system.

In the same way that my brother’s entitlement for state health benefits impacts, but does not categorically eliminate, my relational duties to him, a cosmopolitan regime would not eliminate relational duties among peoples. Relational duties are, therefore, an independent source of moral duty and not a second-best instrumentalist way of promoting an otherwise utopian cosmopolitan ideal.

### III RELATIONAL-DISTRIBUTIVE DUTIES AND INTERNATIONAL TRADE

This Part explains why international trade gives rise to relational-distributive duties among peoples. It further explains why these duties should trigger a political reaction by states. It then contextualizes the analysis by demonstrating how international tax arrangements could promote relational-distributive duties.

#### A. *Applying Relational Duties to Global Trade Relationships*

Although the process of globalization may not have brought peoples to a state of interdependence that justifies cosmopolitan impartial-justice claims, international trade is a type of relationship that in certain cases gives rise to distributive moral duties. Although participation in this enterprise is mostly voluntary—and therefore presumably beneficial to all parties—the allocation of benefits arising from the interaction between the advantaged and the disadvantaged is morally contestable. Peoples living in developed countries benefit from the disadvantages and low bargaining powers of peoples from developing countries.<sup>95</sup> While the former enjoy unprecedented high standards of living, the majority of the latter suffers from inhumane labor conditions and can barely attain basic health care, education, and decent living standards.

People have some obligations, such as fair business conduct, toward others to whom they are connected through trade relationships. In the context of a world characterized by extreme inequality, affluence, and poverty, these fairness duties have a broader scope that includes redistributive considerations. These redistributive considerations are less stringent than domestic redistributive duties. Simply put, although I owe *more* to the people serving in my army and washing the dishes at my nearby restaurant than I owe to persons in China manufacturing my shoes and to farmers in Brazil growing my coffee, I nonetheless have *some* redistributive duties toward those foreigners with whom I am indirectly engaged through trade. Our continuously growing interaction with each other as repeat players in the joint economic enterprise of international trade triggers these redistributive duties.

To establish the claim that the nexus of international trade triggers redistributive duties, I first discuss how globalization has placed peoples in a joint economic system. I then show that even though

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<sup>95</sup> See *infra* notes 129–139 and accompanying text (advancing comprehensive discussion of this controversial claim).

international trade is voluntary, it may give rise to relational duties when market transactions are unfair and when the parties benefiting from this unfairness have the capacity to remedy it.

### 1. *Globalization as Proximity*

The growing intensity of global trade and the growing penetration of global markets have essentially connected people through economic relationships that once were limited to the domestic state. Fifty years ago, most individuals' economic relations existed within the boundaries of their locality or domestic state. Today, while individuals are still likely to have a dominant set of domestic affiliations, they are also likely to have multiple foreign affiliations. International trade essentially brings people "closer" together by connecting them in ways that once were limited to close geographic settings.

Proximity has been widely recognized as a source of special duty.<sup>96</sup> From a relational duties perspective, proximity is a proxy for the existence of meaningful relationships. Individuals are more likely to share an interdependent long-term relationship with their neighbors and colleagues than with distant strangers.

A globalized world with developed financial and commodity markets challenges the value of geographic proximity. While, literally speaking, peoples are no closer to each other today than they were in the Middle Ages, global economic liberalization positions them now as parties to long-term trade relationships. These relationships have drawn formerly discrete economies materially closer to each other.<sup>97</sup>

In essence, globalization is the accelerated mobility of assets and ideas within new integrated and interconnected market settings that transcend the nation-state. Although commerce among nations is not

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<sup>96</sup> With respect to relational duties, it is widely recognized that proximity has an intrinsic value. Few will disagree that I have a duty to aid a drowning stranger, even though it is nothing more than a coincidence that he is drowning next to me. See MURPHY, *supra* note 93, at 127–32 (making special case for rescue). Even scholars that deal with impartial rather than relational justice have recognized that proximity is a relevant instrumental factor because of division-of-labor considerations. Rather than assigning all individuals equal responsibilities toward everything, some type of allocation of responsibility is desirable. In this context, proximity is a proxy for a reasonable allocation because it reduces the transaction costs associated with resource transfers. See Goodin, *supra* note 68 (exploring notion of special national duties); Karen Green, *Distance, Divided Responsibility and Universalizability*, 86 *MONIST* 501, 507 (2003) (basing special duties toward proximate individuals on efficient use of resources). Although this proxy is valid, it is of decreasing significance. Recent improvements in information and transportation technologies have significantly reduced the costs associated with information-finding and made possible the efficient transfer of resources to many places that were considered out of reach less than half a century ago.

<sup>97</sup> Beeson, *supra* note 65, at 6.

a new phenomenon, globalization has created an unprecedented level of economic interconnectedness among peoples. Massive flows of direct and portfolio cross-border investments, which once were fairly rare, are now made on a daily basis,<sup>98</sup> and many businesses depend on foreign suppliers, customers, and service providers.

Nation-states' regulatory gap exemplifies the extent to which market integration has changed our economic relationships. Democratic sovereignty entails that people should be able to determine certain aspects of their lives through an egalitarian process of political participation. Global markets have created certain regulatory problems, however, making it difficult to regulate some major issues on the state level effectively, because both the markets affecting those issues and the agents participating in those markets have become transnational and thus outside the scope of any individual state's control. For example, nation-states cannot effectively regulate certain vital economic issues such as global climate change or the stability of world markets.<sup>99</sup> Recent food and financial crises also reflect globalization's pervasiveness. For example, around June 2008, the decision of the United States government to reduce its dependency on oil by encouraging the use of corn for ethanol resulted in severe food insecurity and social turmoil in parts of the developing world.<sup>100</sup> This example does not suggest that the 2008 food crisis was the fault of the United States or any other country. It does suggest, however, that given the interconnectedness of global markets, the attempt to relegate the meaningful economic relationships that give rise to relational duties only to the domestic or local spheres is artificial and obsolete.<sup>101</sup>

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<sup>98</sup> Ilan Benshalom, *The Quest To Tax Interest Income in a Global Economy: Stages in the Development of International Income Taxation*, 27 VA. TAX REV. 631, 672–73 (2008).

<sup>99</sup> See, e.g., Simon Caney, *Cosmopolitanism and the Law of Peoples*, 10 J. POL. PHIL. 95, 119 (2002) (arguing that environmental issues can no longer be regulated effectively on national level and that this fact challenges Rawls's assumption that international structure of international political system differs fundamentally from nation-state structure).

<sup>100</sup> See Anuradha Mittal, *The 2008 Food Price Crisis: Rethinking Food Security Policies* (U.N. Conference on Trade & Dev., G-24 Discussion Paper Series No. 56, June 2009), at 6–8, available at [www.unctad.org/en/docs/gdsmdpg2420093\\_en.pdf](http://www.unctad.org/en/docs/gdsmdpg2420093_en.pdf). For a somewhat similar analogy, see Shue, *supra* note 50, at 694, which states that international economic interdependence makes global markets resemble a spider's web, in which change voted on in Washington, D.C. over subsidies to Nebraska may change bread prices in Calcutta and meat prices in Kiev).

<sup>101</sup> Much of the criticism of cosmopolitans against the statist theory of Rawls is that it does not account for this change in the global economy. Rawls's attempt to draw a moral line around state boundaries suggests that he sees the nation-state as independent and self-sufficient. The critics of Rawls pointed out that this vision was in fact very different from reality and that very few nation-states can be seen as isolated, autarkic, or independent. See, e.g., Charles R. Beitz, *Justice and International Relations*, in INTERNATIONAL ETHICS,

Like domestic market settings, global market settings are not neutral but political and thus require intensive cooperation. Countries typically seek this cooperation through legal and political devices—mainly treaties and international institutions—that enforce contractual and property rights. Accordingly, international markets do not operate in a vacuum but within a well-developed set of legal and coordination norms.<sup>102</sup> Moreover, the ideology driving the recent flourish of global trade is also anything but neutral. It stresses that the key to increasing human welfare is economic growth achieved through stable adherence to free trade and a liberalized economic structure.<sup>103</sup>

The most visible aspect of the novel interconnectedness between peoples is the emergence of international institutions and agents. Whether a multinational enterprise (MNE), a multinational or international governance institution, an advocacy group, or an NGO, these cross-border agents organize to meet their goals in ways that challenge nation-centric conceptions of global influence. Here, I focus on two key types of international agents: international institutions that coordinate rules related to economic activities and MNEs.

The norms, rules, and principles governing the operations of international institutions like the IMF, the World Bank, and the WTO are the common carriers of global trade. Western-dominated institutions coordinate international trade through a bundle of norms and proceedings, which serves two important functions. First, these coordination norms standardize many aspects of international trade by reducing the transaction and uncertainty costs of cross-border investments. Second, these rules allow international trade to operate as a global public good through a grid that enables interaction and efficient allocation of resources, thus yielding nonexclusive and nonrivalrous benefits that increase as more parties interact through it. International organizations determine these criteria and supervise their enforcement—mainly through reporting but also through arbitration procedures.

These functions highlight a second role of international institutions: being the gatekeepers of access to the public good of interna-

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*supra* note 74, at 282, 285 (criticizing Rawls as “imagin[ing] a world of nation-states which interact only in marginal ways”).

<sup>102</sup> The division of labor in the world economy demonstrates the high level of cooperation between the different economies (and also indicates how well entrenched the neoclassical economic ideology is in the process of globalization). See Charles R. Beitz, *International Liberalism and Distributive Justice: A Survey of Recent Thought*, 51 *WORLD POL.* 269, 293 (1999) (discussing how interactions of wealthy and poor countries “are likely to produce sustainable improvements in minimum standards of living”).

<sup>103</sup> Omar Dahbour, *Three Models of Global Community*, 9 *J. ETHICS* 201, 203–04 (2005) (describing this model as community of trade).



tional trade. Although each sovereign nation's compliance with the criteria set by these institutions is voluntary, countries wishing to benefit from international trade must accept all of the conditions set by international institutions. Hence, when the IMF and the WTO delineate their rules, they are actually delineating the costs of access to international trade and investment markets. In a global economy, in which peoples' welfare has become so dependent on international trade, noncompliance with those rules becomes a remote and merely formal possibility for many sovereigns, no matter how controversial these rules may be.<sup>104</sup> For example, in response to the third world debt crisis during the 1980s, the U.S. Treasury, the IMF, and the World Bank devised a set of conditions for developing countries seeking aid, known as the Washington Consensus.<sup>105</sup> Some of these conditions (e.g., fiscal discipline) reflected sound policy, which was of direct interest to the IMF and other international lenders. Other conditions, however, reflected a strong neoliberal bias and could therefore be seen as ideologically skewed interferences in the internal policies of developing countries (e.g., an emphasis on requirements for trade liberalization, privatization, and deregulation). Viewed as a whole, the process of rulemaking and norm-setting has reached far beyond the original purpose of coordination: It has become a process that allows international institutions to reformulate the economic design of sovereigns.<sup>106</sup>

MNEs offer a different challenge to nation-centric conceptions of global influence. In the past half century, the number and reach of MNEs expanded dramatically, and they now wield enormous economic and investment power. By employing economies of scale, which allow them to reduce collective costs and utilize intangible assets effi-

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<sup>104</sup> Philippe Van Parijs, *International Distributive Justice*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY*, VOL. II, 638, 647 (Robert E. Goodin et al. eds., 2d ed. 2007) (describing growing number of "worldwide supranational organizations . . . with the effective power of imposing binding rules on all its member countries and . . . a merely formal possibility of withdrawal which is becoming increasingly notional").

<sup>105</sup> See WALTER GOODE, *DICTIONARY OF TRADE POLICY TERMS* 476 (5th ed. 2007) (defining "Washington Consensus" as a "set of eleven principles . . . [that] embodied the 'lowest common denominator' of reforms [that] the Washington-based financial institutions, including the International Monetary Fund (IMF) and World Bank, could agree on in 1989 as suitable for Latin America").

<sup>106</sup> See Ciaran Cronin & Pablo De Greiff, *Introduction: Normative Responses to Current Challenges of Global Governance*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS* 1, 3 (Pablo De Greiff & Ciaran Cronin eds., 2002) ("[G]lobal interconnection has already reached such a level that no country or people, however remote, can escape the pressure to modernize their social institutions and integrate them into global markets and networks."); Darrel Moellendorf, *Persons' Interests, States' Duties, and Global Governance*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM*, *supra* note 42, at 148, 155 (illustrating influence of international financial institutions on economic policies of "poor countries").

ciently, MNEs are the crown jewel of modern economic integration. They command the lion's share of Foreign Direct Investments (FDIs) and conduct much of the high profile research and development and manufacturing activities considered essential to technological advancement and economic growth.

Operating in multiple jurisdictions, MNEs are huge generators of economic activity and have largely become de facto setters of standard business behavior. As MNEs consolidated powerful positions in the global economy, their affiliation with specific national jurisdictions gradually weakened. For example, MNEs' nationally diversified shareholders, operations, employees, and consumers make it analytically difficult to identify an MNE with any single nation.<sup>107</sup> MNEs therefore represent a gap in the ability of state sovereignty to regulate the conduct of actors with significant economic power.

The above observations avoid either criticizing or embracing the current global order and the way it facilitates international trade and investment. They do suggest, however, that looking at international trade as either a "natural" development or as a set of sporadic and unrelated transactions is wrong and misleading. International trade performs in a market that, like any other domestic market, is the product of political constructs that govern the rules through which agents interact. Even the decision not to try to subordinate different aspects of global markets to any single sovereign is a political decision from which some benefit and others lose.<sup>108</sup>

As a result of this political decisionmaking, global markets have become structured networks of long-term interdependent relationships that require political cooperation. The cooperation we see today amounts to an economic association. A country's membership in this association has significant implications on its economic structure and

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<sup>107</sup> See Avi-Yonah, *supra* note 10, at 1586–97 (discussing variety of claims different countries might make on their right to subject MNEs to corporate income tax).

<sup>108</sup> For example, the decision not to have a single tax authority that coordinates tax enforcement and rates allows affluent individuals with liquid assets to pay fewer taxes by shifting their profits to low-tax jurisdictions. See Ilan Benshalom, *Taxing the Financial Income of Multinational Enterprises*, 28 VA. TAX REV. 619, 627 (2009) (describing how MNEs use "financial transactions for income shifting purposes, increasing their deductible costs of finance in high-tax jurisdictions and inflating their income on profitable ventures in low-tax jurisdictions"). It also triggers a dynamic of tax competition between different sovereigns. Affluent investors, typically from developed countries, are better off, and their low-income compatriots are worse off. Low-tax countries may be better off because of the surplus of investments but also may be worse off because lower tax yields hinder their ability to provide services to their citizens. See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1639–41 (2000) (refuting contention that "developing countries need tax revenues less than developed countries").

on its citizens' lives. These implications, to be sure, are still far less invasive in comparison to the power states exercise over their citizens. Given the high exit (or non-entrance) costs of this association, however, it is reasonable to expect that some moral relational duties should exist between its participants. When a coal mine collapses in China because of inadequate safety measures, is it only the responsibility of the Chinese government (which may have set lax regulatory requirements), or is it also the moral responsibility of the high-ranking employees and investors of the MNE that owns it or of the consumers that purchase its cheap products? If a shoe company employs children in sweatshop conditions in Indonesia, is it only the Indonesian government's moral responsibility to alleviate these conditions, or is it also the responsibility of the company's shareholders, management, employees, and consumers?

International trade connects peoples in ways that once were confined to domestic settings. These types of relationships in the domestic setting are often a source of special relational duties and responsibilities. It is widely recognized that optimal business strategies, growth, and innovation require abandoning obsolete nation-centric conceptions of global influence. By the same token, the global economy's interconnectedness requires us to examine our relational duties through a global cross-border perspective and not to limit them to the domestic sphere.

## *2. Which Types of Economic Relationships Give Rise to Relational Duties*

The fact that international trade allows people in different countries to connect despite geographic distance does not by itself explain why international trade connections result in relational-distributive duties. Instead, it is the fact that current international trade takes the form of an unfair pattern that gives rise to relational duties. The voluntary nature of trade transactions is not enough to vindicate them as fair. This claim requires close scrutiny: After all, if one assumes that parties are rational, they would engage in global trade only if they would benefit from it. Although this inference may be true, peoples living in developed countries benefit from trade unevenly. In short, the skewed allocation of benefits from international trade is not a coincidence but a direct result of the vulnerability of peoples living in developing countries.

Two additional factors exacerbate the immorality of this allocation pattern: the inability of developing countries to exercise effective control over the rules governing global trade, and developed countries' (unfulfilled) capacity to better assist developing countries. Cou-

pled together, these factors give residents of developed countries an unfair advantage—and result in a situation where the market equilibrium is frequently unfair.

Before proceeding, it is important to stress two points. First, my position is distinct from the cosmopolitan position, which argues that international settings are indistinguishable from analogous domestic ones. I instead focus on the actual attributes of international trade relationships and claim that many of them are unfair and give rise to distributive duties. To be precise, at this point in the Article, I argue not that these relational duties should trigger an institutional response (a task on which Part III.B focuses) but only that they exist in certain international trade relationships.

Second, as Part I has established, the claim that individuals may have certain obligations to those with whom they interact draws upon a rich philosophical literature of ethics. Not everyone agrees that ongoing interaction among individuals can result in relational duties, but this is a fairly well-established field of thought in moral philosophy and one that most (non-economists) accept intuitively and act upon. The previous Section established why, in an integrated global market, considerations about relational duties should not be categorically limited to operating within the framework of the state. This Section takes the argument a step further and asserts that the current practice of international trade between developed and developing countries exhibits an unfair pattern that triggers relational duties.

Trying to define an “unfair pattern” precisely is as futile as attempting to define tax avoidance or pornography. As in the case of tax avoidance or pornography, although we cannot offer a comprehensive definition, we “know it when we see it.”<sup>109</sup> This Article tries to go beyond the “know it when we see it” test to single out a number of factors that characterize the mainstream cases of unfair patterns. Accordingly, the analysis below highlights the main attributes of transactional unfairness and addresses only those relatively strong cases of unfairness in which *all of these attributes apply*.<sup>110</sup>

Generally, we may define transactional unfairness as a situation in which one party uses a disadvantage of a counterparty to seek self-

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<sup>109</sup> Jeffery L. Yablon, *As Certain as Death—Quotations About Taxes*, 102 TAX NOTES 99, 151 (2004) (citing Fred T. Goldberg Jr.’s paraphrase of Justice Stewart’s famous observation about pornography in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring)).

<sup>110</sup> Note that this approach implicitly assumes some overlapping consensus for what unfairness is and therefore is suitable to address only clear-cut cases rather than those at the margin. I do not regard this as a problem given that most existing approaches in political philosophy inadequately address even those clear-cut cases.

serving benefits at that counterparty's expense in a way that is legal but immoral.<sup>111</sup> The immorality of the behavior raises a relational duty to amend it (so that it is no longer unfair) or to compensate the exploited party in other ways. The problem with this type of inquiry is that any voluntary market transaction is generally assumed to be profitable to all parties. The claim that one party generated excessive or unfair returns must rely on a hypothetical benchmark of an alternative transaction with different allocative outcomes—a benchmark that in most cases simply does not exist.<sup>112</sup> Accordingly, rather than providing a full theory of transactional fairness, this inquiry can only enumerate a number of factors that seem to indicate the existence of unfair advantage in the context of international trade. To distinguish between fair and unfair voluntary trade transactions, this Article focuses on objective indicators.

The first factor needed to demonstrate an unfair advantage is that the individuals in a developed country benefit from the global inequality and poverty in a developing country. But the existence of the benefit factor alone is not enough to prove unfairness—after all, benefiting from a comparative advantage is the essence of trade, so this first factor is usually satisfied.<sup>113</sup> The second factor that leads to relational duties is a skewed allocation of the benefits of trade. This occurs when one party receives the lion's share of a transaction's benefits—even when both parties fare better than they would have had they not entered into the transaction.<sup>114</sup>

A situation that may suggest an unfair pattern is when one party—typically, the party supplying cheap labor or scarce natural resources—trades a lot of its resources in exchange for a level of compensation that does not allow it much more than survival. Granted, as with any other political theory that tries to determine sufficiency stan-

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<sup>111</sup> See generally ALAN WERTHEIMER, *EXPLOITATION* 25 (1996) (arguing that exploitation can occur even in consensual transactions); Joel Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201, 203 (Rolf Sartorius ed., 1983) (identifying one element of noncoercive exploitation as profiting from vulnerabilities of others).

<sup>112</sup> David Miller, *Exploitation in the Market*, in MODERN THEORIES OF EXPLOITATION 149, 149 (Andrew Reeve ed., 1987); see also David Miller, *Justice and Global Inequality*, in INEQUALITY, GLOBALIZATION, AND WORLD POLITICS 187, 204 (Andrew Hurrell & Ngaire Woods eds., 1999) (noting that one can determine exploitation inherent in transaction only via reference to "suitable benchmark," the proper definition of which is unclear and controversial).

<sup>113</sup> Put another way: We need further justification for why we do not generate a relational-distributive duty by trading with, and benefitting from the comparative advantage in high human capital of, a developed country such as Finland, whereas we do generate such a duty by trading with, and benefitting from the comparative advantage in low wages and low safety regulations of, a developing country such as Indonesia.

<sup>114</sup> See Feinberg, *supra* note 111, at 223–24 (arguing that unfair exploitation occurs even without harm when one party's "parasitic profits" are unevenly shared with other party).

dards in our dynamic world,<sup>115</sup> it is difficult to draw the line between what is mere survival and what is the opportunity for a decent life.<sup>116</sup> Nevertheless, it seems relatively straightforward to argue that if a person at full employment cannot afford food, shelter, and security, as well as the minimal health care and primary education services necessary to support a family, then that person has not reached a decent standard of living.<sup>117</sup> This is a somewhat minimalist and simplistic definition of decency, but I adopt it here to minimize controversy on this point because it is a relatively conservative definition.

To make my definition even more conservative, I further assume that to indicate an unfair allocation of benefits, the party alleged to be an exploiter should be able to attain a decent living standard, even without the transaction. This is somewhat of a simplification, since one can imagine a more nuanced situation in which the unfair allocation exists between two parties that do not attain a decent standard of living or between two parties that both achieve such a decent standard. But this assumption suffices for the purpose of this analysis, which is concerned with examining clear-cut cases of relational duties arising from international trade relationships and not with providing a comprehensive theory of transactional fairness.

That a trade relationship results in unequal benefits is a necessary but not sufficient indicator of an unfair trade pattern. The core of the distinction between “fair” and “unfair” lies in the unequal bargaining position and in one party’s ability to transform the other party’s vulnerability into a business advantage.<sup>118</sup> This cuts directly against the grain of neoclassical economics. Rather than looking at the United States–Indonesia relationship only as a manifestation of the comparative advantage principle, it argues that the American investors and consumers are exploiting a comparative weakness of individuals living in Indonesia. Hence, to avoid overriding the moral validity of all commercial relationships, we must have a clear idea of what counts as vul-

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<sup>115</sup> See, e.g., NUSSBAUM, *supra* note 92, at 309 (discussing basic capabilities approach, which aims at defining this core minimum necessary for dignified human existence); SEN, *supra* note 92, at 74–76 (same).

<sup>116</sup> See GEORGE DEMARTINO, GLOBAL ECONOMY, GLOBAL JUSTICE: THEORETICAL OBJECTIONS AND POLICY ALTERNATIVES TO NEOLIBERALISM 104 (2000) (drawing connection between this type of argument and Marxian exploitation theory); Hillel Steiner, *Exploitation: A Liberal Theory Amended, Defended and Extended*, in MODERN THEORIES OF EXPLOITATION, *supra* note 112, at 132 (connecting process indicators for exploitation with outcome of material insufficiency for one party).

<sup>117</sup> See Universal Declaration of Human Rights arts. 25–26, G.A. Res. 217A, at 76, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (establishing right to food, clothing, housing, medical care, security, and education).

<sup>118</sup> See GOODIN, *supra* note 63, at 36 (arguing that “‘exploitation’ par excellence” exists when two parties negotiate and there is great disparity in respective bargaining power).

nerability.<sup>119</sup> Put differently, I am not denying that U.S. trade with Indonesia meets the Pareto efficiency principle, but I am arguing that Pareto improvement is not always enough to validate the fairness of a transaction.

To substantiate this claim, it is necessary to distinguish incidents where benefiting from a comparative disadvantage of the counterparty amounts to an unfair advantage from those where it does not. Observing mainstream human conduct suggests that vulnerability plays an important role in determining relational obligations.<sup>120</sup> Voluntary market transactions are not always perceived as fair when one party suffers from an *endowed* disadvantage that significantly reduces its bargaining power when entering potential market transactions.<sup>121</sup>

Disadvantaged parties are de facto forced to enter long-term economic relationships even though their market returns do not provide for decent lives because they simply do not have any acceptable alternatives.<sup>122</sup> This type of disadvantage is of particular concern when it is not something the disadvantaged can directly control and when it perpetually reduces their ability to attain a decent life through market participation.

When a party's profit comes primarily from the other party's ongoing misfortune, this behavior seems unfair. Unfortunately, human history is full of examples of these types of behaviors. For example, some Polish and Lithuanian individuals extracted huge amounts of resources from ghetto-imprisoned, starving Jewish individuals in return for basic food products during World War II.<sup>123</sup> But the Lithuanian and Polish people were not responsible for the imprisonment of the Jewish people in the ghetto and were themselves subject

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<sup>119</sup> Providing a full list of potential vulnerabilities is beyond the scope of this Article. In the context of international trade, however, a few important ones should be mentioned, including food insecurity, acute financial insecurity, lack of relevant expertise or information, and inability to cope with an effective cartel or monopoly arrangement. Although not all people living in developing countries suffer from these types of endowed disadvantages and not all people living in developed countries are immune from them, people living in developing countries are much more likely to suffer from these disadvantages.

<sup>120</sup> See GOODIN, *supra* note 63, at 28–41 (exploring special responsibilities to people with whom one has previously voluntarily contracted).

<sup>121</sup> See DEMARTINO, *supra* note 116, at 77–79 (explaining that neoclassical economic analysis accounts for how inequality in initial resources impacts preferences and ability to exercise free choice).

<sup>122</sup> See Feinberg, *supra* note 111, at 208 (describing situations where individuals have “no choice but to comply or else suffer an unacceptable alternative” (internal quotation marks omitted)).

<sup>123</sup> YITZHAK ARAD, *GHETTO IN FLAMES: THE STRUGGLE AND DESTRUCTION OF THE JEWS IN VILNA IN THE HOLOCAUST* 307–08 (1982).

to an involuntary occupation by Nazi-Germany.<sup>124</sup> Examples of unfair behavior, however, need not be set in such extreme scenarios. Examples can also include contemporary everyday occurrences where American employers, who are not directly responsible for poverty in foreign countries, take advantage of their employees' illegal immigration status to deny them basic labor rights and employment conditions.<sup>125</sup> Although the nonvulnerable parties described did not directly contribute to the vulnerability of the other parties, the transactions were "voluntary," and the disadvantaged parties would be worse off if the transaction had not occurred, we nevertheless regard their behavior as exploitative and morally flawed. We disapprove of non-disadvantaged parties who selfishly use their comparative advantage in these scenarios because it is based on the misfortune and suffering of their counterparties.

This point merits more attention. While it is clear that human beings resent those who take advantage of the vulnerable, this resentment may not be justified normatively. There seems to be a sound case that if society deems redistribution toward the vulnerable as desirable, then society as a whole should bear the cost of and responsibility for this redistribution.<sup>126</sup> Such an arrangement would arguably be more efficient than the distortion of market transactions.<sup>127</sup> To argue that there is a normative need for relational duties, one has to provide more than a knee jerk reaction to explain why voluntary transactions in which parties take full advantage of their counterparties' vulnerability are unfair and normatively undesirable.

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<sup>124</sup> See TADEUSZ PIOTROWSKI, *POLAND'S HOLOCAUST* 21–33 (1998) (detailing atrocities committed during Nazi invasion and occupation of Poland).

<sup>125</sup> This problem may be more serious than many Americans perceive. While many American businesses will not directly hire illegal immigrants as employees, many will outsource jobs to service firms that do. The competitive nature of subcontracting low-skilled service positions requires many of these subcontractors to reduce their labor costs—partly by taking into account the low bargaining positions of these foreign employees. See generally Catherine L. Fisk & Michael J. Wishnie, *Hoffman Plastic Compounds, Inc. v. NLRB: The Rules of the Workplace for Undocumented Immigrants*, in *IMMIGRATION STORIES* 311 (Peter H. Schuck & David A. Martin eds., 2005) (discussing exploitation of undocumented workers by American companies and failure of labor laws to protect them).

<sup>126</sup> This debate echoes in every decision of the state to protect the vulnerable via regulation of nonmonopolistic market transactions—for example, by imposing a minimum wage, by requiring employers to provide medical leave and benefits, and by enforcing antidiscrimination and consumer protection legislation. For a critique of some of these initiatives, see Daniel Shavero, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 407 (1997), which critiques minimum wage initiatives as insufficient to address adequately the needs of households that it purports to assist.

<sup>127</sup> See generally Kaplow & Shavell, *supra* note 4 (arguing that income tax and transfer system more efficiently redistributes income than use of legal rules).



There are a number of possible responses to this challenge. First, if there is a strong and consistent observation that the vast majority of people perceive a certain transaction as morally faulty, the discussion of why relational duties should protect vulnerable parties may not be necessary. In a particular society, the fact that something overwhelmingly seems wrong to the members of that society may suffice to raise relational duties. For example, imagine a society where a large portion of the population considers it wrong for people to work at bakeries for more than ten hours per day or sixty hours per week because of the hard labor it involves. In such a society, bakery owners may have a relational duty not to take advantage of the low bargaining powers of their vulnerable employees to “overwork” them. Even though a shortage of alternative employment possibilities might compel vulnerable employees’ to work more than what is considered reasonable in that society, employers may have a relational duty not to take advantage of this vulnerability. This argument is a positive reflection of the state of affairs in a given society, and not so much a normative argument. Nevertheless, it makes sense that in a society that has cohesive norms, relational duties that follow those norms would be an integral part of how the society operates.

The second response relies on the positive assumption that market mechanisms, actions of social agents (such as state-sponsored welfare institutions), or voluntary actions of private parties cannot sufficiently reduce vulnerabilities.<sup>128</sup> This response, in fact, assumes that a certain degree of uncompensated vulnerability is an inherent part of society. In this state of affairs, it would be counterproductive to strip private parties from any duty to protect the vulnerable, because to do so would be to give those parties socially undesirable incentives to exploit those vulnerabilities. Without relational duties, all duties to protect the vulnerable fall to social agents such as the state, and private parties and communities would have the incentive (and social legitimacy) to maximize their wealth by exploiting the comparative disadvantage of the vulnerable—even though they would know that the vulnerable had no other real protections available to them. Thus, in the absence of relational duties, the ultimate goal of providing more protection to the vulnerable may be severely undermined. For example, imagine a society that seeks to protect individuals who, because of social and genetic endowment, were unable to obtain a good education. Among other things, this protection would allow these vulnerable individuals to make well-informed decisions

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<sup>128</sup> This assumption is particularly plausible given that some measurements of vulnerability are determined in relative rather than absolute terms.

about sophisticated mortgage products. In this society, mortgage sellers should have relational duties to explain the different contracts they are selling to potential “unsophisticated” consumers. Otherwise, the social goal of protecting this vulnerable group would not be adequately met.

The third response is, in a sense, a combination of the two former ones, and states that the absence of relational duties to protect the vulnerable would result in negative expressive-value externalities. In a given society, where there exists a goal of protecting the vulnerable as a positive matter, it is inconceivable to have private parties and communities engaging in the exploitation of vulnerabilities. Such exploitation would project a vision of society that does not care for the vulnerable and would thus have negative externalities upon intangible social fabrics—e.g., trust, solidarity, and human compassion—which are necessary for a well-ordered functioning society. This point is a strong argument because it explains not only why private parties may have relational duties but also why social agents should not compensate private parties when they incur costs to meet those duties. For example, imagine a society that values racial equality. In this society, employers may have a relational duty not to discriminate against minority group members. Given the strong social stand against discrimination, it would be unreasonable to compensate employers that hire employees that come from minority groups. Even if such a reimbursement was administratively possible, it would project a vision that minority group members are indeed different and inferior, rather than reinforce the commitment to racial equality.

The above three justifications for relational duties stress what all of us know from our daily experiences—that as a matter of ethics, and not necessarily as a matter of law, we are all required not to take full advantage of others’ vulnerabilities. We therefore should be able to characterize even a Pareto-efficient transaction as unfair if it involves a vulnerable party who is not able to attain a basic minimum or decent living standard *and* its benefits are unevenly skewed toward a party who is able to live above that standard even without the benefits that the transaction with the vulnerable party confers.

The conclusions of the above analysis may seem counterintuitive to many living in developed countries. After all, the prevalent perceptions are that people living in developing countries are “taking our jobs.” This statement is true to some extent, but it does not change the fundamental point that I have stressed—that upon interacting with peoples that are materially disadvantaged (in both absolute and relative senses), we need to put some moral constraints on our ability to seek self-serving profits. The voluntary nature of the transaction and

the fact that those people would fare worse in its absence are not, therefore, materially important. To produce goods cheaply, many individuals working in developing countries work in harsh and unsafe labor environments. Given the ability to earn a viable living in a different way, most individuals would choose not to work in these places, but their poverty forces them to do so. We take advantage of their poverty in ways that we would regard as immoral if they were in a domestic setting. For example, few would contend that either of the following Pareto-efficient transactions is moral: buying a kidney from a compulsive gambler who will lose all of the money or denying basic work safety conditions to employees that enter the country illegally. In short, human beings tend to regard a transaction as immoral when a party in desperate need receives very low returns for performing an unsafe or degrading task. We do not need a comprehensive definition of transactional fairness to know the above transactions are unfair, and, by the same token, we do not need such a definition of fairness to see that our trade relationships with peoples in developing countries may not be fair.

It is worth examining how this analysis applies to international trade in concrete terms. It is not, I think, controversial to point out how global inequality translates to developed countries' privilege.<sup>129</sup> Low standards of living and low levels of human capital formation in developing countries result in low wages, lax regulatory enforcement, and underpriced natural resources—all designed to attract foreign investments. These factors result in higher purchasing power in developed countries and in higher yields on investments made primarily by their residents.<sup>130</sup>

Developing countries, and the people living in them, strive for foreign investment and cannot afford to reject certain investments or certain jobs. The vulnerability and low bargaining power of developing countries dictate that certain types of economic activities with high long-term negative externalities are shifted to them. Businesses associated with these externalities include pollution-intensive industries and businesses that benefit from low labor standards and practices (e.g., lax safety regulation in dangerous workplaces or gender-based exploitation of young women from rural areas).

Strong economic growth, however, is rapidly mitigating some of these disadvantages in certain countries—but not in all of them. Even

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<sup>129</sup> See generally Jan Nederveen Pieterse, *Global Inequality: Bringing Politics Back In*, 23 *THIRD WORLD Q.* 1023 (2002) (linking inequality to increased privilege in developed countries).

<sup>130</sup> Beitz, *supra* note 7, at 373–75 (investment yields); Thomas Pogge, *Severe Poverty as a Violation of Negative Duties*, 19 *ETHICS & INT'L AFF.* 55, 72 (2005) (purchasing power).

in countries with robust growth figures (e.g., China and India), where market forces increasingly provide this growth, a majority of people are still unable to attain basic health care services, adequate primary education, and basic services like running water. Many developing countries in Asia, sub-Saharan Africa, and South America are far from reaching a state where the majority of the population attains a decent lifestyle, and many of the people in them (including the majority in China and India) will not reach it in the next decade or so. This means that even though economic growth may allow for tremendous progress, child mortality from preventable diseases will probably continue to be very high in most if not all of these countries, at least for the next several years.<sup>131</sup> Furthermore, given the poor educational infrastructures in many of these emerging economies, new generations of young adults are entering the global labor market with little prospect of attaining anything more than low-skill, low-wage jobs. Although market forces are pushing toward a convergence in living standards across the globe, this process of convergence is simply too slow given the dire need. The “radical inequality” between developed and developing countries therefore helps to maintain a vicious circle of poverty.<sup>132</sup> Regardless of whether one thinks that this is the responsibility of developed countries, it is important to recognize that in this cycle are individuals from the developing world that participate in global trade with few chances to realize a genuine opportunity for a decent life.

Two main elements intensify the immoral nature of this pattern.<sup>133</sup> First, the dominance of developed countries in the institutions governing global trade has resulted in many examples of trade arrangements favoring developed countries.<sup>134</sup> The most well-known incident of this kind is the agricultural exception in trade agree-

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<sup>131</sup> See UNICEF, Childinfo Child Mortality Statistics Overview, <http://www.childinfo.org/mortality.html> (last visited Jan. 31, 2010) (noting that “[c]hild mortality is closely linked to poverty” and that “the rate of decline in under-five mortality is still grossly insufficient to reach the MDG goal by 2015”).

<sup>132</sup> Pogge, *Real World Justice*, *supra* note 35, at 37 (coining term “radical inequality” to describe pervasive inequality that keeps those who are worst off in bad position in both relative and absolute terms).

<sup>133</sup> A third element, mentioned *supra* Part I.A, is the awareness in developed countries of issues of global poverty and inequality, which does not allow us to ignore these issues anymore. Global trade is ancient, but electronic media and international NGOs have only recently made information about the consequences of global poverty and inequality so readily available to the general public.

<sup>134</sup> See Thomas Pogge, *Priorities of Global Justice*, 32 *METAPHILOSOPHY* 6, 12 (2001) (describing how economic infrastructure of trade has been structured to favor interests of developed countries, including intellectual property protections, environmental standards, and taxation conventions); Ethan B. Kapstein, *Distributive Justice and International Trade*, 13 *ETHICS & INT'L AFF.* 175, 191–99 (1999) (arguing that trade arrangements have histori-

ments.<sup>135</sup> The international trade regime encourages the liberalization of services and commodity markets, pushing countries to reduce their trade barriers and liberalize their import and export markets. This same regime that promotes liberalization, however, also specifically allows countries to protect (through tariffs and subsidies) their domestic agricultural producers. This exception is primarily designed to shelter the agricultural sector in developed countries from competing with foreign imports from developing countries.<sup>136</sup>

Some argue that international institutions such as the IMF, the WTO, and the Organisation for Economic Co-operation and Development (OECD) engage in regulatory capture by operating in a manner that advances the interests of developed countries.<sup>137</sup> I think that these arguments are exaggerated. However, the fact that many developing countries have little influence on these institutions and are primarily rule-takers is undisputed. Certain international institutions dominated by developed countries can therefore materially and nonreciprocally influence the economic structure of developing countries. Given the public-good characteristics of global trade and the difficulty of exiting its “voluntary” arrangements, this regulation without representation is morally disturbing. Global trade rules entangle people in developing countries in path-dependent arrangements without ever giving them any substantive voice to influence those rules.<sup>138</sup>

Second, the growing capacity of developed countries to reduce the most devastating effects of global inequality and poverty contributes to the moral discomfort created by international trade.<sup>139</sup> As mentioned, the relatively modern phenomenon of enhanced economic growth has only recently enabled the majority of individuals in devel-

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cally been unfairly biased in favor of developed countries’ interests at expense of developing countries).

<sup>135</sup> For a discussion of this issue, see DANI RODRIK, *ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH* 222–23 (2007).

<sup>136</sup> See *id.* Agriculture is still a relatively labor-intensive industry, in which developing countries have the comparative advantage of lower wages.

<sup>137</sup> See, e.g., Helen V. Milner, *Globalization, Development, and International Institutions: Normative and Positive Perspectives*, 3 *PERSP. ON POL.* 833, 838–43 (2005) (presenting analysis implicitly suggesting IMF and World Bank promote policies that serve Western developed countries’ hegemony); cf. Michael Pendlebury, *Global Justice and the Specter of Leviathan*, 38 *PHIL. F.* 43, 46 (2007) (arguing people are at mercy of powers greater than states).

<sup>138</sup> Kok-Chor Tan, *Critical Notice*, 31 *CAN. J. PHIL.* 113, 122 (2001) (reviewing JOHN RAWLS, *THE LAW OF PEOPLES: WITH THE ‘IDEA OF PUBLIC REASON REVISITED’* (1999)).

<sup>139</sup> See F.M. Kamm, *The New Problem of Distance in Morality*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY*, *supra* note 51, at 59, 63 (arguing that interdependence and ease of access may replace notion of “distance” in considerations of duties to others).

oped countries to attain enough surpluses over what is required for them to pursue decent lives. Hence, even though a more egalitarian distribution of resources was always a theoretical option, for the first time in human history, the majority in developed countries could retain a decent standard of living even if they “gave up” some of the market return of their comparative advantages.

The analysis of this subsection does not suggest that specific parties should not engage in cross-border trade transactions because they are unfair. In fact, in a competitive market, parties do not have the privilege to engage only in fair transactions. Neither the potentially exploited party nor the potential exploiter has any ability to influence the economic equilibrium, even if they regard it to be an unfair one. In the context of international trade and investments, firms increasing their costs in order to provide higher-than-market returns to parties in developing countries would be driven out of business given their lower competitive yields.

### *3. Relational-Distributive Justice and the Coffee We Drink*

The above argument suggests that international trade entails some unfair patterns, which may therefore result in relational obligations. It further implies that in a competitive market the task of correcting unfair patterns cannot be assigned to private agents.

An example may help to illustrate this point. Coffee is an agricultural product raised in many developing countries. For simplicity, assume that coffee is a standard commodity with no significant quality variations. Further assume a scenario in which the average price of coffee to end consumers in the developed world is \$5 per pound, while the coffee farmers sell to distributors has an average price of 5¢ per pound. The return that the farmers receive for their crops allows them to attain only a subsistence level.

The price variation reflects, of course, no malice. Farmers could grow coffee in almost every developing country with a tropical climate; therefore, there is a high potential supply of it. In many of these countries, agriculture is the only or the main source of employment because of the low human capital resources and the lack of industrial infrastructure. Hence, a competitive market is bound to reduce the returns of coffee farmers to subsistence levels. Under the assumption that the retail coffee markets in developed countries are competitive, the difference of \$4.95 per pound between the price paid by the coffee distributors to the farmers and the price paid by the end consumers reflects the real costs borne by the coffee industry (e.g., transportation, advertisement, etc.).

Assume further that the vast majority of the individuals from developed countries operating in this industry (as investors, consumers, and/or employees of firms in the coffee trade business) enjoy a lifestyle above that which could be characterized as “decent.” Many would think that the price paid to the coffee farmers is “unfair” because if they were paid 20¢ per pound instead of 5¢ (4% rather than 1% of the retail price), the farmers’ living standards would rise dramatically—enabling them to attain basic goods such as decent K–12 education for their children and better health care services. If such a uniform price increase were to occur, the price to the end coffee consumer would increase by no more than 3 percent. If the demand for coffee is not completely elastic, and coffee is not completely interchangeable with other products such as tea, this change should not affect coffee sales significantly. Additionally, most individuals from developed countries operating in the coffee industry would be able to maintain their high living standards.

True as the above may be, an individual coffee importer cannot buy the coffee from its producers at any more than 5¢ per pound. Given coffee’s homogeneity, and the market returns requested by everyone working in the coffee processing and distributing industry, such an importer would be put out of business because of its higher costs. In reality, as in theory, the global competitive market benefits the end consumer. Indeed, in the last decades we have witnessed how international trade has contributed to an excessive and unprecedented increase in the consumption power and living standards of residents in the developed world. These excessive gains to end consumers in the developed world align with the intuition that the benefits of international trade are in many cases unfairly skewed.

Cosmopolitans will find this example troubling. Why do people in the coffee industry owe anything to the coffee farmers and not to the farmers’ neighbor—a barber—who just by coincidence does not take part in the coffee trade? This objection overlooks a point made earlier that relational duties exist in *parallel* to whether one agrees that there is any cosmopolitan duty.<sup>140</sup> People in the coffee industry may have special relational duties toward coffee farmers even if all humans (barbers and farmers alike) would have been granted a certain minimum by a cosmopolitan political arrangement.

A somewhat different response is that the cosmopolitans’ farmers versus barbers challenge misses the essence of the relational duties argument. Barbers, as well as other service providers, are part of the coffee-farming community. Members in this community work hard to

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<sup>140</sup> See *supra* Part II.B (discussing relational distributive duties).

supply consumers in developed countries with the products that they desire. While the coffee-farming community fares better with foreign trade than without it, its members are still far from having a decent living standard, which they could attain if their developed-world counterparts were willing to sacrifice a very small portion of their profits. The relevant question therefore is not what is the difference between the farmer and the barber but whether our benefit from the extreme poverty of the coffee-farming community, and this community's dependency on us, increases our moral obligations toward its members.

This example serves two purposes: First, it demonstrates that there could be a relatively broad agreement that certain "ordinary" international market settings are "unfair" even if it is difficult to perfectly define transactional fairness. This perceived unfairness demonstrates that relational-distributive concerns may play an important corrective role in voluntary international market settings. Second, it suggests that, in a competitive market, relational-distributive obligations entail a collective action problem. This is a structural problem, and addressing it requires the formation of a mandatory mechanism to overcome it because competitive pressures disable private agents from remedying it themselves.

### *B. Institutionalizing Relational Duties*

Up to this point, this Article has established that relational duties exist and that some features of international trade exhibiting unfair patterns breach those relational duties. It also demonstrated that it is impossible to address these types of problems on an individual level. Here, I explain why, in the context of international trade, relational duties give rise to redistributive justice claims. Rather than affecting our individual behavior, relational duties arising from international trade should affect the structure of the international or supranational political institutions governing trade. Accordingly, even though the relational duties are duties individuals owe to one another, the fulfillment of these claims and duties on the international level should occur among countries.

#### *1. Close Relationships over Long Distances and the Collective Action Problem*

Increasing competitiveness in global markets makes the fulfillment of all of one's relational duties a losing proposition. The overwhelming number of long-distance relationships to which we are indirectly exposed make it next to impossible for us to prioritize all



our relational duties, especially those toward people whom we do not personally know. Thus, even if it were recognized that the global economy sometimes facilitates unfair trade relationships between individuals from developed and developing countries, those in the developed world would not be able to fulfill their relational-distributive duties merely by modifying their personal conduct. This is a classic collective action problem, which should be settled by enforcing a comprehensive, involuntary standard of institutional intervention to help parties meet their duties without being placed at a competitive disadvantage.

As mentioned, the notion of relational obligations that correlate with actual, (at least partly) voluntary relationships is evident in the context of our familial, social, work, and community-based relationships. For example, interpersonal intimate relationships between adults may be subject to moral criticism, but only in extreme cases—e.g., polygamy, physician-patient, and teacher-student relationships—do such relationships require involuntary state regulation. Our challenge is to explain why similarly relational duties have radically different implications in the international trade setting.

The key answer to this challenge is that distance and scale change our ability to fulfill our relational duties on an individual basis.<sup>141</sup> International trade exposes us to a wide network of relationships with a lot of individuals—some of whom suffer from acute disadvantages. Even though trade draws people closer, geographic distance and division of labor in modern economic markets make it impossible to trace those disadvantages. Individuals cannot be expected to undertake costly information-finding and analyzing of expenses to determine their actual relationships and the best way of fulfilling their relational obligations toward distant individuals. This difficulty makes it implausible for a single party to undertake the task of determining and prioritizing among different relational obligations and thus prevents them from acting to meet those obligations.

Just as in the case of individuals, peoples compete for resources. In an insufficiently regulated social structure, this competition may lead to immoral actions.<sup>142</sup> Current international trade relies primarily on parties' ability to advance their position through free contractual bargaining;<sup>143</sup> it is therefore inappropriate to address the problem of

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<sup>141</sup> Andrew Kuper, *More Than Charity: Cosmopolitan Alternatives to the "Singer Solution,"* 16 *ETHICS & INT'L AFF.* 107, 112 (2002).

<sup>142</sup> Jeremy Waldron, *Who Is My Neighbor?: Humanity and Proximity,* 86 *MONIST* 333, 349 (2003).

<sup>143</sup> As mentioned earlier, international organizations such as the IMF, the WTO, and the Organisation for Economic Co-operation and Development (OECD) facilitate our cur-

unfair relationships between developed and developing countries through these channels.<sup>144</sup> Instead, international institutions need to internalize these negative moral externalities of global trade. Since this is a systemic problem, and not a problem that can be corrected effectively through reasonable changes in the conduct of individual parties, it becomes an issue of justice. Global regulation of relational duties is therefore required not only to improve the standard of living in developing countries but also, and perhaps primarily, to help peoples of the developed world remedy the immoral consequences of their occasionally unfair competitive engagement in global trade arrangements.<sup>145</sup>

It should be no surprise that socio-political institutions are necessary to set a standard that helps individuals in the developed world satisfy their relational duties. Part III.A established that trade relationships among peoples have created a complex social construct based on economic associations. The operational goals and structure of this enterprise may differ substantially from those of the domestic state, but both are socio-political constructs. Our domestic experience indicates that coordinating behaviors in such complex social settings requires establishing political institutions that use formal legal devices.<sup>146</sup> Obviously, these legal devices are crude mechanisms that help us satisfy relational obligations only through proxies. There are, however, likely no other viable alternatives.

In Part II.C, I postulated that states will remain the major taxing and spending entities in the foreseeable future. From this, I concluded that states would have to execute any major future global redistribution.<sup>147</sup> Accordingly, in the context of relational duties resulting from

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rent order. The ideology of these organizations is that market participation, the guarantee of freedom of contracts, and protection of property rights are the way to improve human welfare. *See generally supra* Part III.A.1.

<sup>144</sup> For an analysis that reaches a somewhat similar observation, see Ronald U. Mendoza, *The Multilateral Trade Regime: A Global Public Good for All?*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 455 (Inge Kaul et al. eds., 2003).

<sup>145</sup> Feinberg, *supra* note , at 225 (stating that state interference is needed not only to protect exploited party but also to protect exploiter from engaging in behavior that inflicts moral harm).

<sup>146</sup> Cronin & De Greiff, *supra* note 106, at 19–20; *see also supra* note 126 (providing examples of state protection of vulnerable individuals via regulation of nonmonopolistic private transactions).

<sup>147</sup> This, of course, is a refutable assumption, and we may eventually witness other actors—perhaps multinational NGOs such as Oxfam International, which rely on voluntary giving, or regional associations such as the European and African Unions—evolve to take on such a role also. No paradigm, however, has yet offered a viable alternative for an effective international regime that does not rely on state action.

cross-border trade, it is useful to think of a state as an aggregate of its citizens' relational duties.<sup>148</sup>

This conclusion should not be surprising. The argument advanced is not that, as an ontological matter, states *are* an aggregate of their citizens' duties. Rather, I assert that if one accepts the relational-distributive analysis, then in the world we live in, where states are necessary to promote any large-scale redistribution among peoples, policymakers should think of the state construct as a way to meet the relational duties of their citizens. This modest claim aligns well with the institutional-analysis scope of this Article, which examines how existing real-world institutions should operate justly.

To be sure, global trade is not new; neither are the unfair and exploitive practices associated with it. The world has witnessed rapidly growing volumes of international trade since the early days of imperialism, which was bluntly oppressive and exploitive toward the developing world. In the days of colonization, however, it was easy to determine relational duties because members of one nation (the colonizers) were directly exploiting members of another one (the colonized). Even though these duties were hardly ever met, it was easy as a normative matter to determine the obligation. The current situation of economic integration and interrelatedness among different countries' economies diffuses this chain of responsibility. As a result, we witness a web of international relations, which allows all developed countries to benefit from the vulnerabilities of developing countries but does not hold any of them responsible. This diffusion of responsibilities is the essence of the collective action problem that my proposal seeks to address.

The determination of the actual duties that states owe to other states should be made with reference to the following factors: their relative economic positions in terms of per capita GNP (to indicate their relative inequality), their poverty measurements, and the volume of trade between them. The poverty and inequality measurements between two trading countries offer a proxy for the potential existence of unfair relationships between them. For example, an unfair relationship is likely to exist between two countries when one has a per capita GNP in the top quintile (worldwide) and the latter has a per capita GNP in the bottom quintile. To further support a finding of an unfair trade relationship, one would have to show that the average income in the less-developed country does not allow for a decent standard of living. By using an average GNP figure, this mechanism assures that relational-distributive claims would not arise from coun-

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<sup>148</sup> Cf. Cappelen, *supra* note 5, at 106–08 (making similar statement).

tries with high poverty rates that are the result of unequal intra-nation wealth distributions.<sup>149</sup>

After the standards for inequality and poverty have been determined, the existence of an actual relationship and the scale of this relationship should be assessed. The volume of trade serves this function by indicating the degree of interconnection between the parties and thus the corresponding intensity of the relational duties. The relative volume of trade that specific developed countries have with a disadvantaged developing country could also determine the relative burden that each country should have in fulfilling those duties on behalf of its citizens.<sup>150</sup>

The above suggestion is just one example of a possible metric that could help to establish the existence of relational duties among peoples. The metric in the example relies on crude GNP measurements because GNP is a relatively familiar and well-established concept.<sup>151</sup> The factors it sets forward are dynamic and should be revised periodically—so that when the economic positions of two countries converge (whether because the poor country gets richer or vice versa) and the disparity in their bargaining positions is assumingly mitigated, their relational duties would be reduced and eventually eliminated. This Article's suggestion that some dynamic factors should be used in international agreements is not new; indeed, such dynamic factors

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<sup>149</sup> For example, let's assume that Russia is a country endowed with enormous natural resources and that it has a relatively high per capita GNP. It nevertheless has high poverty measures because of the manner in which these resources are allocated. In the previous (semidemocratic) elections, Russians seemed to endorse this allocation of wealth. National sovereignty principles therefore (a) prescribe that Russians, and not peoples of developed countries, are held accountable for Russian political decisions and (b) preclude non-Russians from bearing relational-distributive duties toward Russians. The analysis would be different for a different country. For example, let us now assume that Bolivia has the same problems of inequality and inadequate political institutions as Russia but a far less generous endowment of natural resources. The Bolivian political system may indeed contribute to the poverty of its citizens, but even if allocation were more equal, most Bolivians would be unable to attain a decent living standard.

<sup>150</sup> Since we are dealing with proxies and multiparty scenarios, we need to think of a way to correlate the level of duty. For example, assume that I owe my brother more than I owe my cousin, and that I would owe my cousin more if I were the only relative he had than if he had numerous others that were much more affluent than me. In the same way, the obligation of country A to country B may depend on other relationships that they both have with other countries.

<sup>151</sup> There are other indicators, however, which may be superior to GNP. More elaborate indicators could take into account purchasing-power indexes and, more importantly, capabilities indexes developed in accordance with the capabilities approach developed by Sen and Nussbaum. *See supra* note 92. The U.N. Development Program has recently adopted such a capabilities index in its report. *See* U.N. Dev. Program, *Human Development Report 2009 Overcoming Barriers: Human Mobility and Development*, 14 (2009), [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf).

already play an important role in fundamental international agreements.<sup>152</sup> There are other variations and alternative metrics that nation-states could use to measure the relational-distributive duties and claims of their peoples. This Article does not argue that there is only one metric through which relational duties could be met, but it argues that establishing international and supranational institutions that promote considerations of relational-distributive obligations is the affirmative duty of sovereigns.

The notion that international and supranational political institutions should be modified to correct systemic problems builds on a body of literature in liberal thought stressing individuals' duty to establish just institutions,<sup>153</sup> especially when concerns over protecting the vulnerable are involved.<sup>154</sup>

Once a systemic injustice is recognized, it is the affirmative duty of each individual to help establish just institutions to correct injustice by setting a common standard with which all people should comply. Such a standard helps achieve two goals. First, it makes it easier to determine that everyone is contributing at least her fair share—which, as in the case of any common action, helps to deter free riders. Second, it sets a benchmark for what different parties “owe” to each other and relieves them from the constant need to ameliorate injustices for which they are not directly responsible.

## 2. *Understanding the Difference Between Brazil and Bhutan*

The argument that relational duties are a source of global distributive claims differs from the more traditional impartial-justice, cosmopolitan argument because it bases redistributive relational claims on actual trade relationships. By basing these claims on actual relationships, it recognizes that in a world with multiple sovereigns, basing cross-border redistribution on impartial factors is unsustainable. It is

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<sup>152</sup> For example, the Kyoto Protocol gives developing countries more time to meet their emission targets. DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* 33–45 (2001).

<sup>153</sup> See TAN, *supra* note 8, at 34 (“[J]ustice can call on us to establish common institutions where none existed if doing so is necessary to facilitate its ends.”); see also NUSSBAUM, *supra* note 92, at 306–10 (arguing that people have duty to create “a decent institutional structure” to promote human capabilities); cf. George Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241, 257–58 (1987) (asserting that individuals have obligation to support institutions “only when [they] provide[] goods that are presumptively beneficial”).

<sup>154</sup> Arguably, this arrangement is motivated primarily by the intuition that the least well off should be protected. See GOODIN, *supra* note 63, at 111 (“[P]rotecting the vulnerable . . . must be primarily a matter of protecting those people whose vital interests are particularly vulnerable to our actions and choices. In short, the argument for protecting the vulnerable is first and foremost an argument for aiding those in dire need.”).

also more intuitive than the cosmopolitan argument because it does not classify the primary allegiance individuals feel toward their compatriots as immoral.

To illustrate this point, consider four countries: the United States, Botswana, Brazil, and Bhutan. With regard to these four countries, assume the fact pattern below.

Of the four, the United States is the richest country, in the sense that it has the highest per capita GNP.<sup>155</sup> Botswana is a poor country. Because of its relatively small population, democratic government, and huge diamond resources, however, all of its citizens have access to reasonable health and education services. Brazil and Bhutan are also poor countries, but many of their citizens do not enjoy minimally acceptable levels of subsistence. In these two countries, the largest causes of mortality are preventable diseases such as dysentery, no comprehensive childhood immunization program is available, illiteracy rates are high, and many families face food and shelter insecurity.

The United States has some degree of commercial relationships with Botswana and practically no such relationships with Bhutan. On the other hand, the United States has an extensive commercial and diplomatic relationship with Brazil. American corporations are invested heavily in Brazil, and American shareholders have yielded substantial profits on their Brazilian investments over the years. Brazilian businesses use intellectual property developed in the United States, and a lot of Brazilian manufactured and agricultural goods are sold in U.S. markets.

Cosmopolitan notions of impartial distributive justice would require the United States to transfer funds to the other three countries for one or both of the following reasons: First, all human beings require equal moral consideration; second, the United States shares the same economic system with the other three countries. Pogge's modified "do no harm" cosmopolitan argument would claim that the international economic order harms the poor countries, and the United States should compensate them for that harm.<sup>156</sup> Under a cosmopolitan approach, Americans should provide the other three peoples with a similar and equal moral respect and resources so that all individuals in those three countries may reach a certain distributive standard that would allow them to lead decent lives. Of course, faced with the reality that most Americans exhibit a bias in favor of compa-

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<sup>155</sup> I chose these countries because there has not been any direct form of oppression or war between any two of them in the recent past so the analysis would not be complicated by possible claims for compensation based on historic events.

<sup>156</sup> See *supra* notes 35–44 and accompanying text (explaining Pogge's position).

triot, cosmopolitan theory may recognize the need to compromise on this ideal. Yet even under such a compromise, in which American citizens were allowed to grant preferential treatment to other Americans, American citizens still would not be allowed to differentiate among foreigners. Hence, they would not be able to show a distributional preference toward Brazilians as compared to the Bhutanese so long as the levels of poverty in both countries were the same. This point illustrates the major problem with Pogge's "do no harm" argument: the difficulty of establishing the ways in which Americans harm countries with which they have little contact, such as Bhutan and Botswana.

On the other hand, statisticians such as Rawls claim that the United States has no obligation toward any of these countries other than in cases of acute humanitarian crises.<sup>157</sup> If earthquakes hit Bhutan, Botswana, and Brazil, the United States is equally obliged to help all of them. Unless such a devastating occurrence happens, American citizens have the same non-duty relationship with poor Brazilians as they do with poor people in Bhutan. They should have no special duty to Brazilians raising their coffee, and have no responsibility if, as a result of the decision to subsidize corn for the purpose of producing ethanol in the United States, many poor Brazilian families experience food insecurity. The fact that the Brazilian economy is connected to and rather dependent on the American economy does not strengthen or weaken Brazil's plea for American help; therefore, it is in exactly the same position as Bhutan.

Unlike the other approaches, under the relational-distributive obligations I propose, the commercial relationships between Americans and Bhutanese are insignificant, so Americans may have humanitarian duties toward the Bhutanese but not relational duties. The case of Botswana is slightly more complicated, because its citizens may not qualify as poor in an absolute sense, and their commercial relationships with Americans are not very intensive. Accordingly, if one adopts the position that relational duties should only exist for those that qualify as poor, it is reasonable to expect that Americans do not hold any relational duties toward the people living in Botswana. If one views moral duties as arrayed along a continuum, one can argue that the United States has to account for some, relatively weak, relational duties that Americans owe to people living in Botswana.

Under the relational duties framework, Americans have major distributive obligations toward Brazilians. Brazil's poverty and unequal position suggest that there is a high probability of unfair exchanges between the two peoples; moreover, the high volume of

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<sup>157</sup> See *supra* notes 25–27, 33–34 and accompanying text (explaining Rawls's position).

trade between them suggests that their relationship is very strong. The relational duty framework uses trade relationships between countries as a proxy for the relational duties between their peoples. Therefore, since the United States and Brazil are currently the best representatives of their peoples, there should be a direct correlation between those factors and the wealth transfers from the United States to Brazil.

Suppose that apart from the United States, Brazil also has extensive commercial relationships with Portugal, Britain, and France. In this case, the burden of meeting the relational-distributive duties toward Brazil should be allocated among these countries according to two factors: trade volume between each country and Brazil and each country's capacity to help Brazil. Even though the vast majority of people in all four of Brazil's above-mentioned trading partners enjoy a higher-than-decent living standard, there are great differences between the four countries. For example, as between Portugal and the United States, the latter commands much more wealth and has a greater capacity to help.

### 3. *Relational Duties Among Countries: Some Final Remarks*

The above proposal may raise some concerns. First, the existence of a collective action problem, which makes it difficult to impose fair trade practices, reduces but does not necessarily nullify the possibility for fair conduct. Some companies may already engage in fair trade practices today. Therefore, shifting the responsibility to the state level may reduce the "demand" for private fair conduct. This may absolve existing unfair practices and be less accurate than private action, because states are only crude proxies for the level of their peoples' involvement in international trade.<sup>158</sup> The response to this concern is that while adopting the above notion would probably impact the behavior of private parties,<sup>159</sup> this would be true for any type of regulatory action. Government action is justified only if a collective action problem is so severe that addressing it with regulation is likely to yield more beneficial results than allowing private parties to choose for themselves. Policymakers face this problem frequently—for example, more welfare may result in less charity, and setting state standards on environmental and safety issues may lower the actual practices of cer-

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<sup>158</sup> I thank Lee Fennell for bringing this point to my attention.

<sup>159</sup> One could imagine other scenarios, however. For example, such a policy could help to center issues of fair conduct in the heart of the political debate.



tain businesses.<sup>160</sup> The above discussion demonstrates why the collective action problem associated with global markets' competitiveness and interrelatedness disables parties from effectively addressing the issue of fair practices.<sup>161</sup> In this market setting, private actions are likely to be sporadic (and may only be motivated by public relations concerns),<sup>162</sup> so the benefits that stem from any potential state action would likely compensate for any reduction in those practices.

Second, this Article's argument implicitly assumes that governments are benevolent and competent agents serving their peoples' interests. This assumption, unfortunately, is not the case with many governments in developing countries that suffer from weak institutions, low expertise, and corruption.<sup>163</sup> It is, however, important to recognize that this is a general problem with any transfer to such countries rather than a problem limited to redistributive transfers. For example, when the United States and its residents enter into oil production contracts with countries like Angola or Nigeria, they in effect support corrupt governments.<sup>164</sup> Very little of this oil money is invested in the people of those countries. Some of it finds its way to private bank accounts in Switzerland, and some of it is used to oppress opposition groups in those countries. Therefore, the problem of what corrupt governments do with money they should invest on behalf of their citizens is broader than the issue of redistributive payments. In the context of redistributive payments, there are solutions that can partially overcome some of these problems.<sup>165</sup> Given the need to limit its scope, however, this Article will not address any of them in detail.

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<sup>160</sup> See Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 *IND. L.J.* 1047, 1060 (2009) (arguing reduction in marginal tax rate does not lead to increased charitable contributions).

<sup>161</sup> See *supra* Part III.B.1.

<sup>162</sup> See generally *Just Good Business: A Special Report on Corporate Social Responsibility*, *ECONOMIST*, Jan. 19, 2008 (discussing increasing popularity of corporate social responsibility initiatives among companies striving to protect and improve their reputations).

<sup>163</sup> Irish, *supra* note 10, at 300 (noting prevalence of weak institutions with low expertise in developing countries); see also Risse, *supra* note 52, at 87 (highlighting empirical work showing importance of institutional quality to economic prosperity).

<sup>164</sup> See TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2009 tbl. (2009), [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table) (placing Nigeria and Angola 130th and 182nd, respectively, out of 180 countries on list amalgamating thirteen different corruption-perception surveys).

<sup>165</sup> My general impression is that this problem could be partially mitigated by having a rule that if the corruption measurements of a certain developing country exceed a certain level, the developed country would make transfers to a trust of NGOs that would invest the funds in the development of the country. This system is far from a perfect solution, but it provides an avenue to pressure governments to reduce their levels of corruption and to improve their legal institutions. See generally Dale Jamieson, *Duties to the Distant: Aid, Assistance, and Intervention in the Developing World*, 9 *J. ETHICS* 151 (2005) (emphasizing

Third, some may regard this idea of relational-distributive duties as too limited. Many of the least developed countries (e.g., many sub-Saharan countries, East Timor, Bangladesh) are so disadvantaged that they do not have any external trade relationships with developed countries. Therefore, countries with the most dire need for external resources would not benefit from this framework.

The above concerns are valid. The advantage of the relational-distributive framework over the cosmopolitan ideal, however, does not lie in its comprehensive coverage. The advantage of the relational setting is that it rejects the idea that cross-border transfers of wealth are a form of charity and instead establishes a system of entitlements backed by concrete duties that addresses how the redistributive burden should be systematically and fairly allocated. It relies on the premise that even though human relationships may in many cases be a product of coincidence, they are not morally arbitrary. It achieves this while avoiding the cosmopolitan absurdity, which would require the United States to distribute funds to countries like Bhutan and North Korea, thus putting forward a claim for redistributive justice that could not be met in the absence of a world government capable of coercing states to adopt or forego certain policies.

The relational duty theory is not a cosmopolitan impartial justice theory because it does not try to eliminate the role of luck and coincidence. Instead, it relies on intuitive notions that taking unfair advantage of the vulnerable is immoral and, most importantly, that people have greater responsibility to those distant peoples with whom they have actual economic relationships.<sup>166</sup> It also incorporates some notion of impartiality, because it determines distributive obligations in accordance with objective indicators. For example, the United States may disagree with some policies executed by the Mexican or Chinese governments. As long as there are commercial trade relationships with them, however, the United States must ensure that its relational-distributive duties toward the people of Mexico and China are met.

This Article began by explaining that liberal thinkers avoid making partiality claims because they perceive moral arguments based on actual human interactions as insufficiently ambitious. Here, I have demonstrated that this is not necessarily the case and that relational duties that are symptomatic of systemic unfairness can and should be translated into impartial political claims, which should in turn be the basis for the reform of international institutions. Furthermore, this

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that more than just financial help is necessary to help alleviate poverty in developing world).

<sup>166</sup> See generally Moellendorf, *supra* note 106 (advocating for limiting global duties of justice on basis of economic associations).

Article offers an impartial standard by which the interests of foreigners should be prioritized and addressed by developed countries in a way that aligns with common political intuitions. It argues that people owe more to those with whom they are closely connected and those who depend upon them and, further, that individuals' relational duties depend on both their capacity to help and on the other party's actual level of disadvantage.

A final, valid concern cautions that by imposing duties on transactions between developed and developing countries, we may disincentivize persons in the former from engaging in such trade relationships. The first response to this concern is that every voluntary transaction results in a welfare surplus. When dealing with a vulnerable party, the non-vulnerable party is not required to give up its surplus, nor to reduce it to the level at which the non-vulnerable party would be indifferent to transacting with a vulnerable party; instead, the non-vulnerable party must only allocate the surplus more evenly. Accordingly, if the relational duties are imposed uniformly, there would still be benefits to buying coffee from developing countries rather than trying to produce it in developed countries, because the developing countries have factors (e.g., appropriate climate and cheap labor) that make it cheaper to produce coffee. Relational duties would not eliminate the surplus, they would just allocate it so that the coffee farmers, and not just Starbucks customers, would be able to attain basic health and education services for their children. The second response is that there are ways to recognize those duties without imposing any penalties on those individuals and businesses in the developed world that directly engage in trade with the developing world. The below analysis demonstrates how policymakers could design international tax policy to account for such duties without imposing direct penalties on private parties engaged in cross-border transactions.

#### IV

#### POLICY IMPLICATIONS

So far, this Article has dealt only with the source of the duty for redistribution in a world economy composed of people living in separate nation-states, which are connected through intensive trade relationships. It has introduced the novel concept of global relational-distributive duties but has not indicated a specific institutional arrangement through which this duty should be fulfilled. These relational-distributive duties could be met in many ways—lump-sum

transfers among states, global labor safety regulations, and anti-child-labor initiatives, to name a few examples.

Here, I demonstrate how the international tax regime (ITR) could be modified to promote the discharge of relational-distributive duties. I suggest that even though we think of the tax system primarily as a way to promote domestic distributional outcomes, international tax arrangements also offer a promising avenue through which relational-distributive claims could be met. The ITR is the set of norms and soft law rules through which countries divide the rights to tax cross-border economic activities.<sup>167</sup> Accordingly, it assumes the existence of states *and* the existence of trade relationships among them, which are the cornerstone assumptions of this Article's relational-distributive duties analysis. Since the ITR mirrors the international trade regime, the tax relationships between countries can serve to correct the relational claims arising from their trade relationships. ITR conventions can require developed countries to transfer some of their taxing rights to developing countries, thus addressing relational duties by serving as an indirect, macro price-correction mechanism. Startlingly, even though the ITR deals with allocating taxing rights between nations, global redistributive considerations play little if any role in policy and scholarly debates about the ITR. Although explaining the ITR's structure in depth is impossible within the framework of this Article, I briefly explain how relational duties should affect a number of core income tax arrangements.

This Part discusses why tax distributive arrangements provide effective mechanisms for meeting relational-distributive duties and do not require the extensive on-the-ground cooperation of foreign countries' enforcement branches that alternative solutions aimed at addressing the issue of relational-distributive duties would require. One does not have to subscribe, however, to the notion that tax practices are categorically more effective than any alternative in order to accept my argument. The skeptical reader should be able to agree that, given doubts about the effectiveness of direct trade regulation, policymakers ought to be willing to consider using the ITR to meet the relational-distributive duties of their peoples.

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<sup>167</sup> See generally REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME* (2007) (arguing that tax treaty network and domestic tax codes embody international tax regime).

A. *Using International Taxation To Promote Relational-Distributive Duties*

The ITR has several distinctive features.<sup>168</sup> First and foremost, it requires an economic relationship that two nation-states could tax—i.e., transactions that are subject to tax under the laws of more than one country. Only present economic relationships trigger ITR analysis, and the ITR only takes into account taxes levied by nation-states—not those levied by state and local governments. Hence, once a transaction has been identified as a potential tax subject of more than one jurisdiction, the distribution of these tax rights is regulated by ITR conventions.<sup>169</sup> The ITR deals with these taxing-right conflicts through a set of soft law principles embedded in domestic tax legislation and bilateral double taxation treaties.<sup>170</sup> Double taxation treaties are contractual arrangements that countries enter to reduce the risk of double taxation, which would hinder trade and investment relationships between them.<sup>171</sup>

The ITR allocates wealth—in the form of taxing rights—among sovereign countries when persons within both countries share some relational trade or investment relationship. It therefore seems like an optimal mechanism to settle relational-distributive claims triggered by trade relationships. It also aligns well with the assumptions of my analysis; it accepts the existence of sovereign nation-states and their imperative role in any mass global redistribution enterprise, and it develops a distributive framework based on observable current trade indicators, avoiding problems of causation associated with corrective justice. Most importantly, it avoids both the daunting challenges of recognizing foreigners' rights and the task of linking those rights to meaningful correlative duties.

Using the ITR to promote relational-distributive duties has other significant benefits. First, under a relational framework, duties correlate with levels of association. These duties align well with the tax

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<sup>168</sup> Cappelen, *supra* note 5, at 98–99 (providing excellent summary of international tax norms for non-tax scholars).

<sup>169</sup> See Benshalom, *supra* note 98, at 636–42 (discussing application of international tax norms in context of taxation of interest income).

<sup>170</sup> The key example of these principles is that when a non-resident engages in an economic activity in a foreign country, that foreign country has the first right to levy income taxes on the proceeds of this activity. The country in which that individual resides may have a residual right to levy taxes and must provide some type of relief from the taxes paid in the country where the activity took place. Most of these norms are codified in a model tax treaty published by the OECD. See MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (OECD Comm. on Fiscal Affairs 2008) [hereinafter OECD MODEL], available at <http://www.oecd.org/dataoecd/14/32/41147804.pdf>.

<sup>171</sup> See Benshalom, *supra* note 98, at 660–64 (discussing motivations for entering into taxation treaties).

framework because countries' obligations under tax agreements correlate with the level of trade relationships between them. For example, suppose that a double-taxation treaty between a developed and a developing country assigns proportionally high taxing rights to the developing country. As the volume of trade between the two countries increases, their relational duties are assumed to be stronger. As their trade relationships intensify, the ITR would account for the higher level of duties automatically—simply by assigning more taxing rights to the developing country.

Second, a redistributive allocation of taxing rights seems to be a relatively effective way to fulfill relational-distributive obligations. Other ways of meeting relational-distributive duties such as labor law or price control standards would be difficult to regulate and enforce.<sup>172</sup> Moreover, any attempt to regulate the production of goods and the labor standards in developing countries may be politically infeasible due to the suspicion that such regulation is really an excuse for protectionism by developed countries.<sup>173</sup> Developing countries are therefore likely to classify any such attempt as an imperialist intervention and to reject it on that account. Although developed countries obviously could address their relational duties by directly spending to help others in developing countries, gaining the necessary domestic support for large lump-sum transfers would be difficult.<sup>174</sup> This political difficulty can be explained on behavioral grounds: Governments may find it easier to forgo future tax revenues than to incur immediate losses.

In comparison to those mechanisms, fulfilling relational-distributive duties through the ITR would provide a crude and more administrable macro price-correction mechanism. Rather than making sure that importers of coffee pay a fair price to farmers, the developing country would retain a greater right to tax the profits of this transaction. It could then use the extra revenues generated to provide better services to their low-wage citizens. Money is fungible, and once it is allocated to a developing country, there is no way to trace whether it has reached the farmers. Tax revenues, however, will serve to raise living standards and government services in a way that should also benefit the farmers. This argument relates in an interesting way to

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<sup>172</sup> For example, any attempt by the WTO to set safety or labor standards in developing countries would be ineffective and inefficient due to its lack of enforcement and information gathering capacities.

<sup>173</sup> See DEMARTINO, *supra* note 116, at 212 (“Indeed, many labor activists in developing countries have opposed [U.S.] efforts to tie trade preferences to labor standards, because they see such measures as protectionist, nationalist, and paternalistic.”).

<sup>174</sup> Cappelen, *supra* note 10, at 434 (providing brilliant analysis of this issue).

the orthodoxy that the tax system redistributes wealth more efficiently than regulation.<sup>175</sup> Admittedly, the way in which this Article describes international taxation and its relationship with international trade seems to align with what critics of this orthodoxy claim—that the distinction between state tax and regulatory actions tend to blur at the margin.<sup>176</sup> The tax system, however, is the most *effective* way to redistribute. This effectiveness stems from the crudeness of tax rules and their (limited) reliance on few indicators as rough proxies to determine the appropriate distributive outcome.<sup>177</sup>

Third, private parties from the developed world would not necessarily be penalized with excessive duties because they chose to undertake a transaction with parties in developing countries. Their taxes do not necessarily have to increase simply because developed countries would be required to give up some of their taxing authority; more importantly, developing countries may choose not to exercise all their taxing rights, or to exercise them at lower rates to encourage foreign investment. There is a genuine fear that developing countries would be forced through a tax-competitive process to omit all of their tax rights in an effort to attract foreign investments. These are, of course, serious concerns for any operational global redistributive ITR arrangement, which are mostly relevant in the context of corporate taxation. If, however, a redistributive ITR framework also provides developing countries with the ability to waive some taxes in order to attract investment,<sup>178</sup> it could not be portrayed as promoting developed countries' protectionism.

Some of the above points involve complicated tradeoffs and should be viewed as promising reform options but also as potential reasons for concern. The ITR's relational framework, however, still appeals to a strong intuition that some economic relationships entail certain costs and that parties should not be able to contract around aspects of the transaction that involve negative externalities. If inter-

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<sup>175</sup> See Kaplow & Shavell, *supra* note 4, at 825–27 (discussing relative efficiency of income tax system versus legal rules to redistribute income). For a different view, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980), which argues that in certain cases contract law is effective way to promote distributive justice.

<sup>176</sup> See, e.g., Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 *TAX L. REV.* 157, 179 (2003) (“[O]ne of the most important observations of our analysis is that, at the margins, these categories—tax rules and legal rules—begin to break down.”).

<sup>177</sup> Addressing the distinction between efficient and effective distribution is outside the scope of this Article and must be deferred to future research.

<sup>178</sup> See *infra* note 198 and accompanying text (giving example of how allocation of right-to-tax interest payment redistributes wealth by allowing source countries to attract investment).

national trade gives rise to unfair patterns, that should be corrected, and the ITR seems to provide a proper involuntary framework for imposing those duties on specific agents. Taxes are coercive costs imposed on agents to finance the government's activities and to achieve certain distributional goals, and parties cannot and should not be able to exercise full contractual control to determine their tax treatment. The involuntary nature of tax transactions makes them an ideal mechanism to address distributive concerns on both the domestic and international stage.

Unlike the cosmopolitan ideal, the ITR relational-distributive justice framework depends on the actual choices of agents in different countries who decide to interact with others. Put differently, rather than trying to establish a flawless world, my proposal offers a principled framework for how to establish a system of fair international trade. This goal is an achievable ambition and makes the ITR a plausible mechanism for achieving the type of global wealth redistribution that would appeal to policymakers—more so than any other cosmopolitan cross-border regulatory or transfer framework.

### B. *The Current ITR Arena*

Finally, this Article surveys the ITR's current institutional and scholarly arena. It demonstrates how today's ITR conventions fall short of addressing any issue of distributive justice. It then explains the sources of this deficiency and briefly mentions a few potential issues within the ITR income tax conventions that could be reformed to promote the fulfillment of relational-distributive duties.

As mentioned, unlike in the case of the domestic realm, where philosophers, economists, and legal scholars all recognize that tax policy is the key policy instrument for promoting distributive objectives, the distributive impact of the ITR has received little attention. As a general proposition, more collaboration among economists, policymakers, and normative philosophers would be desirable—but the gap in the case of the ITR is especially alarming.<sup>179</sup> Philosophers concerned with promoting global distributive justice tend to neglect completely ITR arrangements and to focus instead on how to better regulate trade. In particular, they focus on issues such as privatization, deregulation, and agricultural protectionism.<sup>180</sup> Tax rules are complex

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<sup>179</sup> Kapstein, *supra* note 84, at 79 (noting that economic justice assertions are “seldom” matched to economic theories or empirical analyses).

<sup>180</sup> The best example is the collection of essays in *GLOBAL INSTITUTIONS AND RESPONSIBILITIES* (Christian Barry & Thomas W. Pogge eds., 2005). This book, written and edited by the leading philosophers dealing with issues of global distributive justice and the institutional reforms necessary to achieve it, provides novel insights about how institutional



and the tradeoffs associated with them are often not intuitive, so philosophers tend to avoid addressing them altogether. Tax scholars, on the other hand, find it difficult to offer a normative judgment about certain tax arrangements without the concrete foundation of a normative theory.

One factor that could account for the literature gap on domestic and international tax redistribution is the way in which international ITR institutions have developed over the last half-century. Currently, there is no international organization that directly regulates international taxation. Scholars have long categorized taxation as an explicit feature of national sovereignty, and, as such, there has been no substantial shift in taxing authority from the nation-state to international and supranational institutions as in the case of trade.<sup>181</sup> The major international forum in which ITR policy is deliberated and coordinated is the OECD, which is a forum established and dominated by Western developed countries. The OECD has been able to create the tax component of the international trade public grid<sup>182</sup> through the model tax treaty (and commentary),<sup>183</sup> which helps countries to establish treaties to avoid double taxation, and also through numerous reports, policy briefs, and other publications dealing with tax treaties and issues of international taxation. Through the treaty and various other reports and policy briefs, the OECD has created a network. The United Nations and the IMF have also made some efforts to aid developing countries in establishing their tax systems and in negotiating tax treaties.<sup>184</sup> The history of those institutions indicates, however, that they have no serious ambition to promote global wealth

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frameworks should be reconceptualized to achieve this end. None of the articles in this book, however, address issues of international taxation.

<sup>181</sup> Ilan Benshalom, *A Comprehensive Solution for a Targeted Problem: A Critique of the EU's Home State Taxation Initiative*, 48 EUR. TAX'N 630, 630 (2008).

<sup>182</sup> See *supra* notes 99–103 and accompanying text (discussing international public trade grid); see also Eduardo A. Baistrocchi, *The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications*, 2008 BRIT. TAX REV. 352, 358–60 (2008) (describing OECD tax treaty network).

<sup>183</sup> OECD MODEL, *supra* note 170.

<sup>184</sup> U.N. DEP'T OF ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/PAD/SER.E/21, U.N. Sales No. E.01.XVI.2 (2001) [hereinafter U.N. TAX CONVENTION]; Vito Tanzi, *The IMF and Tax Reform* (Int'l Monetary Fund, Fiscal Affairs Dep't, Working Paper No. 90/39, 1990), available at <http://ssrn.com/abstract=884755>; see also Whitney Whisenhunt, *To Zedillo or Not To Zedillo: Why the World Needs an ITO*, 16 TEMP. INT'L & COMP. L.J. 541 (2002) (describing efforts made by United Nations to create International Taxation Organization and why United States should support it).

redistribution;<sup>185</sup> this is particularly true with regard to the OECD, which is by far the most dominant ITR forum.

In this respect, it is important to consider the two following notions. First, even though tax-coordination has been the main goal of the OECD, there is no a priori reason to think that this should be its only goal. If institutional reform is required to prevent unfair trade, the historical limitations of the ITR framework should not be seen as a normative constraint.

Second, the loose level of ITR regulatory control of the actual allocation of taxing rights among nation-states does not mean that no allocation paradigm exists. Although tax coordination between sovereigns is weaker than in the case of trade, taxing rights of global trade profits are de facto allocated all the time. The decision between sovereigns not to engage in an explicit agreement about how to allocate taxing rights is a political decision in itself, which has its own underlying implications and normative assumptions. For example, the fact that we have no comprehensive multilateral agreement that prevents income shifting to low income-tax jurisdictions does not mean that there is no allocation of benefits. Sophisticated taxpayers use the absence of such a comprehensive agreement to allocate more income to low-tax countries such as Ireland; the benefits of this allocation are shared by those taxpayers and low-tax countries at the expense of other (high-tax) countries.<sup>186</sup>

As some important scholars have noted, the current ITR debate adopts a neoliberal discourse that highlights contractual equity considerations—e.g., reciprocity, nondiscrimination, and economic neutrality/efficiency<sup>187</sup>—and marginalizes issues of redistribution and poverty reduction.<sup>188</sup> This ongoing marginalization of global redistributive issues should not be determinative of future actions. The ITR

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<sup>185</sup> U.N. TAX CONVENTION, *supra* note 184, at xx–xxiv (discussing rationale of Convention without mentioning global wealth distribution); *see also* Benshalom, *supra* note 98, at 665 (noting how U.N. Tax Convention failed to consider distribution's role in international taxation).

<sup>186</sup> Ilan Benshalom, *Sourcing the "Unsourceable": The Cost Sharing Regulations and the Sourcing of Affiliated Intangible-Related Transactions*, 26 VA. TAX REV. 631, 684–87 (2007) (providing example for such transactions in context of intangibles-related transactions).

<sup>187</sup> Alvin C. Warren, Jr., *Income Tax Discrimination Against International Commerce*, 54 TAX L. REV. 131, 135 (2001); *see also* Irish, *supra* note 10, at 295–96 (providing critical analysis for why reciprocity fails as principle governing tax relationships between developed and developing countries).

<sup>188</sup> *See, e.g.*, Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Counties*, 44 HARV. INT'L L.J. 139, 186 (2003) (“[T]he marginalization of the goal of redistribution and legitimization of inequality in tax reform are serious consequences of the wholesale adoption of [optimal tax] theories and should be addressed.”).

involves a number of key issues that bear directly on the question of how taxing rights between developed and developing countries should be allocated. The most well-known issue is the conflict between the notions of source and residency taxation.<sup>189</sup> Many countries, including most notably the United States and the United Kingdom, have reserved the right to tax the income that their individual and corporate residents derive from activities and investments in foreign jurisdictions.<sup>190</sup> This approach has been the dominant approach throughout most of the twentieth century, even though in recent years many other sovereigns have limited or eliminated their residency-based taxes.<sup>191</sup> The main rationale supporting residency taxation is that the burden of financing the government should be allocated among residents and citizens in accordance with their ability to pay the tax.<sup>192</sup> Since foreign income has exactly the same purchasing power as income earned from domestic activities, it should receive precisely the same tax treatment when determining taxpayers' ability to pay.<sup>193</sup>

An additional basis of taxation is source taxation—or the right of the state to tax income arising from an economic activity that is taking place within its jurisdiction. The rationales for taxing non-residents at the source are not self-evident. The leading explanations view the source tax as a benefit tax in which the country of source charges the business enterprise for using its infrastructure.<sup>194</sup> Developing countries are typically net-capital-importers and therefore source jurisdic-

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<sup>189</sup> See, e.g., MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 12–19 (2003) (discussing competing rationales for “worldwide” and “territorial” tax systems).

<sup>190</sup> See, e.g., *id.* at 13 (2003) (“For example, the United States collects a residual tax on foreign-source income of U.S. residents when the foreign tax rate on the income is lower than the U.S. tax rate.”); HM TREASURY, TAXATION OF COMPANIES’ FOREIGN PROFITS: DISCUSSION DOCUMENT 3 (2007), available at [http://www.hm-treasury.gov.uk/d/consult\\_foreign\\_profits020707.pdf](http://www.hm-treasury.gov.uk/d/consult_foreign_profits020707.pdf) (presenting proposal to “reform[] the taxation of foreign profits”).

<sup>191</sup> Benshalom, *supra* note 181, at 631.

<sup>192</sup> GRAETZ, *supra* note 189, at 14–15.

<sup>193</sup> Stephen E. Shay et al., “What’s Source Got To Do With It?” *Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81, 96 (2002); see also Robert J. Peroni, *A Hitchhiker’s Guide to Reform of the Foreign Tax Credit Limitation*, 56 SMU L. REV. 391, 391–93 (2003) (arguing that proponents of foreign tax credit bear burden of justifying the subsidy).

<sup>194</sup> Peggy B. Musgrave, *Interjurisdictional Equity in Company Taxation Principles and Applications to the European Union*, in TAXING CAPITAL INCOME IN THE EUROPEAN UNION 46, 52 (Sijbren Cnossen ed., 2000). Other explanations stress the administrative and political difficulty of taxing businesses and investments of foreigners at potentially lower effective tax rates than those of domestically owned enterprises.

tions; in contrast, developed countries, where most investors reside, have traditionally been perceived as residence jurisdictions.<sup>195</sup>

In previous articles, I have argued that the notorious complexity of source rules<sup>196</sup> is due primarily to a lack of normative comprehension as to what they are expected to achieve.<sup>197</sup> The nexus which ties an economic activity to a source jurisdiction is primarily a normative one, and source rules are bound to be complicated as long as this normative benchmark is not fully elaborated. The relational-distributive analysis is one example of such a normative framework. When tax policymakers consider the scope of source and residency taxation, they should also consider the impact of relational duties on the allocation of taxing rights between countries. Increasing the scope of source jurisdiction at the expense of residency,<sup>198</sup> therefore, *may be required* for developed countries to satisfy their relational-distributive duties toward developing countries. This shift in the right-to-levy-tax would benefit the governments of developing countries over the governments of developed countries. However, it would neither penalize parties in developed countries directly for the trade relationships they have with members in developing countries nor create any disincentives to engage in such trade.<sup>199</sup>

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<sup>195</sup> In recent years, this distinction has been blurred. See Benshalom, *supra* note 98, at 702 (describing how “this distinction between capital-exporting and capital-importing countries became obscure”). More importantly, the emergence of the tax planning industry, which allows many investors to shelter their income in low-tax jurisdictions and to avoid both high source and resident tax rates, suggests that the residency/source conflict is not a zero-sum game between developed and developing countries but a zero-sum game among investors, tax havens, and developing and developed countries.

<sup>196</sup> For articles discussing the source rules, see Reuven S. Avi-Yonah, *For Haven’s Sake: Reflections on Inversion Transactions*, 95 TAX NOTES 1793 (2002); Michael J. McIntyre, *The Design of Tax Rules for the North American Free Trade Alliance*, 49 TAX L. REV. 769, 775–77 (1994).

<sup>197</sup> Benshalom, *supra* note 181, at 641; Benshalom, *supra* note 98, at 698–99.

<sup>198</sup> The source country typically has the primary right to tax. Residence taxation is secondary and typically provides tax credit for any source taxes paid. Accordingly, many of the tax benefits that developing countries try to offer foreign investors are “swallowed” by developed countries’ residual residence taxation. My analysis of relational-distributive justice may dictate that developing countries *have the right* to offer tax holidays to investors or that certain investments in developing countries should be exempt (fully or partially) from residence taxation. See Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT’L ECON. L. 45, 51–59 (2002) (proposing U.S. offer tax exemption for investment income from Sub-Saharan Africa); Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System To Promote Developing Countries*, 23 VA. TAX REV. 161, 201–03 (2003) (suggesting developed countries replace portion of foreign aid spending with tax exemptions for investments in developing countries).

<sup>199</sup> This argument conforms with the analysis presented in Part II.C.1, which suggests using countries as proxies for the relational duties of their peoples. Despite the various costs associated with international trade, countries engage in it because they think that,

A simple example of how relational-distributive duties could impact actual tax allocation arrangements may be helpful. Current ITR conventions grant the residence country, where investors reside, the right to tax interest payments they receive on loans made to foreigners.<sup>200</sup> The source country, where the borrowers reside, has the right to implement a withholding tax on those payments, but this right is limited in two important ways. First, over the years, double taxation treaties have reduced withholding tax rates on interest, so that most interest payments are subject only to low or no withholding taxes.<sup>201</sup> Second, any attempt by the source country to waive some of its taxing right is “swallowed” by the residual tax laid by the residence country.<sup>202</sup> As a result, a source country is effectively limited in its ability to tax interest payments or to attract foreign investors by waiving its rights to tax them. This state of affairs is by no means neutral or natural but rather the result of a long struggle between capital-importing and capital-exporting countries in the first half of the twentieth century.<sup>203</sup> A possible arrangement that would take into account developed countries’ relational-distributive duties toward developing countries would give the latter exclusive taxing rights in interest payments paid by borrowers within it. This right would leave a source country with both the exclusive right to tax this income and the ability to waive some of its rights to tax in order to attract foreign investments.<sup>204</sup>

Developed countries sometimes make certain concessions to developing countries—typically within the framework of double taxation treaties.<sup>205</sup> These concessions are, however, part of the treaty negotiation process and are not a normative benchmark that developing countries can assert. Current practices allow for helping devel-

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overall, they benefit from it. The allocative cost associated with relational-distributive duties stemming from international trade is only one type of cost that should be addressed as part of that tradeoff.

<sup>200</sup> See Benshalom, *supra* note 98, at 636–42 (explaining source country withholding system and difference between withholding system and corporate taxation).

<sup>201</sup> See *id.* at 652–57, 670–74 (providing explanation of process by which the withholding tax base was eroded).

<sup>202</sup> See Julie Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753, 1768–70 (2005) (explaining how U.S. foreign tax-credit system is designed to prevent investors from taking advantage of lower foreign tax rates).

<sup>203</sup> See Benshalom, *supra* note 98, at 644–47 (describing development of ITR).

<sup>204</sup> Taxing exclusively and at a lower rate would give the developing country the best of both worlds. On the one hand, the lower rate would allow the country to provide tax incentives to attract foreign investors, and, on the other hand, it would allow the country to receive some revenues from the economic activity of foreigners within its jurisdiction.

<sup>205</sup> See, e.g., Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN’S L.J. 505 (2009) (discussing “tax sparing,” one such concession).

oping countries as a form of foreign policy “charity,” given in the form of taxing rights, which are “tax-expenditures” and not an integral component of the tax system.<sup>206</sup> This practice differs from this Article’s proposal, which suggests that the soft law principles defining the international income tax base should be revised to take global relational-distributive concerns into account. Accordingly, allocating a greater share of the taxing rights arising from cross-border transactions to developing countries should be integrated into both the mainstream of OECD double-taxation treaty negotiation policy and the domestic tax legislation of developed countries dealing with the taxation of cross-border transactions.<sup>207</sup> This is only one example of how this Article’s normative analysis bears concrete significance on fundamental questions regarding the allocation of taxing rights among sovereigns.

The most important issue concerning the allocation of taxing rights in the contemporary ITR arena, however, is the taxation of multinational corporate enterprises (MNEs). MNEs are wealthy, sophisticated taxpayers with an exceptional ability to reduce their tax liabilities through particularly effective tax lobbies.<sup>208</sup> Therefore, the corporate tax rate is particularly susceptible to pressures of tax competition, and recent evidence suggests that effective corporate income tax rates on certain activities are very low, partly as a result of tax competition.<sup>209</sup> More importantly, trade between MNEs accounts for much of international trade, and its regulation is currently one of the weakest links in the existing ITR paradigm.<sup>210</sup> MNE taxation, however, is technically complicated and sophisticated from a policy perspective, because it connects global relational-distributive duties with issues of tax-competition, tax-avoidance, and tax-cooperation.

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<sup>206</sup> For a general discussion of tax expenditures, see Benshalom, *supra* note 160, at 1055–56.

<sup>207</sup> See generally Michael S. Knoll, *International Competitiveness, Tax Incentives, and a New Argument for Tax Sparing: Preventing Double Taxation by Crediting Implicit Taxes* 26–31 (Inst. for Law & Econ. Research Paper No. 08-21, 2008), available at <http://ssrn.com/abstract=1259927> (providing novel justification of this practice based on theory of implicit taxes).

<sup>208</sup> See Julie Roin, *Taxation Without Coordination*, 31 J. LEGAL STUD. S61, S84 (2002) (suggesting public choice model explains MNEs’ behavior).

<sup>209</sup> See, e.g., James R. Hines, Jr. & Adam B. Jaffe, *International Taxation and the Location of Inventive Activity*, in INTERNATIONAL TAXATION AND MULTINATIONAL ACTIVITY 203, 203 (James R. Hines, Jr. ed., 2001) (“One of the factors contributing to the generosity of tax benefits for R&D is competition among governments to attract R&D-intensive investments by multinational corporations . . .”).

<sup>210</sup> Intra-MNE trade is considered the weakest link because MNEs have the ability to manipulate intra-group prices to inflate their deductible costs in high-tax jurisdictions and to shift their income to low-tax jurisdictions. See generally Benshalom, *supra* note 108, at 627 (describing how MNEs jurisdiction shop to avoid tax).

Because of this complexity, and because this Article is focused on a more general conceptual theory, an exploration of the precise relationship between relational-distributive duties and the allocation of the MNE tax base will be reserved for a future paper.<sup>211</sup>

It is, however, important to note that MNEs' dominant position in the global economy dictates that the MNE tax-base allocation bears immense international distributive implications and should therefore take into consideration relational-distributive obligations. Furthermore, many tax academics believe that effective tax cooperation is necessary to address problems associated with tax competition over MNE investments.<sup>212</sup> To achieve effective tax coordination, states would have to assure that a critical mass of states coordinate. Such a critical mass would obviously include most developed countries, which are typically high-tax countries, but it would also have to include many low-tax developing and emerging economies—such as Brazil, China, India, and Indonesia, which are key players in the global economy. These developing countries typically use their low effective corporate tax rates to attract foreign investment.<sup>213</sup> Accordingly, unlike the developed countries, which stand only to gain from effective tax coordination, developing countries may fear to enter such a cooperative scheme because the short-term costs may outweigh the long-term (speculative) benefits.

To enable effective coordination, developed countries need to assure that all participants stand to gain from cooperating. This can be done in three non-mutually exclusive ways. First, developed countries can threaten developing countries with penalties (e.g., trade sanctions) if they do not cooperate. Second, developed countries can try to buy the cooperation of a sufficient number of developing countries. Third, and most relevant to this inquiry, cooperation can be facilitated if it involves an organizing principle that all parties consider fair. This pre-coordination stage is essentially a constitutive moment: More states will be willing to enter into a long-term cooperation scheme if they have confidence that the agreement they are entering into is fair and that it will continue to be fair in twenty years whether or not their

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<sup>211</sup> For a partial discussion of this issue, see Ilan Benshalom, *The Quest To Tax Financial Income in a Global Economy: Emerging to an Allocation Phase*, 28 VA. TAX REV. 165, 203–20 (2008), which proposes a formula approach for allocating the income of financial MNEs.

<sup>212</sup> See, e.g., Reuven S. Avi-Yonah et al., *Allocating Business Profits for Tax Purposes: A Proposal To Adopt a Formulary Profit Split*, 9 FLA. TAX REV. 497, 514–15 (2009) (discussing “the possibility of gains from [tax] coordination with other countries”).

<sup>213</sup> See GRAETZ, *supra* note 189, at 524–30 (presenting perspective of “developing countries in competi[tion] for investments through, *inter alia*, aggressively competitive tax policies”).

economic position relative to the position of other countries has improved. In a way, this Article addresses the types of questions that nations should ask once they realize that tax coordination is essential.

The preceding discussion of how the ITR's income tax allocation could be reformed to promote relational-distributive duties emphasizes the importance of this Article's proposal. Relational-distributive duties, however, should not be restricted to income tax allocation. Many developing countries have weak income tax regimes and rely on tariffs, real estate taxation, and natural resources taxation. Relational-distributive duties require policymakers to look beyond traditional ITR arrangements, which for historic reasons focus on the allocation of income taxation.<sup>214</sup>

This relational-distributive duties framework aims to promote a realistic arrangement. Rather than attempting to erase all flaws from the world by constructing novel political institutions, it accepts some existing political structures and tries to make the world a better place by pointing out how and why these institutions should promote justice. Rather than promoting a set of "soft" principles of cosmopolitan justice, it provides guidance for constructing a global system which redistributes wealth among sovereigns by assigning concrete entitlements and duties.

Determining how an international political framework should assign these duties is not an easy task. Globalization gave rise to new types of tax practices and created a powerful new class of international investors comprised of MNEs and individuals with liquid wealth. Sovereigns have found it increasingly difficult to address these problems by themselves. In the long run, this inability to address problems of eroding tax bases would likely pressure governments to engage in cartel-like arrangements to combat tax-avoidance and tax-competition tendencies. Any future tax cooperation arrangement would have to include developing economies such as China and India to be effective and would have to grant them some concessions in return for their willingness to limit the tax breaks with which they lure foreign investors. Developing a normative benchmark over the proper global distributive role of the ITR is therefore essential to providing any future coordinated scheme with the necessary global political legitimacy.

The notion that to gain political legitimacy, international institutions should take a more active role in promoting fair trade and assuring the rights of peoples living in the developing world is

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<sup>214</sup> Benshalom, *supra* note 98, at 644-45.



receiving growing support.<sup>215</sup> As such, delineating an international ITR framework that addresses peoples' relational-distributive duties is crucial to help politically legitimize the operation of institutions coordinating global ITR policy. This legitimacy will be vital to further allow the ITR to evolve and meet the challenges of the twenty-first century. More importantly, however, an ITR that explicitly addresses issues of global relational-distributive duties would help to legitimize the political structure of global trade itself and the actions of agents participating in it.<sup>216</sup>

Even though the ITR may be an effective tool to address relational-distributive duties in a multistate global environment, the preceding analysis suggests that current ITR arrangements require many modifications before they actually meet this goal. This need for modifications, however, does not weaken the argument for the appropriateness of the tool. ITR arrangements are superior to any type of alternative arrangements and the modifications required by them do not undermine the underlying premises of our political reality. They do not require the abolition of states or the regulation of commerce in foreign countries, and developing countries cannot view them as unjustified imperialist interventions in domestic matters.

#### CONCLUSION

This Article broadens political philosophy's exploration of the scope of distributive duties in an economically integrated world. Our international trade relations give rise to relational duties to those with whom we trade. These duties give rise to obligations when developed countries unfairly trade with disadvantaged developing countries, even if we cannot agree on the scope of (impartial) distributive justice. These relational-distributive duties deviate from the traditional political philosophy debate about issues of impartial global distributive justice. Instead of drawing on either cosmopolitan or statist theories, the notion of relational-distributive duties draws on the intuitive notion that the advantaged have an obligation to establish political institutions that protect the vulnerable from unfair exploitation.

This approach of seeking justice through relationships succeeds where both cosmopolitan and statist positions fail by providing guidance for real-world policy questions of how best to construct interna-

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<sup>215</sup> See, e.g., Dirk Haubrich, *Normative Concepts of Global Distributive Justice and the State of International Relations Theory*, 15 *CAMBRIDGE REV. INT'L AFF.* 183, 183–84 (2002) (arguing that September 11 terrorist attacks resulted in growing recognition of global distributive justice as integral component of effective antiterrorism strategy).

<sup>216</sup> See Sol Picciotto, *INTERNATIONAL BUSINESS TAXATION* 65 (1992) (discussing legitimacy problems facing global approach to taxation).

tional institutions. While the ITR is not the only mechanism available with which to construct international institutions, this Article has demonstrated how it could be modified to accommodate considerations of relational-distributive duties.

Taxes involve money, and the way sovereign states allocate the right to tax among each other has a significant distributive impact on the way global wealth is allocated. Thinking about global wealth distribution through the ITR will be useful to policymakers because it accepts the existence of states and relies on the importance of actual relationships, which, whether we like it or not, are key to any real-world attempt to promote issues of wealth redistribution among peoples.