

RETHINKING INTERNATIONAL DISTRIBUTIVE JUSTICE: FAIRNESS AS INSURANCE

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ABSTRACT

A common perception among international relations policymakers and theorists is that states' primarily self-serving motivations inhibit their participation in promoting international distributive-fairness considerations. This article asserts that this notion is significantly incomplete and misleading; it results in deficient theories and, more importantly, in sub-optimal international arrangements. The deficiency of current approaches is that they view distributive fairness as only performing a normative wealth redistribution function and fail to recognize its practical insurance function. In a very crude way, "distributive fairness" means that countries should pay for the provision of international public goods (for example, controlling global warming by reducing emissions) according to their relative economic abilities. In the short-term, this means that rich developed countries should pay more than poor developing ones. However, in long-term agreements where there are considerable uncertainties with respect to which countries will be wealthier in the future, it is also a partial insurance against becoming poor(er). Therefore, incorporating fairness considerations into international agreements insures many, if not all, countries against "overpaying" as compared to what other countries are required to pay. Once policymakers recognize this insurance function, they can facilitate more effective international agreements that encourage countries to undertake more substantial obligations. This will help policymakers to better coordinate states' actions in order to meet the growing demand for many crucially undersupplied global public goods.

INTRODUCTION

The notion that states should not be expected to engage in international "distributive fairness" has been accepted for centuries¹ but is, nevertheless, materially incomplete. In a global economy, where many problems require coordination between states, this notion is not only intellectually wrong but also hazardous because it results in sub-optimal levels of international coordination. This article argues that incorporating distributive-fairness considerations into long-term international agreements should be viewed not only as a redistributive wealth transfer, but also as an act of insurance against economic volatility. Therefore, the common understanding, which associates distributional fairness only with state benevolence, is wrong and

¹ See 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" and stating that, particularly in the international context, "all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators . . .").

misleading. Rational state actors will seek to incorporate some distributive-fairness considerations if they view doing so as a way to hedge against uncertainty in their future economic positions. This does not mean that the United States would be concerned that any one of the BRICS economies would somehow surpass it in terms of economic development in the foreseeable future.² However, hedging against uncertainty does not suggest one is concerned with extreme risks such as the risk that the average American would become poorer than the average Chinese. The concept of insurance, however, includes much more than an attempt to avoid destitution and should be thought of as a way to deal with *any* type of uncertainty, such as that the economic gap between the average American and Chinese citizens could change over time. Assume that, under an international environmental agreement, the United States undertakes more burdensome obligations than any of its BRICS counterparties, reflecting its relatively strong contemporary economic position. Under this arrangement, the United States should be very concerned about a *relative* decline in its economic position that would not trigger a corresponding modification in its obligations as compared to those of its BRICS competitors.

Although this article makes a general point about the role of distributive-fairness considerations, which could be applied to a wide spectrum of coordinative schemes (for example, trade and corporate taxation), it focuses upon the most acutely underprovided set of public goods—environmental goods—with an emphasis on the international experience in climate change negotiations.³

The process of globalization was heavily influenced by neoliberal ideologies that support an agenda of rapid trade liberalization.⁴ Under these

² The acronym “BRICS” stands for Brazil, Russia, India, China, and, as of 2010, South Africa. Peter Drysdale, *The BRICS, the G-7 and Deploying New Global Economic Power*, 10 EUR. VIEW 159, 159 (2011).

³ SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 2–3, 195–200 (2003) (providing a thorough game theory explanation of the difficulties in attaining multilateral agreements to supply global environmental public goods); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, A REPORT OF WORKING GROUP I OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 13 (Susan Solomon et al. eds., 2007); ERIC A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE 13–33 (2010) (surveying the science on the impact of climate change and arguing for the necessity of international agreement to reduce emissions of greenhouse gases); LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 1, 190 (2006); Rowena Cantley-Smith, *Climate Change and the Copenhagen Legacy: Where to from Here?*, 36 MONASH U. L. REV. 278, 279 (2010); Julie A. Nelson, *Ethics and the Economist: What Climate Change Demands of Us* 1–2 (Global Dev. & Env’t Inst., Working Paper No. 11-02, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1862229 (describing the situation as profoundly unsafe, interdependent, and uncertain and stating that we are facing a need for a globally coordinated action that humans have never before attempted).

⁴ JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK xv (2006).

approaches, states are supposed to act as the pure *homo economicus*—rational, self-maximizing, and completely egoistical. This framework leaves very little room for fairness considerations and is suspicious of, if not hostile to, arguments about international fairness considerations.⁵ Perhaps because of this background, academics tend to pay little attention to issues of distributive fairness and, instead, focus their analyses of state interactions primarily in terms of cost–benefit allocation and free-riding problems.⁶

The above analysis may have been suitable when the scope of international regimes was limited. After all, during the nineteenth century and the first eighty years of the twentieth century, international regimes were mainly meant to regulate states’ “natural” antagonism and limit the scope of their egoistical behaviors.⁷ The best that such regimes could hope to achieve was the mutual coexistence of discrete states.⁸

Reality, however, has changed significantly over the last decades in two important respects. First, the role of international regimes and agreements has transformed from merely attaining coexistence to achieving more active coordination that would allow a stable supply of certain global public goods. International market integration has reduced the ability of states to effectively govern many issues unilaterally and to successfully provide public goods.⁹ This is problematic because the integrated global market stands upon the infrastructures of nation states. Therefore, the sustainability and stability of this new global setting depend on nation-states’ capability to correct market failures and to provide public goods. This has resulted in a

⁵ BARRETT, *supra* note 3, at 2; Carl Davidson et al., *Fairness and the Political Economy of Trade*, 29 WORLD ECON. 989, 989 (2006); Steven M. Suranovic, *A Positive Analysis of Fairness with Applications to International Trade*, 23 WORLD ECON. 283, 284 (2000).

⁶ Asbjorn Aaheim, *The Appropriateness of Economic Approaches to the Analysis of Burden-Sharing*, in FAIR WEATHER: EQUITY CONCERNS IN CLIMATE CHANGE 94, 94 (Ferenc L. Tóth ed., 1999); Arthur J. Cockfield, *Taxing Foreign Direct Investment in a Non-cooperative Setting: Contributions by Alex Easson*, in GLOBALIZATION AND ITS TAX DISCONTENTS: TAX POLICY AND INTERNATIONAL INVESTMENTS 18, 19 (Arthur J. Cockfield ed., 2010); Jack Mintz & Joann M. Weiner, *Some Open Negotiation Issues Involving a Common Consolidated Corporate Tax Base in the European Union*, 62 TAX L. REV. 81, 82 (2008). For an exception, see the social constructivist literature *infra* note 115.

⁷ PHILIPPE CULLET, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 3 (2003).

⁸ *Id.* at 3; ROBERT JACKSON & GEORGE SORENSEN, INTRODUCTION TO INTERNATIONAL RELATIONS THEORIES AND APPROACHES 112–16 (2003) (explaining the liberalism interdependence approach, which highlights the importance of interdependence and multilayered coordination as a successful state strategy for progress in the contemporary international arena).

⁹ CHRIS BROWN, UNDERSTANDING INTERNATIONAL RELATIONS 128–30 (2d ed. 2001); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS 64–65 (2008); DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 195–96 (2007).

growing understanding that states need to coordinate their actions in order to increase the well-being of their citizens.

Second, since the decolonization of the 1950s, the members of the international community, as well as their economic heterogeneity, have proliferated.¹⁰ In the contemporary multistate setting, policymakers find it difficult to determine just what interstate equality or fairness requires. Even if states do not want to promote distributive-fairness goals, they need to recognize that any decision to coordinate their actions with respect to issues of common interests has a distributive *impact*. This impact is becoming increasingly important and the difference in views about it creates serious obstacles to effective international agreements on a wide array of issues.¹¹ Hence, while not all international regimes have professed distributive objectives, questions about their appropriate distributive impact are unavoidable. Reaching agreements about these questions comprises the core of many regulatory challenges in contemporary international relations.¹²

The current situation of an interdependent world economy in which sovereign nation-states are not able to coordinate their actions in order to deliver many important international public goods is unsustainable.¹³ The rapid growth associated with globalization has come at the cost of increasing the number of problems that states cannot control independently — such as environmental threats, inter- and intra-nation inequalities, and a contraction of many social safety nets due to fiscal constraints. While the argument that globalization undermines national sovereignty is quite common, it is important to recognize that state sovereignty also manifests through participation in international agreements. Put differently, if one considers sovereignty as the ability to govern and provide solutions to problems that a given state's residents face, then this ability to govern is achieved both through domestic legislation *and* through international coordinative agreements. Hence, establishing international regimes that effectively provide public goods that states are unable to provide by themselves can simultaneously strengthen states' sovereignty and bolster the stability of the global market — because the two are interdependent. Coming up with a framework that would allow for such coordination is

¹⁰ TUULA HONKONEN, THE COMMON BUT DIFFERENTIATED RESPONSIBILITY PRINCIPLE IN MULTILATERAL ENVIRONMENTAL AGREEMENTS: REGULATORY AND POLICY ASPECTS 366 (2009).

¹¹ Cecilia Albin, *Negotiating International Cooperation: Global Public Goods and Fairness*, 29 REV. INT'L STUD. 365, 365 (2003).

¹² CECILIA ALBIN, JUSTICE AND FAIRNESS IN INTERNATIONAL NEGOTIATION 2–3 (2001); Nicholas Stern, *The Economics of Climate Change*, in CLIMATE ETHICS: ESSENTIAL READINGS 39, 68 (S. Gardiner et al. eds., 2010).

¹³ STIGLITZ, *supra* note 4, at xi.

therefore of critical importance.

Instead of engaging in a normative inquiry about what distributive fairness is, this article engages in a policy-driven inquiry into the *instrumental* role of fairness considerations in international negotiations and agreements. Because disagreements about distributional considerations comprise some of the main obstacles to coordination,¹⁴ a more practical understanding of them can help facilitate more stable and effective international agreements. This article's main argument is that the economic and international relations literature focuses on the normative impact of distributive-fairness considerations and, by doing so, fails to recognize their more practical long-term insurance function. This insurance function is instrumental and therefore independent from the question of whether countries have (or lack) any moral commitment to global wealth redistribution. Upon entering binding international agreements, countries are afraid to undertake burdensome long-term commitments based on their current economic situations. Their main concern is that, if their relative economic position changes without a correlative change in their obligation, they will be at a disadvantage relative to other countries.¹⁵ International agreements that integrate aspects of "distributive fairness"¹⁶ redistribute resources from wealthier to poorer countries. However, in addition, *they also provide wealthy and middle-range countries with insurance against (not necessarily radical) changes in their relative economic positions.*

Integrating distributive-fairness considerations would allow countries to hedge the risk that their relative economic positions will change without a correlative change in their international obligations. In other words, countries could hedge uncertainty with respect to their future economic positions. Because the relative economic positions of countries are not stable, affluent countries also have an interest in integrating fairness into international agreements. Put differently, if the United States and the European Union enter into a long-term agreement with China, India, and Brazil that correlates the countries' contributions with their economic abilities, the distributive aspect of this agreement would achieve two things.

¹⁴ POSNER & WEISBACH, *supra* note 3, at 3–5 (stating that allocating the burdens of abatement measures among states, particularly between certain emerging economies and industrialized countries, is the most difficult challenge to the establishment of a climate treaty); Albin, *supra* note 11, at 367; Richard M. Bird & Jack M. Mintz, *Sharing the International Tax Base in a Changing World*, in PUBLIC FINANCE AND PUBLIC POLICY IN THE NEW CENTURY 408, 432 (Sijbren Cnossen & Hans-Werner Sinn eds., 2003).

¹⁵ For a detailed discussion on why states prioritize their relative (over absolute) payoffs, see *infra* notes 42–46 and accompanying text.

¹⁶ The term distributive fairness is crudely defined by this article as correlating the level of obligations with countries' level of economic well-being — so that wealthy countries pay more. This of course is not the only definition of distributive fairness. For a more elaborate discussion, see *infra* notes 158–162 and accompanying text.

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In the short run, it would prescribe wealth redistribution from the more prosperous Western countries to the emerging countries. In the long run, however, it would allow *all* countries to insure their relative payoff from the agreement in case their relative economic position changes. Because, under the agreement, contributions correlate with economic ability, all countries could better manage the risk of future economic volatility. This would allow them to assume more ambitious obligations without fearing that committing to heavy obligations would put them at a competitive disadvantage with respect to other countries in the future.

This state of affairs is not theoretical; it quite accurately describes some of the main tensions between the major, developed countries and emerging economies with respect to many international agreements.¹⁷ Most importantly, the inability of existing measures to deal with long-term agreements in light of uncertainty is a main obstacle in agreeing upon an international coordinative framework on vital international issues such as climate change.¹⁸

To avoid the criticism of being naïve, I accept a conservative yet dominant theme of international relations—the realism approach—that state actors primarily aim to promote their own egoistic interests.¹⁹ I further agree that most states' actions should be primarily explained as motivated by self-serving interests and not by ethical considerations. In this setting, the article's analysis provides an innovative answer to the questions of why and when distributive-fairness considerations align with states' interests. Without arguing that fairness considerations can solve all coordination problems, the article contributes to the existing literature on this topic by showing that there is no dichotomy between distributive fairness and effective international agreements and that a better understanding of the distributive-fairness insurance function can help facilitate more effective coordinative schemes. Given the vitality of the issues at stake, this inquiry's attempt to bridge realism and idealism in an effort to yield better international regimes should be seen as an acute necessity, rather than as an academic privilege.

The conclusion of this article's analysis is that policymakers can wisely

¹⁷ Emerging economies are unwilling to undertake levels of obligation similar to those of developed countries, and developed countries are unwilling to undertake long-term obligations that would put them at a competitive disadvantage in light of emerging economies' rapid levels of growth. POSNER & WEISBACH, *supra* note 3, at 3–5; *see infra* Parts III.B.–C.

¹⁸ *See* Rafael Leal-Arcas, *Alternative Architecture for Climate Change—Major Economies*, 4 EUR. J. LEGAL STUD. 25, 53 (2011); *infra* notes 183–198 and accompanying text.

¹⁹ JACKSON & SORENSON, *supra* note 8, at 72 (tracing this notion to classic realism and the writings of Machiavelli).

incorporate distributive-fairness considerations into long-term international agreements. Although this would not solve all problems that arise from establishing international agreements, it would make an important contribution by providing an adequate way to hedge uncertainty. The insurance function of these considerations may increase the effectiveness, compliance, and participation in those agreements and allow governments to better provide public goods that require international coordination. This result is not intuitive because distributive-fairness considerations are too often portrayed as unrealistically utopian, benevolent, and impractical features that cannot be reconciled with international relations.

This article's analysis challenges and supplements existing conceptions within international relations, international law, and economic literature by demonstrating the constructive role distributive-fairness considerations can play in facilitating international agreements. It opens a novel discussion about how international agreements and organizations can promote, and be promoted by, addressing distributive-fairness considerations. The article also suggests that fundamental reforms are merited—namely because the way in which distributive considerations are addressed today promotes little if any insurance function.²⁰

Part I describes the international setting in which international agreements take place. Part II identifies different scholarly approaches to these considerations and evaluates the merits and the shortcomings of each approach. Part III advances the article's main argument: distributive-fairness considerations carry an important and unrecognized insurance function. This Part uses different environmental problems that require international coordination as examples to stress the difficulties of reaching and maintaining a coordinative international agreement. It uses these examples to explain how the incorporation of distributive-fairness considerations can mitigate, though not solve, some of the difficulties. Part IV offers some conclusions.

I. DISTRIBUTIVE FAIRNESS IN CONTEMPORARY INTERNATIONAL AGREEMENTS

This Part outlines the role of distributive-fairness considerations in contemporary international arrangements. The analysis briefly describes the framework in which international agreements take place and then explores the impact of distributive-fairness considerations on international trade and environmental agreements. It provides examples of how they are

²⁰ Most distributive concerns are addressed through differential treatments—special provisions crafted for developing countries. These arrangements are flawed because they are country-based, are incoherent, have unclear or limited time horizons, and are not outcome-oriented. *See infra* Part I.C.

implemented and explains why, to date, distributive considerations have not successfully advanced developing countries or international cooperation.

A. Why Are There International Agreements? An Overview of the Coordinative Framework

Recent years of rapid globalization have resulted in an unstable political situation. On the one hand, many issues affecting people's lives have become global in a way that undercuts states' abilities to unilaterally manage them.²¹ On the other hand, states are the only legitimate authorities that can make binding political decisions on behalf of their peoples.²² Hence, even though a global reality requires global rules and standards,²³ no mechanism can bypass states' abilities to enforce rules within their own jurisdictions.²⁴

Given their inability to satisfactorily govern complex global issues by themselves, states have an incentive to better manage these issues by coordinating their actions.²⁵ However, coordination imposes certain duties and requires ongoing effective monitoring to prevent free-riding. The need for lasting, coherent, and foreseeable administration of international relations requires policymakers to rely on legal systems and to devise binding multilateral legal instruments (for example, treaties) and enforcement institutions.²⁶ These agreements and (even more so) organizations enable states to coordinate their actions through a stable framework of monitoring and penalties.²⁷ These legal regimes reduce

²¹ ANDREW HURRELL, *ON GLOBAL ORDER* 8 (2007) (arguing that this is most evident in the case of trade and environmental issues); RODRIK, *supra* note 9, at 195–96; Andreas Lange & Carsten Vogt, *Cooperation in International Environmental Negotiations Due to a Preference for Equity*, 87 J. PUB. ECON. 2049, 2049–50 (2003).

²² BROWN, *supra* note 9, at 127–29 (discussing the development of the sovereignty concept); Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 106–07 (2009) (describing different definitions of sovereignty).

²³ STIGLITZ, *supra* note 4, at 207.

²⁴ RODRIK, *supra* note 9, at 196–212 (defining globalization as the growing volume of international trade driven by lower communication and transportation costs); STIGLITZ, *supra* note 4, at 21; Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1, 33 (2010); Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 180 (2008).

²⁵ BROWN, *supra* note 9, at 128; HURRELL, *supra* note 21, at 292; Eric T. Laity, *The Competence of Nations and International Tax Law*, 19 DUKE J. COMP. & INT'L L. 187, 192 (2009).

²⁶ CULLET, *supra* note 7, at 23–24.

²⁷ Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 353, 356 (2008); Amrita Narlikar, *Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO*, 29 WORLD ECON. 1005,

transaction costs by offering standard agreements²⁸ and often employ professional, quasi-independent bureaucracies that enable reciprocal enforcement.²⁹

To be effective, these rules and institutions need to be intrusive in many cases, so they also affect how different states are domestically governed.³⁰ Furthermore, the rules governing these international regimes remain open for other states to join³¹ and are in some ways dynamic so that they can modify states' obligations as reality changes.³² Hence, by subscribing to these legal regimes, states lose control over important aspects of their domestic and foreign policies.³³ This loss of control operates as a disincentive for states to enter into demanding international agreements or to concede their powers to international organizations.³⁴

States' demand for coordination results from the need for regulation of a certain issue and from fear of losing control to larger, supra-national bodies.³⁵ To date, economic globalization has outpaced global governance, leaving many issues that require global regulation to be governed by an array of inadequately coordinated and insufficiently effective international

1007 (2006); Kenneth A. Oye, *The Conditions for Cooperation in World Politics*, in INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES 36, 41–42, 47–49 (Robert J. Art & Robert Jervis eds., 3d ed. 1992).

²⁸ Aharon Ilouz, Allocation of Jurisdictional Power and Institutional Choice in the International Trade Regime and in the International Tax Regime—A Game Theory Analysis 19 (Jul. 3, 2009) (unpublished manuscript), available at <http://ssrn.com/paper=1429183> (providing a survey of the literature that highlights international agreements' transaction costs saving attribute).

²⁹ HURRELL, *supra* note 21, at 310; Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 3–8 (1998) (stating that the action of an autonomous body can also affect the legitimacy of collective actions and thus provide an incentive for states to grant international organizations independence, states use international organizations to reduce certain cost); Robert Axelrod & Robert Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 250–51 (1985) (saying that institutions reduce verification costs); Blum, *supra* note 27, at 353.

³⁰ HURRELL, *supra* note 21, at 292.

³¹ Ilouz, *supra* note 28, at 15.

³² BARRETT, *supra* note 3, at 18.

³³ ALBIN, *supra* note 12, at 2.

³⁴ BROWN, *supra* note 9, at 132–35 (explaining the reluctance of states to engage in cooperative agreements according to two approaches in international relations: realism and functionalism); Robert O. Kohane, *Cooperation and International Regime*, in CLASSIC READINGS AND CONTEMPORARY DEBATES IN INTERNATIONAL RELATIONS 320, 329 (Phill Williams at el. eds., 3d ed. 2005) (explaining states' willingness to commit themselves to flexible regimes to try and solve common problems rather than to hierarchical systems of control as driven by a fear of losing sovereignty).

³⁵ STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 33 (1999).

organizations and agreements.³⁶

The analysis in this article assumes that, despite the global nature of various problems, any related action must be mediated by states that would be central parties to any successful large-scale agreement.³⁷ It puts aside domestic political considerations³⁸ and further assumes that states' decisions whether to engage in international coordinative arrangements are rational—meaning that in most cases there is a reasonable connection between states' actions and their goals.³⁹ Accordingly, rational states are willing to enter coordinative agreements only when their leaders perceive that those agreements will benefit their policy goals.⁴⁰ In deciding whether to join long-term agreements, sovereign states have to evaluate whether the coordinative gains outweigh their costs—namely, whether providing better solutions to international problems justifies limiting their future ability to design certain policies.⁴¹

Finally, this article assumes that when states enter international agreements they care about their relative payoffs and not only about their absolute payoffs.⁴² As realist approaches to international relations

³⁶ STIGLITZ, *supra* note 4, at 21; Albin, *supra* note 11, at 365.

³⁷ See HURRELL, *supra* note 21, at 233–35; Benschalom, *supra* note 24, at 33–34; Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT'L L.* 113, 129–30 (2009) (noting that when agreements require international distributive tradeoffs or complicated compliance mechanisms, active agreements among states are still key to the success of the agreements).

³⁸ To be sure, intra-country politics (e.g., short-term election considerations) also play a considerable role in the decision to enter international cooperative agreements. However, the aim of the current analysis is how to facilitate a dynamic that promotes cooperation among states, not how to approve such in a specific state. These are two separate questions and there is no a priori reason to believe that a dynamic that encourages cooperation among states would trigger anti-cooperation dynamics within states. Hence, while this article recognizes the importance of intra-state politics, it does not find that its proposal affects them in any particular manner and therefore does not address them directly.

³⁹ GUZMAN, *supra* note 9, at 120–22.

⁴⁰ POSNER & WEISBACH, *supra* note 3, at 6; Mintz & Weiner, *supra* note 6, at 86.

⁴¹ Ring, *supra* note 24, at 230; Daniel Bodansky, *A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime* 16 (Mar. 7, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773865 (making a similar argument in the context of climate policy—stating that, because climate policy touches upon many domestic policies including agriculture, land-use, and transportation, for many countries the costs of binding emission targets to national sovereignty outweigh their benefits from the reduction).

⁴² In other words, achieving Pareto optimality is a necessary but not sufficient condition for countries to join an international agreement. See Mintz & Weiner, *supra* note 6, at 86 (suggesting that Pareto optimality is required to achieve international coordination). While neoclassical rationality stresses that rational individuals should only try to maximize their absolute payoffs, experimental behavioral economics repeatedly proves this assumption

suggest,⁴³ states care not only that they are better off with the agreement than without it, but also that their counterparties' share of the coordinative gains will not be dramatically greater than their own.⁴⁴ This emphasis on the relative payoff could be seen as motivated (irrationally) by envy and is therefore rejected by certain approaches to international relations.⁴⁵ However, while envy may play some role, rational states are also likely to care about their relative payoffs. States compete against one another in many margins—namely, for development and revenues (but also for a skilled workforce). Therefore, if an international agreement provides a certain advantage to one state, this state is able to free up resources to better compete with other states. For example, the Kyoto Protocol imposes certain emission reduction obligations on developed signatories, which gives an advantage to emerging signatories (for example, making production cheaper because energy is relatively cheaper in comparison to its costs in developed countries).⁴⁶

Under the above setting, states seek to coordinate their actions to attain global public goods that they cannot attain unilaterally. These goods have to be supplied by a coordinative arrangement with broad participation or not supplied at all.⁴⁷ Whenever there is no single party that is responsible for creating the problem or for enforcing its solution, the state-based institutional arrangement will not be sufficient to address the problem.⁴⁸

wrong (with respect to individuals). See Lange & Vogt, *supra* note 21, at 2051–52 (surveying this literature).

⁴³ For a discussion of realist approaches see *infra* note 113.

⁴⁴ This is one of the assumptions that differentiates realist and liberal approaches in international relations. BROWN, *supra* note 9, at 49–50 (surveying the debate of whether states care about absolute or relative payoffs and mentioning that claims that the notion that relative obligations are more important are backed by observations); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 494, 498–99 (1998); see also Andreas Hasenclever et al., *Theories of International Regimes*, in CAMBRIDGE STUDIES IN INT'L RELATIONS, at 113–21 (Cambridge Stud. in Int'l Rel. Ser. No. 55, 1997); Joseph Grieco et al., *The Relative-Gains Problem for International Cooperation*, 87 AM. POL. SCI. REV. 729 (1993) (providing one of the canonic discussions of this issue). This point also corresponds well with the findings of behavior psychology. See generally STEVEN J. BRAMS & ALAN TAYLOR, *FAIR DIVISION* (1996) (surveying the game theory literature on how people respond to distributive games).

⁴⁵ The emphasis on relative payoffs is rejected by liberal approaches in international relations, which claim that states' utility functions are independent from each other. Grieco, *Anarchy*, *supra* note 44, at 495–97. For more on liberal theories see *infra* note 114.

⁴⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol or Kyoto]. For a description of the Kyoto Protocol see *supra* notes 103–106.

⁴⁷ Blum, *supra* note 27, at 358.

⁴⁸ Stephen M. Gardiner, *A Perfect Moral Storm*, in CLIMATE ETHICS: ESSENTIAL READINGS 87, 88–89 (making this case in the context of environment regulation).

The clearest example of this type of good is environmental protection. The diffused, fragmented, and loosely coordinated state-based environmental regulatory regimes impose standards that are insufficient to deal with many environmental issues. This insufficiency is most notable in the context of the current climate change crisis created by the rapidly growing globalized economy.⁴⁹

The question of how to best provide this global public good is essentially a classic multiple-player prisoner's dilemma setting.⁵⁰ For example, the effects of CO₂ emissions and air pollution cross borders. Hence, any country reducing them is not only benefiting itself, but also (and perhaps primarily) providing a public good because the benefit is non-exclusive to the abating country.⁵¹ However, the impact of each single country on the global levels of pollution or emissions is rather small, so there are few (if any) incentives for each country to bear substantial costs to reduce them by itself.⁵² When countries lack ability to govern certain issues that impact the quality of their residents' lives, they should cartelize by entering a coordinative agreement with other states to take similar actions to address the global problem.⁵³ These incentives are intensified when the coordination scheme has a long-term horizon, such that each state is a repeated player that can penalize non-compliance by other states and expect to be penalized for its own non-compliance.⁵⁴

Effective international coordinative arrangements are, however, difficult to achieve because of the lack of trust among countries. This lack of trust arises primarily from the lack of a reliable comprehensive enforcement apparatus to guarantee the cooperative outcome. Without effective means of enforcement, countries have incentives to defect from the cartelized arrangement whenever defection allows them to reduce certain costs and therefore to maintain a higher level of productivity relative to other countries.⁵⁵ This cost reduction can be achieved by not joining the

⁴⁹ HURRELL, *supra* note 21, at 216, 219.

⁵⁰ As in a prisoner dilemma setting, cooperation yields the most optimal result but, at the same time, each party has an incentive to free-ride on the cooperation of other parties (by explicitly or implicitly defecting from the cooperative arrangement) to maximize its own returns.

⁵¹ Lange & Vogt, *supra* note 21, at 2049–50. Traditional public good analysis requires that the good would be nontrivial—so that higher consumption of it does not decrease its value. HARVEY S. ROSEN & TED GAYER, PUBLIC FINANCE 45–48 (2008).

⁵² Lange & Vogt, *supra* note 21, at 2049–50.

⁵³ BARRETT, *supra* note 3, at 85–96 (providing an overview of game theory with respect to coordination); Philippe Cullet, *Differential Treatment in International Environmental Law: Toward a New Paradigm of Inter-State Relations*, 10 EUR. J. INT'L L. 549, 550 (1999).

⁵⁴ Daniel N. Shaviro, *Why Worldwide Welfare as a Normative Standard in U.S. Tax Policy?*, 60 TAX L. REV. 155, 158 (2007).

⁵⁵ *Id.* at 162–63.

agreement or by explicitly withdrawing from it. However, this type of behavior may be costly because an international agreement may penalize non-participating or defecting states.⁵⁶ These measures may include withholding certain benefits from the uncooperative states and imposing trade penalties that would burden exports or other measures that would make the defecting country bear the costs of free-riding.⁵⁷ However, states can also engage in implicit defection by not fully complying with the agreement, colluding with defectors, or not penalizing defectors (whenever imposing the penalty is costly and undermines its own self-interest).⁵⁸ In the absence of enforcement mechanisms that can penalize non-compliers and non-signatories, the free-rider-defection incentive is likely to increase as more countries join the coordinative arrangement.⁵⁹

Coordination also becomes more complicated as the heterogeneity of the parties increases.⁶⁰ Heterogeneity may mean that some countries have to make bigger sacrifices to comply with the coordinating scheme, to the point where the prospective benefits of coordination may be insufficient to encourage them to join. If their costs are greater than the anticipated benefits, these countries may require some type of payoff to join the coordinative agreement.⁶¹ This need for side payments to facilitate international coordination may dramatically increase if, as assumed, countries are also concerned with their relative payoffs. In such a setting, countries may require side payments even if their (net) coordinative benefits are substantial. Hence, achieving a coordinative agreement in a very heterogeneous and unequal global economy, where the impact of certain policies on different participants varies dramatically, is a considerable political challenge.⁶²

B. The Rise and Fall of the Sovereign Equality Paradigm in International Law and International Distributive-Fairness

International law developed along the notion of state independence and sovereignty. State sovereignty — the exclusive functional and normative authority of the state to use governmental powers to make decisions for its

⁵⁶ George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S96–98 (2002) (analyzing the reasons why states cooperate and comply with international law).

⁵⁷ Allison Christians, *Networks, Norms and National Tax Policy*, 9 WASH. U. GLOBAL STUD. L. REV. 1, 35 (2010).

⁵⁸ GUZMAN, *supra* note 9, at 66–67.

⁵⁹ Michael Finus & Stefan Maus, *Modesty May Pay!*, 10 J. PUB. ECON. THEORY 801, 802 (2008).

⁶⁰ Blum, *supra* note 27, at 356–57; Shavero, *supra* note 54, at 58.

⁶¹ BARRETT, *supra* note 3, at 335; Bird & Mintz, *supra* note 14, at 411.

⁶² HURRELL, *supra* note 21, at 231, 287.

residents⁶³ — is a complicated and somewhat vague concept.⁶⁴ It is also, however, a valid norm in international relations that assigns states the full authority and responsibility to decide whether to engage in international agreements. In traditional international law analysis, this independence translates into the notion of “sovereign equality”: the expectation that states should be treated equally, and agreements among them should be applied through neutral terms that provide reciprocal benefits.⁶⁵ This fundamental notion of reciprocity is still, in many ways, the core default assumption of international law.⁶⁶

However, the notion of sovereign equality has been recognized as an inadequate organizing principle of international law and, as such, of international agreements.⁶⁷ From a descriptive perspective, the great heterogeneity among countries (in terms of economic development and political institutions)⁶⁸ suggests that formal equality is in many cases alien to reality.⁶⁹ Sticking to this fiction is futile — *real* differences among states require more nuanced non-reciprocal arrangements to facilitate international coordination.⁷⁰ Furthermore, the notion of sovereign equality has been criticized as being neutral in form but not in substance — it mainly favors bigger and more-developed countries.⁷¹

Despite the notion of sovereign equality, international relations research has gradually grown to recognize that distributive-fairness considerations play some role in the formation and operation of international agreements.⁷² Arguments that use distributive-fairness rhetoric are getting a stronger hold

⁶³ Ring, *supra* note 24, at 182 (discussing the validity of this characterization of state sovereignty).

⁶⁴ JACKSON & SORENSON, *supra* note 8, at 21–23 (providing the different factors through which state sovereignty could be considered in international relations); KRASNER, *supra* note 35, at 20–25.

⁶⁵ KRASNER, *supra* note 35, at 14; Christopher Schreuer, *The Waning of Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT’L L. 447, 448 (1993).

⁶⁶ CULLET, *supra* note 7, at 93; HONKONEN, *supra* note 10, at 37; RAJAMANI, *supra* note 3, at 2; Cullet, *supra* note 53, at 535.

⁶⁷ Cullet, *supra* note 53, at 558; Schreuer, *supra* note 65, at 449.

⁶⁸ CULLET, *supra* note 7, at 84; HONKONEN, *supra* note 10, at 366 (stating that, prior to WWII, international law was the law of imperial colonial powers that were in many respects equal, but that, due to decolonization after WWII, the number of countries that were considered parties under international law and their heterogeneity grew rapidly).

⁶⁹ RAJAMANI, *supra* note 3, at 177–79 (describing the relevant differences among countries with respect to obligations associated with climate change and reduction in emissions).

⁷⁰ CULLET, *supra* note 7, at 171.

⁷¹ *Id.* at 171.

⁷² Davidson et al., *supra* note 5, at 990.

in international negotiations.⁷³ They seem to have instrumental and expressive values;⁷⁴ evidence suggests that they impact international negotiators' attitudes⁷⁵ and countries' behaviors.⁷⁶ While the way in which states employ these considerations is indeed subjective and biased,⁷⁷ their frequent use and salience suggest that they cannot be ignored.⁷⁸ There is a growing recognition among policymakers and academics that a better theoretical and policy evaluation of international relation settings requires a better understanding of the role of distributive-fairness considerations.⁷⁹

The main avenue through which distributive-fairness considerations manifest themselves is the differential (that is, asymmetrical and more favorable) treatment of various developing countries in different international agreements.⁸⁰ Differential treatment serves both expressive and practical functions. As an expressive matter, certain scholars have argued that the incorporation of differential treatment recognizes and supports the validity of claims made by developing countries.⁸¹ These claims justify providing developing countries with special treatment on a mixture of grounds, including substantive equality considerations,

⁷³ HURRELL, *supra* note 21, at 19; JACKSON & SORESENSEN, *supra* note 8, at 157; Bird & Mintz, *supra* note 14, at 432 (stating that experience strongly suggests that perceived fairness is generally a more critical element than efficiency in policymaking and that real-world arguments are typically about what is perceived to be fair).

⁷⁴ HONKONEN, *supra* note 10, at 108–09.

⁷⁵ ALBIN, *supra* note 12, at 215; Frank J. Garcia & Lindita Ciko, *Theories of Justice and International Economic Law*, in RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW 4 (Chios C. Carmody et al. eds., forthcoming 2012), available at: <http://ssrn.com/abstract=1962933>; Andreas Lange et al., *On the Importance of Equity in International Climate Policy: An Empirical Analysis*, 29 ENERGY ECON. 545, 545 (2007).

⁷⁶ Narlikar, *supra* note 27, at 1006, 1026 (observing that, in certain cases, leading countries of the developing world, such as Brazil and India, were willing to support redistribution and equity-based demand of less-developed countries even if those demands adversely affected them).

⁷⁷ This is known as “fairness bias,” through which individuals interpret fairness consideration in a self-serving manner. Olof Johansson-Stenman & James Konow, *Fair Air: Distributive Justice and Environmental Economics*, 46 ENVTL. & RESOURCE ECON. 147, 150 (2010).

⁷⁸ HONKONEN, *supra* note 10, at 360.

⁷⁹ GUZMAN, *supra* note 9, at 19–20 (suggesting that much of the criticism against constructivism is that, given their relative flexible framework and assumption, when compared to realism, they make it difficult to provide general models to predict state behaviors); Johansson-Stenman & Konow, *supra* note 77, at 148.

⁸⁰ CULLET, *supra* note 7, at 84; RAJAMANI, *supra* note 3, at 1; Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT’L L. 975, 980 (2000).

⁸¹ Cullet, *supra* note 53, at 551.

redistributive equity, their right for development, and compensatory justice.⁸²

In a more practical sense, providing developing countries with different treatment (for example, lower obligations, compensation, and assistance) encourages them to join and implement multinational agreements.⁸³ However, developing countries have been most successful in introducing fairness-based differential treatment in those cases where the developed world was most keen on reaching agreement.⁸⁴

C. Differential Treatment Regimes Under International Trade and Environmental Law and Their Discontents

This subpart briefly surveys the most visible and significant use of differential treatment arrangements in the fields of international trade and environmental law. It then explains the main criticism of the use of differential treatment — namely that, as a tool, it has not been applied in a systematic or coherent manner. This has prevented the preferential treatment practice from materializing into full redistributive or development agendas. As such the success of using this instrument in promoting more effective or equitable trade and environmental regimes has been limited.⁸⁵

The intellectual foundation of multilateral trade law is that liberalized, non-discriminatory trade is the best avenue for economic development.⁸⁶ Hence, most multilateral trade rules promote non-discriminatory reductions in trade barriers — namely tariffs and quotas.⁸⁷ Nevertheless, the World Trade Organization (WTO) Agreements, and the General Agreement on Tariffs and Trade (GATT) that preceded it, contain many differential treatment provisions that favor developing countries.⁸⁸ These include

⁸² HONKONEN, *supra* note 10, at 12, 59; RAJAMANI, *supra* note 3, at 252; Cullet, *supra* note 53, at 551, 558.

⁸³ CULLET, *supra* note 7, at 16.

⁸⁴ Cullet, *supra* note 53, at 560.

⁸⁵ *Id.* at 173.

⁸⁶ Derk Bienen & Mamo E. Mihretu, *The Principle of Fairness and WTO Accession—An Appraisal and Assessment of Consequences 2* (Soc’y of Int’l Econ. Law, Working Paper No. 2010/29, 2010) available at <http://ssrn.com/abstract=1633043>.

⁸⁷ The most prominent example is the Most Favorable Nation clause under WTO/GATT law, which requires WTO members to equally apply their lowest tariffs to all other members. ALBIN, *supra* note 12, at 105. See generally Michael Trebilcock & Michael Fishbein, *International Trade: Trade Remedies*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 1, 1–57 (Andrew T. Guzman & Alan O. Sykes eds., 2007) (surveying the way in which international trade law has reduced trade barriers).

⁸⁸ ALBIN, *supra* note 12, at 106; WILLIAM DAVEY & JOHN JACKSON, *THE FUTURE OF INTERNATIONAL ECONOMIC LAW* 116 (2008) (stating that there are 155 special differential treatment provisions in the WTO Agreements); HONKONEN, *supra* note 10, at 50–54; Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMP. L. REV. 291,

provisions that provide developing countries with more flexible liberalization obligations, longer schedules to implement their obligations, and more favorable adjudication terms.⁸⁹ These differential treatment arrangements also allow developed countries to adopt discriminatory rules that deviate from the WTO framework by favoring producers from developing countries.⁹⁰

The desirability of providing developing countries with differential treatment has been recognized as an inherent part of the WTO.⁹¹ Nevertheless, to date, the idea of promoting developing countries through differential treatment has had only a marginal impact.⁹² It is not only that economic interests better explain actual arrangements of multilateral trade agreements,⁹³ but also that the differential practices have never materialized to a fully coherent agenda. First, there are deep disagreements about the appropriate scope of differential treatment.⁹⁴ While developing countries maintain that differential measures should promote long-term redistributive purposes, developed countries view them as provisional measures that should gradually diminish once developing countries' economic integration progresses.⁹⁵ Second, the various types of differential treatment in trade law

293–95 (2004) (explaining the process through which the GATT agreements allowed for the development of a generalized system of preferences that permitted developed countries to offer non-reciprocal concessions to developing countries); Juliane Kokott, *Equity in International Law*, in *FAIR WEATHER?: EQUITY CONCERNS IN CLIMATE CHANGE* 177 (Ferenc L. Tóth ed., 1999) (arguing that the favorable treatment of developing countries under GATT and WTO Agreements means that equitable principles have become part of trade law); Andrew D. Mitchell & Tania Voon, *Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over*, 15 *GLOBAL GOVERNANCE* 343, 345 (2009) (pointing to six categories of differential treatment).

⁸⁹ Garcia, *supra* note 88, at 291–93; Garcia, *supra* note 80, at 989–95 (describing the various mechanisms under trade law that favor developing countries); Webb McArthur, *Reforming Fairness: The Need for Legal Pragmatism in the WTO Dispute Settlement Process*, 9 *RICH. J. GLOBAL L. & BUS.* 229, 231–34 (2010).

⁹⁰ Garcia, *supra* note 88, at 303–04.

⁹¹ Seung Wha Chang, *WTO for Trade and Development Post-Doha*, *J. INT'L ECON. L.* 553, 554–55 (2007) (describing paragraph 44 of the Doha trade-talks ministerial declaration).

⁹² DAVEY & JACKSON, *supra* note 88, at 116; Mitchell & Voon, *supra* note 88, at 347–48 (arguing that differential treatment regime is developing countries' political right but conceding that there is a need to find a way to operationalize them); Narlikar, *supra* note 27, at 1025–26.

⁹³ This point is supported even by scholars who highlight the importance of fairness considerations. See ALBIN, *supra* note 12, at 106.

⁹⁴ Chang, *supra* note 88, at 555–60 (delineating the lines of controversy about differential treatment in the WTO committee assigned to integrate them into the WTO framework).

⁹⁵ DAVEY & JACKSON, *supra* note 88, at 118–19; HONKONEN, *supra* note 10, at 64;

have been incompletely implemented⁹⁶ — there is no list of benefits or criteria that trade policymakers can apply to determine their benefits or obligations.⁹⁷ For this reason, differential treatment under international trade law may carry some expressive value but has not made it possible for most developing countries to harvest the benefits of multinational trade to the same extent that developed countries have.⁹⁸

The growing awareness of the need to address global environmental issues — and the inability of states to act by themselves to promote environmental protection — have resulted in many agreements that include differential treatments.⁹⁹ The two best examples of differential treatments are the Montreal Protocol¹⁰⁰ and the Kyoto Protocol.¹⁰¹ The first is concerned with the depletion of the ozone layer and the latter with climate change.¹⁰² Both require countries to reduce gas emissions; both protocols deal with supplying pure international public goods because the atmosphere is not exclusively controlled by any country;¹⁰³ both protocols allow for some trading in emission entitlements; and both impose a lower level of obligation on developing countries.¹⁰⁴ There is, however, a substantial difference between the two: the Montreal Protocol imposes lower obligations on developing countries (though it imposes uniform obligations within country categories), whereas the Kyoto Protocol imposes no quantitative limitation on non-developed countries.¹⁰⁵ While there are many

Chang, *supra* note 88, at 556.

⁹⁶ HONKONEN, *supra* note 10, at 59; Chang, *supra* note 88, at 554–55.

⁹⁷ STIGLITZ, *supra* note 4, at 82; Bienen & Mihretu, *supra* note 86, at 14; Andrew Brown & Robert Stern, *Concepts of Fairness in the Global Trading System*, 12 PAC. ECON. REV. 293, 304–05 (2007) (mentioning that many of the benefits have not been fully used for a variety of reasons including transaction costs); Garcia, *supra* note 88, at 298 (arguing that some of the benefits are vaguely defined and offer developing countries only uncertain future benefits).

⁹⁸ Garcia, *supra* note 88, at 303; Chang, *supra* note 88, at 553.

⁹⁹ HONKONEN, *supra* note 10, at 111–78.

¹⁰⁰ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol or Montreal].

¹⁰¹ Kyoto Protocol, *supra* note 46.

¹⁰² Montreal Protocol, *supra* note 100.

¹⁰³ In such a state of affairs, every country has the incentive to engage in emission of those gases whenever such behavior allows for cheaper production of goods. Unless there is a coordinative agreement that constrains countries' egoistic behavior, they are all bound to be worse off. *See* discussion *supra* Part I.A.

¹⁰⁴ Montreal Protocol, *supra* note 100; Kyoto Protocol, *supra* note 46; *see also* BARRETT, *supra* note 3, at 361 (providing a table that summarizes the main features of both agreements).

¹⁰⁵ Montreal Protocol, *supra* note 100; Kyoto Protocol, *supra* note 46. *See also* BARRETT, *supra* note 3, at 361 (noting that the Montreal Protocol also requires developed countries to transfer money to developing countries to assist them in adjusting to the

other important differences between these protocols (for example, enforcement mechanisms) the issue of how to allocate obligations remains at the forefront.¹⁰⁶ In this respect, it is important to note that, while the Montreal Protocol has succeeded in mitigating the environmental hazard (according to most views), the Kyoto Protocol has failed.¹⁰⁷

The Montreal Protocol and the Kyoto Protocol provide the most important examples of agreements that have incorporated differential treatment considerations; there are however many others.¹⁰⁸ The role of the differential treatment principle in environmental law has nevertheless been limited.¹⁰⁹ Although the principle aligns with intuitions about which country should carry the burden of environmental protection, there is a lot of ambiguity and disagreement about what this principle actually means.¹¹⁰ With a few exceptions (for example, the Montreal Protocol), most examples do not demonstrate that differential treatment has had any major, positive impact.¹¹¹ Furthermore, the fact that developing countries are subject to more lenient environmental protection requirements materially jeopardizes the ability to meet certain environmental protection goals.¹¹²

In summary, while it is clear that distributive-fairness considerations do play a role in international negotiations and agreements, it is equally clear that this role is limited. It has not helped facilitate major redistributive measures or effective international coordinative arrangements with respect to many cardinal issues.

II. SCHOLARLY APPROACHES TO DISTRIBUTIVE-FAIRNESS CONSIDERATIONS

This Part briefly surveys the existing international relations literature

agreement's requirements); RAJAMANI, *supra* note 3, at 94–95.

¹⁰⁶ BARRETT, *supra* note 3, at 247–49, 346–49.

¹⁰⁷ *Id.* at 359–407.

¹⁰⁸ CULLET, *supra* note 7, at 135–70 (providing an elaborate case study of the plant variety protection efforts); RAJAMANI, *supra* note 3, at 93–115.

¹⁰⁹ David G. Victor, *The Regulation of Greenhouse Gases: Does Fairness Matter?*, in FAIR WEATHER?: EQUITY CONCERNS IN CLIMATE CHANGE 193, 205 (Ferenc L. Tóth ed., 1999).

¹¹⁰ HONKONEN, *supra* note 10, at 327.

¹¹¹ In fact, it has been convincingly argued that, whenever costly commitments are involved, as in the case of climate change, the notion that there is a need to use differential treatment to favor developing countries has failed to promote effective coordination. Victor, *supra* note 109, at 201.

¹¹² POSNER & WEISBACH, *supra* note 3, at 73–75; Mary J. Bortscheller, *Equitable but Ineffective: How the Principle of Common but Differentiated Responsibilities Hobbles the Global Fight Against Climate Change*, 10 SUSTAINABLE DEV. L. & POL'Y 49, 49–51 (2010) (arguing that the Kyoto Protocol framework, which does not impose any concrete emission requirements on major emitters such as China, is inadequate).

about distributive-fairness considerations and the role it plays in international agreements and negotiations. The first subpart identifies two conflicting views about distributive fairness: “cosmopolitanism” and “egoist-realism.” The second subpart identifies two more down-to-earth approaches: the “fairness perception” and the “division of labor.” These latter approaches allow some reconciliation between the two former ones. By outlining the different approaches, this Part sets the groundwork for the article’s main argument that current literature has, in some ways, failed to fully conceptualize the potential role of fairness considerations. All these approaches differ on the extent to which international arrangements should promote wealth redistribution among nations. They all agree, however, that the desirability of such redistribution is the core question with respect to whether international agreements should incorporate fairness considerations. This article challenges this common denominator and argues that focusing only upon the distributive function of fairness considerations is the main vulnerability of all four approaches. Hence, rather than breaking down international relations literature into traditional paradigmatic divisions of realism (and neo-realism),¹¹³ liberalism (and neo-liberalism),¹¹⁴ and constructivism,¹¹⁵ this analysis reframes and re-labels new categories that are more narrowly tailored to how fairness considerations are viewed.

A. Utopian Cosmopolitanism and Self-Serving Egoist-Realism

This subpart identifies two approaches towards redistributive-fairness considerations: cosmopolitanism and egoist-realism. “Cosmopolitanism” stresses that fairness considerations *should* impact international agreements and institutions to assure that the benefits of globalization are more evenly shared among countries.¹¹⁶ Cosmopolitanism encompasses those

¹¹³ Realism (and neorealism) is the notion that states compete for power (or hegemony) to survive in an international setting characterized by anarchy. BROWN, *supra* note 9, at 44–48; CYNTHIA WEBER, *INTERNATIONAL RELATIONS THEORY* 14–17 (2d ed. 2005).

¹¹⁴ The liberal (and neoliberal) approach views states as rational actors seeking to maximize their preferences through contractual settings. BROWN, *supra* note 9, at 48–51; JACKSON & SORESENSEN, *supra* note 8, at 106–35; WEBER, *supra* note 113, at 104–06.

¹¹⁵ The constructivists suggest that identities and interests in international relations are not stable but that ideas and international relation institutions interactively shape each other. The constructivist approach has become more influential in the post-Cold War years. JACKSON & SORESENSEN, *supra* note 8, at 253–59; WEBER, *supra* note 113, at 60–61.

¹¹⁶ WEBER, *supra* note 113, at 38–40 (characterizing this approach as idealism—an approach that views states as community members rather than as competitors—and noting that even though aspirations were that proper structuring of international relations would make the world a better place, the descriptive power of this approach was limited during WWII and the Cold War era). For an example of such an approach, see Garcia, *supra* note 80, at 980–81 (arguing that international trade has made the rich richer and the poor poorer

approaches that view ideas about justice and fairness as the core of the international coordinative agreements. Advocates of these approaches stress that ideas about what is fair impact how parties act and shape international arrangements that regulate states' behavior. Therefore, ideas about fairness matter because incorporating them into international arrangements can help promote a more just global order.¹¹⁷

Even if international arrangements do not have any explicit distributive goals,¹¹⁸ many of them are bound to have a significant distributive *impact* and therefore cannot avoid issues of global wealth distribution.¹¹⁹ According to cosmopolitans, the structure of these regimes is not natural but political¹²⁰ and therefore should also serve moral goals of assisting developing countries.¹²¹ Many existing political and legal documents recognize this moral duty when they declare a normative commitment to certain distributive values and aspirations.¹²²

In contrast to cosmopolitanism, "egoist-realism" argues that the self-serving interests of state parties are the primary force that shapes

and that it is the duty of liberal developed countries to respond to this global inequality).

¹¹⁷ Unsurprisingly, the core of this prescriptive approach lies within contemporary cosmopolitan political philosophy, which stresses that there is a moral duty to extend distributive justice considerations beyond the framework of the nation-state. Although they rely primarily on normative grounds, the traces of these philosophical approaches can also be found in positivist international relations scholarship. Constructivism, for example, is an approach that stresses that states' goals and preferences not only shape international arrangements but also are shaped by them. Diane M. Ring, *Who Is Making International Tax Policy? International Organizations as Power Players in a High Stakes World*, 33 *FORDHAM INT'L L.J.* 649, 680–82 (2010) (providing a comprehensive survey of the cognitivist approach); see also GUZMAN, *supra* note 9, at 19–20 (discussing "cognitivism," a somewhat similar approach in international law). For some of the leading texts on the issue of global distributive justice, see CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); THOMAS W. POGGE, *REALIZING RAWLS* (1989); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2002); KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS—COSMOPOLITANISM, NATIONALISM AND PATRIOTISM* (2004); see also HONKONEN, *supra* note 10, at 82–90 (surveying the literature); Benshalom, *supra* note 24, at 9 (same).

¹¹⁸ This is arguably the case with international trade law. See *supra* notes 86–87 and accompanying text.

¹¹⁹ Stern, *supra* note 12, at 68 (making this claim in the context of environmental regulation).

¹²⁰ Benshalom, *supra* note 24, at 40.

¹²¹ STIGLITZ, *supra* note 4, at 82–84; Garcia, *supra* note 88, at 301.

¹²² DAVEY & JACKSON, *supra* note 88, at 116; Narlikar, *supra* note 27, at 1028 (describing how this newfound sensitivity can help explain the ministerial declaration of the Doha round); STEVE VANDERHEIDEN, *ATMOSPHERIC JUSTICE: A POLITICAL THEORY OF CLIMATE CHANGE* 55 (2009).

international regimes.¹²³ The egoist-realism approach focuses on states' motivations to act in a self-serving way to increase their material wealth.¹²⁴ This approach stresses that domestic political forces expect policymakers to prioritize national interests over global ones.¹²⁵ Hence, under this view, states negotiate with one another to overcome classic common action problems where some mutual gains could be derived from coordination¹²⁶ (for example, overcoming certain market failures and reaching a stable allocation of power and resources).¹²⁷ Because states have unequal bargaining powers, it is unlikely that the outcomes of international agreements would share the coordinative benefits equally among them.¹²⁸ Hence, international agreements create an unsuitable policy vehicle with which to promote any global distributive agenda.

This subsection's comparison of cosmopolitanism and egoist-realism is in some ways not intuitive: it compares what is essentially a theoretical-normative academic approach with an empirical-descriptive one. This comparison, some may say, produces little value because the two are obviously distinct in many ways. Egoist-realists do not say that normative considerations should not matter; they just express skepticism as to whether they actually do. Cosmopolitans, on the other hand, may think that fairness considerations should guide international agreements and organizations, while being fully aware that it is difficult to satisfy this ambition in many cases.

The point of this subpart's analysis is that these two approaches have very different emphases on how to handle the phenomenon of rapid global

¹²³ This approach originates from the political theory of Thomas Hobbes, which views states (and individuals) as motivated by egoism. HOBBS, *supra* note 1, at 82–86; VANDERHEIDEN, *supra* note 122, at 93–95. It is important to note that there are other accounts of Hobbes.

¹²⁴ This definition is somewhat broader than the definition of realism under international relations. *See supra* note 113 and accompanying text.

¹²⁵ Shavero, *supra* note 54, at 178. This approach resembles traditional realist approaches within international relations, which argue that states should be viewed as actors that engage in international negotiations as part of a search for promoting their own material self-interests. *See* Ethan Kapstein, *Fairness Considerations in World Politics: Lessons from International Trade Negotiations*, 123 POL. SCI. Q. 229, 233 (2008) (explaining the difference in the way self-interest is defined and that materiality is typically defined in terms of power, wealth, or security).

¹²⁶ ALBIN, *supra* note 12, at 1 (stating that, counter to the view expressed in the author's book, this is how international agreements are typically theorized).

¹²⁷ Ring, *supra* note 117, at 679–82.

¹²⁸ VANDERHEIDEN, *supra* note 122, at 91–92. This assumes that, in the course of negotiations, states do as much as they can to leverage various resources to best promote their self-serving interests against their counterparties. ALBIN, *supra* note 12, at 2 (noting that every state has the ability to pressure its counterparties through its ability to threaten to leave the negotiations).

economic integration. This difference in emphasis results in two extreme and difficult-to-reconcile prescriptive conclusions with respect to distributive-fairness considerations. However, the expectations that states either always respond or always refrain from responding to distributive-fairness considerations seem alien to the much more complex realities of how states actually behave. The next subpart therefore tries to elaborate upon two more nuanced approaches to why and how states should respond to distributive-fairness considerations.

B. Bridging the Gap: The Legitimizing-Redistributive Function of Fairness

This subpart identifies two approaches that stem from the dichotomy of cosmopolitanism and egoist-realism. The first, the “fairness-perception” approach, explains how fairness considerations actually impact international agreements and negotiations. Taking egoist-realism as its point of departure, it explains why policymakers seeking to better promote certain policies might consider adopting redistributive-fairness measures to deal with some exogenous factors such as public opinion. According to this approach, state parties use redistributive measures instrumentally as a way to legitimize international agreements that serve their interests.

The fairness-perception approach offers a pragmatic view of international relations.¹²⁹ This approach recognizes that neither utopian-cosmopolitanism nor egoist-realism offers an accurate account of reality and that it is very difficult to break down how much states’ positions are driven by fairness and self-interest.¹³⁰ It also recognizes that, to be effective, international agreements and institutions need to be viewed as fair by their stakeholders — state leaders as well as peoples.¹³¹ Thus while the egoist-realists may be correct that states do not try to promote international fairness, wise policymakers should recognize that a key feature of effective policies is that they are *perceived* as fair.¹³²

The fairness-perception approach assumes that states are self-serving but does not presuppose that their interests are solely material. Even if international policymakers are rational and motivated primarily by promoting their own states’ objectives, distributive-fairness considerations may still matter. If a sufficient number of people care about these issues,

¹²⁹ The fairness-perspective approach is closest to the liberalism approach within international relations, which views states as cooperating to achieve their preferences.

¹³⁰ See *infra* notes 131-38.

¹³¹ HONKONEN, *supra* note 10, at 263 (suggesting that leaders of developed countries have an immaterial interest in ensuring that the international regime is viewed as fair to maintain their dominance and to generate domestic democratic support for their foreign policy); Narlikar, *supra* note 27, at 1007.

¹³² THOMAS M. FRANK, THE POWER OF LEGITIMACY AMONG NATIONS 239 (1990); Narlikar, *supra* note 27, at 1007.

policymakers will take their preference into account to better design international policies. Agreements that are perceived as fair to others will result in higher participation and compliance; this in turn will foster trust among participants, which will increase the arrangements' long-term stability.¹³³ In other words, the fairness-perception approach highlights that the redistributive function of fairness considerations has an ancillary legitimization function. Since legitimacy is important (from a positive, non-normative perspective), some parties will be willing to incur the costs associated with assuring that an agreement they are interested in is perceived as distributively fair.

Legitimacy under this analysis is not a moral principle but a Machiavellian, (self-serving) interest of state parties — an observation that has two main implications. First, it would be advisable for players with long-term interests in the success of certain international policies to evaluate whether these policies are perceived as fair by most parties.¹³⁴ Second, states that think that distributive-fairness considerations would improve their respective bargaining position should try to leverage them.¹³⁵ Although systematic understanding of the actual impact of fairness considerations on international arrangements is only just beginning,¹³⁶ these two predictions align with the findings of behavioral experiments that highlight the importance of fairness to cooperative arrangements.¹³⁷ They also seem to align with the complicated and pragmatic horse-trading dynamic of international negotiations, where there is no clear distinction between fairness and pragmatic considerations, as well as with how negotiators view their work.¹³⁸

The case for the fairness-perception approach becomes stronger if one accounts for the transaction costs associated with multiparty negotiations. Multilateral arrangements may reduce transaction costs because they allow the formation of international standards and save the costs of having all potential parties negotiate separate agreements. However, multilateral negotiations are not free of costs and, when a large number of states negotiate an agreement, buying the consent of all participants may be costly.¹³⁹ Hence, for an international coordinative arrangement to be

¹³³ ALBIN, *supra* note 12, at 218; Kapstein, *supra* note 122, at 231.

¹³⁴ ALBIN, *supra* note 12, at 15; Kapstein, *supra* note 122, at 231.

¹³⁵ Narlikar, *supra* note 27, at 1011.

¹³⁶ Davidson et al., *supra* note 5, at 1001.

¹³⁷ COLIN F. CAMERER, *BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION* 43 (2003) (reporting that, in a certain game called “ultimatum,” people preferred not to receive anything than to let their counterparty receive more than 80% of their prize); Kapstein, *supra* note 122, at 236 (surveying such a literature).

¹³⁸ ALBIN, *supra* note 12, at 18.

¹³⁹ Blum, *supra* note 27, at 358.

effective, it should often be negotiated by a small number of dominant countries that have high stakes in its success.¹⁴⁰ Then, after agreement is reached by the key players, they should invite other countries to join on a “take it or leave it” basis, leaving only a small space for new signatories to deviate from the agreed upon terms. This can arguably be the best course of action in the context of climate change, where about twenty countries account for 70% of the total emissions.¹⁴¹ Under plausible assumptions about the interaction between states, it seems as though once enough dominant countries (for example, United States, the European Union, China, India, Russia, and Brazil) join a climate treaty, most other countries will follow.¹⁴²

Although this has been the pattern of many successful multinational agreements,¹⁴³ there are problems with the dynamic in which only a few (dominant) countries act as the rule-makers and agenda-setters. First, it is often the case that, to be effective, other countries have to join these agreements and then comply with the terms. Moreover, effective coordination may require parties to the agreement to penalize non-

¹⁴⁰ Bird & Mintz, *supra* note 14, at 434–36; Blum, *supra* note 27, at 351.

¹⁴¹ Rafael Leal-Arcas, *Top-Down Versus Bottom-Up Approaches for Climate Change Negotiations: An Analysis*, 6 IUP J. GOV. PUB. POL’Y 1, 11 (2011); Eric W. Orts, *Climate Contracts*, 29 VA. ENVTL. L.J. 197, 220 (2011) (stating that a multilateral agreement between China, the EU, India, and the United States would form a template to lead the world forward on global level issues related to climate change).

¹⁴² This is likely to occur because the benefits of non-participation (e.g., the reduction in relative competitiveness) would be reduced as more countries joined, while the possible costs for not joining (e.g., trade penalties) might increase. See Geoffrey Heal & Howard Kunreuther, *Tipping Climate Negotiations* 2, 13 (Nat’l Bureau of Econ. Research, Working Paper Series No. 16954, 2011), available at <http://www.nber.org/papers/w16954>; Frank Jotzo, *Comparing the Copenhagen Emissions Targets* 3 (Crawford Sch. Centre for Climate Econ. & Policy, Paper No. 1.10, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878905 (reviewing the current emission reduction pledges of countries according to the Copenhagen Accord and suggesting that in relative terms—that is, total percentage of reduction and per capita reduction—the pledges that major, developed and developing countries had obliged themselves to were commensurate with each other).

¹⁴³ Blum, *supra* note 27, at 351–52 (stating that the Bretton–Woods agreement was structured around bilateral agreements between the United States and the United Kingdom); see also Ilan Benshalom, *The Quest to Tax Interest Income: Stages in the Development of International Taxation*, 27 VA. TAX REV. 631, 657–67 (2008) (explaining how the post-WWII double-tax treaty between the United States and the United Kingdom essentially determined the path to the OECD double-tax treaty, which is the most important international tax document used by countries); Blum, *supra* note 27, at 358–59 (stating that, even in areas such as trade liberalization and environmental agreements, the effective coalition may be large although success may primarily depend on a smaller subgroup of states and saying that, even in the case of climate change, agreement is most vital among the fifteen countries that are responsible for 85% of emissions).

signatories, non-compliers, and defectors.¹⁴⁴ It is clear that in such a setting, where the success of the agreement depends on the action of countries that were not part of its negotiation, legitimacy and compliance can be major issues.¹⁴⁵ The legitimacy function of fairness-perception may be of special importance if poor, developing countries disproportionately comprise those countries that are rule-takers rather than rule-makers, as is often the case.¹⁴⁶ In these instances, policymakers of the countries negotiating the agreement may yield a direct benefit if the agreement is viewed as fair: poor developing countries will have greater incentives to join. Also, fairness-legitimacy may portray non-participants and non-compliers as free-riders even if they are poor, which, in turn, may help legitimize penalties against them.

The “division-of-labor” approach responds to the fairness-perception argument by making the case that international policymakers should *not* integrate fairness considerations into international regulatory arrangements. Distributive-fairness considerations are likely to distort international arrangements rather than help facilitate them. Under this framework, redistributive-fairness considerations should be addressed separately.

The main point of this approach, as it was originally proposed by three prominent University of Chicago Law School scholars,¹⁴⁷ is that there should be a division of labor: each policy should be addressed separately to achieve the most optimal result.¹⁴⁸ Coordinating international regulatory challenges such as global warming requires effective and efficient regulatory responses, and therefore should not be held hostage by difficult-to-agree-upon fairness considerations, important as they may be. Global inequality is yet another international public good that requires policymakers’ attention, and therefore should be advanced separately to assure optimal regulatory design. While side payments to some countries may be a necessary feature to buy the cooperation of certain key countries,

¹⁴⁴ Scott Barrett, *A Theory of Full International Cooperation*, 11 J. THEORETICAL POL. 519, 524 (1999). Many of these penalties may consist of no more than the denial of certain benefits that the agreement provides to its members. However, this denial may be significant when the agreement regulates matters that have a major economic impact.

¹⁴⁵ STIGLITZ, *supra* note 4, at 97–98.

¹⁴⁶ Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT’L L. 221, 221 (2006) (arguing that the current rhetorical emphasis of the WTO on development can be seen as a quest for the absence of legitimacy due to the asymmetric rules of the GATT/WTO agreements).

¹⁴⁷ An article written by Eric Posner and Cass Sunstein and a book written by Eric Posner and David Weisbach address the role of fairness considerations with respect to climate change. POSNER & WEISBACH, *supra* note 3; Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565 (2000).

¹⁴⁸ Posner & Sunstein, *supra* note 147, at 1591.

international environmental regimes should avoid advancing any broader redistributive agenda.¹⁴⁹

Although very different in their policy prescriptions, the fairness-perception and division-of-labor approaches have a number of important features in common. In some ways, both approaches have significant prescriptive value because their analyses generate conclusions with respect to what policymakers should do. More importantly for this article's purpose, both approaches view fairness considerations as *exogenous to international policymaking*.

Under the fairness-perception approach, policymakers would be wise to respond to distributive-fairness considerations only if there is an outside "demand" for them. Under this approach, these considerations add no substantive value but for the fact that they are on demand and are necessary to legitimacy. This implies two points. First, fairness considerations are just like any other type of policy preference (for example, a preference that international agreements would be written on pink sheets of paper) and policymakers should respond equally to all these preferences. Second, good policymaking does not require that agreements *be* fair, but only that they be *perceived* as fair.¹⁵⁰ Therefore, sound policymaking requires assessing perceptions of fairness and determining how an agreement could be "marketed" as fitting those considerations.¹⁵¹

Under the division-of-labor approach, the story is simple: issues of global distributive justice should be directly addressed. In all other regulatory settings, the vagueness of distributive-fairness considerations makes them a liability rather than an asset. Therefore, incorporating distributive-fairness considerations into international arrangements results in sub-optimal global regulatory arrangements and therefore should be ignored.

C. Summary

By surveying existing literature on the role of distributive-fairness considerations in international agreements, this Part demonstrates that there are numerous ways that this topic can be understood. At the outset, it is clear that both the cosmopolitanism and egoist-realism agendas fail to account for reality if taken to their extreme.¹⁵² In a global-political reality of interdependent yet sovereign states, no single party can afford to be completely benevolent or to completely disregard the interests of other

¹⁴⁹ POSNER & WEISBACH, *supra* note 3, at 86.

¹⁵⁰ Bird & Mintz, *supra* note 14, at 425.

¹⁵¹ These marketing requirements may be very broad and may therefore only partially resemble the inquiry of whether a specific arrangement meets certain fairness criteria.

¹⁵² JACKSON & SORESENSEN, *supra* note 8, at 78–79, 96–97 (exploring criticism on both extreme positions).

states.¹⁵³ The fairness-perception and division-of-labor approaches offer more nuanced analyses that describe the costs and benefits of integrating distributive fairness into international agreements. Both approaches also enable international policymakers to draw some conclusions with respect to the function of distributive-fairness considerations. While both approaches draw very different conclusions about how policymakers should respond to fairness considerations, they share the view that these considerations are biased, subject to manipulation, and exogenous to most regulatory challenges facing the international community.

The next Part argues that fairness considerations should be understood as an inherent component of international arrangements and not as an irrational preference or as a distraction. If fairness considerations were properly conceived, this understanding could lead policymakers to address them in a way that promotes more effective and stable international coordination over global issues.

III. DISTRIBUTIVE FAIRNESS AND UNCERTAINTY

This Part stresses that fairness considerations should be viewed as inherent components of long-term international agreements because they allow such agreements to account for uncertainty. Dealing with uncertainty is a problem in many long-term agreements. Rational parties agree to undertake material obligations as part of a binding long-term, large-scale, cooperative agreement only when they have a high level of confidence that they will be able to meet their obligations and that their (relative) payoff will not decline. In accordance with this line of reasoning, this article points out that distributive-fairness considerations offer important insurance functions to parties of multinational arrangements. This function is very different from the redistributive (or legitimizing-redistributive) function emphasized by the current literature. Acknowledging this insurance function of distributive fairness explains why redistribution may align with countries' long-term, self-serving interests. Furthermore, while redistribution and insurance are not mutually exclusive concepts, recognizing distributive fairness's insurance function carries significant policy implications.

Because of this insurance function, rational parties that wish to promote objectives that require long-term international coordination in an unstable reality should seek to promote fairness considerations. More importantly, from a policy perspective, policymakers should rethink whether the way in which distributive-fairness considerations are currently addressed by international agreements provides optimal results. Instead of using

¹⁵³ Robert O. Keohane, *International Institutions: Can Interdependence Work?*, FOREIGN POL'Y, Spring 1998, at 82, 92.

differential treatment provisions that rely on the distinction between developed and developing countries, the agreements should use neutral terms that correlate countries' relative obligations with their relative economic abilities. This type of rule-setting would provide a dynamic mechanism that assures that countries' obligations under an agreement correspond to their relative economic positions. Thus, this setting would encourage countries to undertake substantial long-term international obligations, which are necessary for effective coordination and governance of global issues.

The starting point of the analysis is that effective coordinative international agreements that require states to take substantial burdens are not impossible. One important way to increase the possibility of successful coordinative agreements is to structure them with the right incentives so that countries will be prepared to undertake and comply with their obligations.¹⁵⁴ Global markets require international regulatory institutions to provide global public goods because they cannot generate a system that adequately monitors their failures and externalities.¹⁵⁵ These international institutions should shift away from traditional goals of helping sovereign states to co-exist and instead facilitate stable coordinative arrangements, which are based on the communality of interest.¹⁵⁶ The next subparts show how integrating notions of distributive fairness may help in facilitating this type of international institution. They show that, if coherently applied, distributive-fairness considerations may increase countries' incentives to coordinate by helping them secure their relative payoffs over a long period of time.

A. What Is Fairness?

Social scientists trying to model states' behavior often doubt that non-self-serving fairness considerations do or should play a role in international negotiations.¹⁵⁷ The reason for that is clear. There are many conflicting fairness principles, which are used by various parties in different settings in a self-serving way.¹⁵⁸ The moral (and legal)¹⁵⁹ ambiguity as to what

¹⁵⁴ BARRETT, *supra* note 3, at 2–3.

¹⁵⁵ RODRIK, *supra* note 9, at 145; STIGLITZ, *supra* note 4, at 21.

¹⁵⁶ CULLET, *supra* note 7, at 3.

¹⁵⁷ See Aaheim, *supra* note 6, at 94 (calling distributional matters the “Achilles’ heel” of economic analysis); Bird & Mintz, *supra* note 14, at 425; Davidson et al., *supra* note 5, at 989; Johansson-Stenman & Konow, *supra* note 77, at 148.

¹⁵⁸ See Albin, *supra* note 11, at 370, 372–74; see also Lange et al., *supra* note 75, at 548 (2006); Suranovic, *supra* note 5, at 286–91; Steven Suranovic, *International Labour and Environmental Standards Agreements: Is This Fair Trade?*, 25 *WORLD ECON.* 231, 243 (2002).

¹⁵⁹ HONKONEN, *supra* note 10, at 99–106.

distributive fairness prescribes means that in any dispute every party can raise fairness arguments that promote its own goals.¹⁶⁰

This article concedes that state parties' tendency to pick and choose self-serving fairness arguments undermines the credibility of such fairness-considerations. It does not follow, however, that distributive-fairness considerations are completely manufactured concepts. Distributive considerations may be difficult to define, but in a world characterized by great poverty and inequality, they are equally difficult to ignore. This article also argues that the worst foe of a good theory is the perfect one, so a theory about the role that distributive-fairness considerations ought to play should not attempt to prematurely provide an overarching distributive agenda to which all parties should subscribe. Instead, a theory should be able to delineate the main features of fairness considerations to provide a meaningful analysis of their impact on real-world negotiation settings.

The distributional question has many layers and benchmarks — and there are many theories about how inequality should be measured and how and to what extent it should be remedied.¹⁶¹ This article uses the common denominators of various benchmarks as the analytical foundation. This definition of fairness is not intended to provide an exhaustive list of possible distributive-fairness arguments.¹⁶² Instead, it aims to provide a sketch of the main attributes shared by most distributive-fairness arguments. Put differently, the discussion below attempts to characterize distributive-fairness considerations and not to inquire what they ought to be or when they should be applied. This relates to the main goal of the article: to demonstrate that distributive considerations have an insurance function on top of their distributive function. This ambition allows using only the most basic notion of distributive fairness, which suggests that wealthier parties transfer resources to the poorer, rather than coming up with a nuanced definition of what distributive-fairness considerations would require in any of a variety of scenarios.

Distributive-fairness considerations are outcome-based. They stress that fairness requires all parties to have at least a certain level of economic resources. When not all parties manage to attain the required level, distributive fairness considerations support adopting direct wealth transfers or regulatory schemes that would redistribute resources so that more parties attain the required level. Hence, to the extent that a regulatory regime imposes certain costs on parties, there should be some correlation between the parties' obligations and their economic abilities. When a global public

¹⁶⁰ See Suranovic, *supra* note 5, at 304.

¹⁶¹ See Benschalom, *supra* note 24, at 34–36.

¹⁶² For example, the approach adopted by this article is purely outcome-based and does not take into account the process through which inequalities have been generated. This starkly contrasts with many contemporary distributive fairness approaches.

good is concerned, reducing the relative level of obligations of poorer parties is essentially a form of transfer. Because complying with obligations is costly, wealthier parties bear a higher proportion of the costs without changing their share of the benefits from the public good. Therefore, such a regulatory regime improves the relative economic position of poorer parties. In the context of international environmental agreements that seek to limit emissions, typical distributive considerations imply that wealthier countries would bear a higher proportion of the costs associated with abatement. Poorer countries would therefore benefit from lower emissions at a lower cost, which will improve their position relative to wealthier countries.

Although there is no single, agreed-upon formula that evaluates countries' economic abilities, some intuitive common grounds could be assumed. For example, most people could agree that Germany has a greater economic ability than Egypt. This point is developed later in Part III.D, where the article examines the potential policy implications of its argument. However, at this point, the analysis requires only that the critical reader agrees with the following two notions: (1) countries' economic abilities can be evaluated and (2) an international agreement that supplies a public good while imposing higher obligations on wealthier countries is in fact engaged in a wealth transfer from wealthier to poorer countries.

The next subpart examines when policymakers ought to take fairness considerations into account in advancing coordinative arrangements that would benefit their own countries. More precisely, it inquires under what conditions rational parties to international agreements would attempt to correlate their level of obligations to their level of economic well-being.

B. Uncertainty and Fairness Insurance

This subpart argues that parties are likely to endorse the adoption of fairness considerations into an international agreement whenever there is a lot of uncertainty with respect to their abilities to meet their obligations and their relative payoffs. This uncertainty increases when an agreement has a longer time horizon and imposes higher burdens and when the world economy exhibits a high degree of volatility. In less certain settings, countries would be willing to take substantial long-term obligations as part of a coordinative international attempt to supply international public goods if two conditions are fulfilled: (1) the agreement takes their (current) abilities into account *and* (2) the agreement accounts for changes in their relative economic abilities.

Put differently, countries' tendency to join the agreement would significantly increase if the agreement provides them with insurance against the possibility that they become relatively poorer and thus less willing to make the sacrifice associated with meeting their obligations. Because countries are concerned with their relative payoff, being relatively poorer

would not mean that they could not meet their obligations. Instead, it would mean that if a country's relative economic position *with respect to other countries' declines*, meeting its obligations would be more costly to that country (in terms of sacrifice) than to other countries. Hence, countries that care about the stability of their relative payoffs would be reluctant to enter a long-term international agreement in which they undertake fixed (and substantial) obligations. Side payments offer partial relief by increasing poor countries' current payoffs but they do not solve the problem that is associated with long-term contractual uncertainty of a change in their relative economic position. In contrast, correlating obligations and economic well-being would help remedy the long-term uncertainty with respect to countries' relative payoffs. Therefore, incorporating fairness considerations seems rational in a rapidly growing (but unstable) global economy.

This analysis challenges the fairness-perception approach by making an (admittedly counterfactual) assumption that there is no public opinion demand for international distributive fairness. It then points out that if countries are interested in assuring their relative payoffs over time, they would appreciate that their relative level of obligations would be sensitive to their relative economic abilities. This correlation of economic ability and level of obligations corresponds with the definition of distributive-fairness considerations developed in the previous subpart. Hence, the importance of distributive-fairness considerations stems from the need for insurance in long-term agreements and is not contingent upon how fairness is perceived by the general public.

The potential impact of the insurance function in complex, real-world international coordinative efforts is discussed in detail in Part III.E. At this point a set of simple examples may help illustrate how the insurance function of distributive considerations can effect international agreements. Assume a two-country scenario where there is no public demand for international distributive fairness. Hence, the residents of both countries (A and B) do not think they owe or deserve any type of redistributive transfers to each other, no matter what economic positions they hold.¹⁶³

Both countries are in an equal economic position. Both states want to assure the supply of a certain public good — sustaining the fishery in a lake they share by preventing pollution — which neither country can achieve on its own. The maintenance of the public good requires an annual investment

¹⁶³ This notion rejects the cosmopolitan notion and claims that distributive efforts should be exclusively (or at least primarily) allocated within the state. The most prominent and well known version of this moral approach was proposed by John Rawls. See JOHN RAWLS, *THE LAW OF PEOPLES* 105–20 (1999) (arguing that people have duty of assistance to other people only when the state they live in fails and explaining how this duty should be distinguished from the cosmopolitan approach to distributive justice).

of \$1 million and will provide each country with an annual benefit of \$1 million, totaling \$2 million of benefits overall. Because the return on the investment is high, and the relative payoff is equal, both countries are likely to join the agreement in that given year and to each contribute \$500,000 per year.

A and B could enter into such an agreement on a short-term basis and renegotiate every year or two. However, they decide to enter into a fifty-year (long-term) agreement to save transaction costs, to allow long-term investments and budgetary planning, and to develop stable institutions that will monitor the agreement. This change in the time horizon will potentially change the way in which A and B are willing to allocate the burden between them. The leaders of each country know that, because the time horizon of the agreement is longer, there is a higher probability that their relative economic positions will not remain equal throughout the term of the arrangement. Assume for example that, after twenty-five years, A has doubled its economic ability while B's ability has stagnated. Under this new condition, in absolute terms the agreement is still a good investment for both countries. Both states have to increase taxes or cut public provisions to raise the \$500,000 but their relative payoffs have changed. A has become wealthier, so making the \$500,000 investment requires less sacrifice from it — in terms of opportunity-costs, coming up with \$500,000 is much easier for A than for B.¹⁶⁴ Hence, if B is making a higher sacrifice than A, the relative payoff for B is smaller. Since the agreement has a long time period, B may need to suffer this lower relative payoff for a substantial period of time. This analysis is straightforward, almost trivial.¹⁶⁵

The above analysis also applies to the situation in which both A's and B's economic positions improve but A becomes much wealthier than B. In such a setting A's sacrifice decreases and its payoffs remain stable, while B's sacrifice and payoffs both remain the same in absolute values. Because A is sacrificing less in terms of opportunity costs, its relative payoffs increase. However, if distributive-fairness considerations were incorporated, A's relative obligations would increase in a way that would limit an increase in its relative payoff. Put differently, distributive-fairness considerations provide insurance that protects countries not only from economic decline but also from the relative improvement of other countries.

The likelihood of entering a long-term agreement will decrease if the leaders of A and B think that their economic positions may deteriorate over

¹⁶⁴ See, e.g., Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 905 (2011) (noting that "welfarist" analysis always assumes that the extra income is worth more to the poor than it is to the rich).

¹⁶⁵ This analysis follows the declining marginal utility of money assumption of neo-classic economics. *Id.* at 915–17 (explaining the basic features of the declining marginal utility assumption).

time in absolute (and not only in relative) terms. Consider an extreme situation in which, twenty-five years after A and B enter the agreement, A's economic ability has doubled; at the same time B's economic ability has shrunk by half. In this setting, B may have to cut substantial public services to come up with the \$500,000 that it is obliged to invest in the provision of the public good under the agreement. Hence its payoffs and benefits remain stable in monetary terms, but its sacrifice would be greater after its economy has shrunk. This suggests that its net benefit from the agreement is likely to decrease after it has suffered a decline in its economic ability. This means that if A's and B's obligations are not correlated with their economic abilities, not only are their relative payoffs at stake, but so are their absolute payoffs.

The longer the time period of the agreement, the greater uncertainty there is that countries will be able to sustain their relative payoffs. Because the rate of defection from multilateral international agreements is very low,¹⁶⁶ parties implicitly expect that they will continue indefinitely.¹⁶⁷ Therefore, if long-term agreements are a precondition for long-term planning and investment in the provision of international public goods, this type of uncertainty is a serious obstacle.

One way to limit the level of uncertainty is to correlate the relative obligations to A's and B's economic abilities. Let us assume that, if, after twenty-five years, A's economic well-being doubles and B's economic well-being decreases by half, their obligations under the agreement will reflect such changes. Accordingly, A will be required to pay \$800,000 — realizing a net benefit of \$200,000 — and B will be required to pay only \$200,000 — realizing a net benefit of \$800,000. It may still be difficult for B to come up with the investment, but its absolute payoff will be huge so it would be worthwhile to comply with the agreement.

It is important to notice that essentially the same analysis would apply even if there was a smaller change in A's economic well-being relative to B's. Assume that A's economic well-being would increase by 5% while B's well-being stagnated, A would still find it easier to generate the appropriate resources than would B. Hence, correlating A's and B's obligations with their economic abilities would also help both of them insure their relative payoffs against smaller changes in their relative payoffs.

The more serious question is why A would agree to such a condition, or, more precisely, why it would not defect from it. A would probably not

¹⁶⁶ GUZMAN, *supra* note 9, at 3–7, 87–88 (providing examples in which states adhere to their obligations under international law even when it seems to go against their interest and even when there is no immediate tangible sanction associated with the violation; explaining that this behavior partly stems from the fear of diminished reputation).

¹⁶⁷ Blum, *supra* note 27, at 353.

agree to such an agreement if it was certain that its economy would grow at a much higher rate than B's. But if A was not sure whether its relative economic position would improve or worsen relative to B's, it would agree to such a setting. Even if A had some estimates that its economic ability would increase at a higher rate than B's, A's leaders would still have incentives to enter a fair agreement if they were somewhat risk-averse.

If the level of A's and B's obligations under the agreement were modified only on year twenty-five, A would have an incentive to defect from the agreement at the end of year twenty-four. If both A and B paid \$500,000 for the first twenty-five years and then did a reassessment, A would enjoy its high relative payoffs for the first twenty-five years and then defect from the agreement before suffering an increase in the burden. However, if A's and B's economic abilities could be determined through easy-to-observe factors, the level of their obligations could be modified annually without incurring substantial transaction costs. Because A's growth is likely to be gradual and somewhat volatile, its obligations under the agreement would only slightly change in every given year. A's incentives to defect would therefore be significantly reduced given that it would still have a positive (absolute) payoff, a similar relative payoff, and concerns about future changes in its economic well-being.

The level of uncertainty would of course decline as the years go by, so that, in year forty-five, if A's economic position is much better relative to B's position, it may have substantial incentives to defect from the agreement. These defection incentives are reduced if there are costs associated with unilateral defection from multinational agreements. Furthermore, even though the uncertainty is considerably lower in year forty-five, the benefits of defecting are also substantially smaller and A will also have to incur the high defection penalties in return for five years of nonpayment.

Finally, now that A is a wealthier country, it would probably have a lower relative marginal return for its investments in domestic public goods. Unlike B,¹⁶⁸ A, which probably invests more in more luxurious public goods, is likely to yield a relatively lower marginal return for any additional investment in them.¹⁶⁹ This means that its opportunity costs for diverting money to clean the lake may be relatively small. In other words, if countries' preferences for particular global public goods are sensitive to their economic abilities, an increase in their absolute economic abilities

¹⁶⁸ This discrepancy exists because any money B diverts towards cleaning the lake comes at the expense of much needed investments in public health and education.

¹⁶⁹ Victor, *supra* note 109, at 196–97 (stating that wealthy countries' willingness to assume higher obligations under various international environmental agreements reflects their willingness to provide what is essentially a luxury good for developing countries, but rejecting the notion that this willingness has anything to do with fairness).

would increase their demand for “luxurious” global public goods.

This point is crucial, given the serious limitation of the examples used so far: the assumption that the payoff of \$1 million to each country is equal to the overall amount needed for investment. Hence, in the above setting, once A and B commit themselves to some investment, they are both better off in terms of their absolute payoffs. This, however, may only apply to a subset of cases. If each country would benefit \$1 million from the agreement (\$2 million overall), but its costs were \$1.5 million, A and B would each be willing to increase their share in the costs in a rather limited way (for example, \$900,000) to assure a minimal rate of return on their investments.¹⁷⁰ In this scenario, or in a scenario where it is difficult to measure or quantify the payoff, the insurance role of distributive fairness would be reduced. The knee-jerk reaction would be that distributive considerations would only be applied in those cases where investment in global public goods will yield high returns.¹⁷¹ However, if both A and B know that their preferences are sensitive to their economic abilities and therefore their demand for “luxury” global public goods will increase if their absolute (not relative) economic abilities increase, then this knowledge should be factored into the agreement. It is therefore important to recognize that tailoring levels of obligations to absolute levels of economic ability will allow for even more effective international coordination to take place. If absolute economic ability were factored into a wider array of international agreements, this would enable a broader margin for effective coordination. This in turn would increase the significance of distributive-fairness considerations and their ability to maintain consistent relative payoffs, which comprise the core of this article’s argument.

The important point stemming from the above discussion is that, while neither A nor B can anticipate its relative economic position in fifty years, they can both anticipate how much a change in their relative economic position would impact their relative payoff from the agreement. The leaders of both A and B know that there is low (or no) demand for redistribution between states, that there are high penalties for defecting from international agreements, and that providing a public good such as lake cleaning requires long-term commitment. Given the above, both leaders would seek to insure themselves against future changes in their economic positions by incorporating fairness considerations into the agreement.

The following paragraphs highlight two factors that increase the

¹⁷⁰ Since the total cost of the agreement is 1.5 million, if the situation of one country improves and it would be willing to annually invest up to \$900,000, the other country would still have to commit to investing \$600,000 annually. Given A and B’s uncertainty about the future, this amount might be difficult for them to commit to.

¹⁷¹ For example, reducing CO₂ emissions so that world temperature goes up only by 5 (and not by 10) degrees Celsius. See POSNER & WEISBACH, *supra* note 3, at 10–40.

uncertainty associated with long-term agreements thus strengthening the need for insurance through fairness-distribution considerations. First, the stakes of uncertainty increase as the level of obligations increases. If the obligation under the agreement requires a country to undertake relatively minor costs, the impact of uncertainty may be negligible. For example, if in the above scenario A and B both have a GDP of \$10 trillion, bearing an annual cost of \$500,000 may not seem that significant to them. This may change, however, if the annual costs of coordination are \$500 billion. Even though the net benefits would also be higher — concerns over the ability to meet the obligation and the relative payoff in light of long-term contractual uncertainty would increase. Many of the global issues that require coordination (for example, climate change and financial stability) involve very high stakes, entail massive costs (in terms of reducing economic growth), and require massive investment in institutions and research. Given these high stakes, states' incentives to insure against uncertainty should increase.

Second, if A and B operate in a volatile economy, that experiences a high frequency of unanticipated economic shocks, the incentive to hedge against uncertainty will grow. If they operate in an interconnected global economy, where many of the shocks are not only unforeseen, but also external and in some ways beyond their control, the incentive to hedge will be dramatically larger. In recent years, the global economy has experienced not only enormous economic growth, but also frequent and severe financial crises and commodity price shocks.¹⁷² It thus seems to be the case that the volatility of the globalizing economy should increase states' incentives to hedge against uncertainty.

C. Assessment of the Insurance Function's Impact

The failure to deal with uncertainty identified by this subpart accounts for some of the difficulties of reaching coordinative agreements when countries have different prospects of growth. Rather than providing a model for when international distributive considerations would tip the balance in favor of cooperation, this article's analysis highlights that incorporating distributive-fairness considerations into international agreements can help foster a dynamic of more effective cooperation. This dynamic would encourage countries to undertake substantial obligations that would facilitate the provision of international public goods.

While it is difficult to prove the actual impact of incorporating fairness-

¹⁷² The food and financial price crises of 2008 serve as the best example for the impact of such external shocks. Benshalom, *supra* note 24, at 39 (arguing that the world has become closer and more interconnected and using the food crises as an example to substantiate this claim).

considerations, the following points indicate that their impact may be significant. First, when negotiating international arrangements, countries seek predictability and non-discrimination.¹⁷³ There may be two types of predictability: obligations and sacrifices. If obligations are fixed (not sensitive to changes in countries' relative economic positions), then countries will be able to account for them but not for their relative payoffs. This inability to predict the long-term relative payoff will lead countries to accept only low levels of obligations. However, if countries are concerned with controlling their payoffs, and even more so if they are interested in maintaining their relative payoffs, the important feature is to maintain a certain level of sacrifice. If the level of obligation correlates with economic ability, then an automatic built-in fairness mechanism will offer an important feature that allows a more stable and predictable structure of sacrifices and payoffs.

Second, because countries compete against each other for resources and dominance, the story of international relations provides many beggar-thy-neighbor incidents that result in high levels of distrust among countries. Explicit contractual agreements with concrete obligations that offer credible benchmarks to evaluate compliance offer an avenue to overcome this inevitable problem of mistrust. The remaining struggle, however, is that credibility comes at the expense of flexibility.¹⁷⁴ The correlation of obligations with economic well-being would make international agreements more flexible in the sense that they would allow them to accommodate the changing economic circumstances within a given country. To be sure, flexibility may be needed for a variety of reasons, and the correlation of obligations to economic position is not in any way a solution to them all.¹⁷⁵ Nevertheless, a regime that reduces (or increases) countries' relative levels of obligation as their economic positions change, allows for a system that is both credible and responsive.

Third, until now this article's analysis has stressed the importance of reducing countries' obligations as their (relative) situation worsens; there is, however, equal importance in raising the relative level of obligations as

¹⁷³ See Nicolas M. Perrone, *Scrutinizing States' Power in a Liberalized Economy: A Comparative Analysis of the International Investment Regime and the International Trade System* 31 (Jun. 30, 2010) (unpublished manuscript), available at <http://ssrn.com/paper=1633007> (making a similar argument with respect to investors).

¹⁷⁴ Scott Barrett, *Consensus Treaties*, 158 J. INST. & THEORETICAL ECON. 529, 532 (2002).

¹⁷⁵ For example, in the case of environmental agreements that try to reduce emissions, the level of obligation should be modified as more knowledge is generated on the effects of global warming. POSNER & WEISBACH, *supra* note 3, at 10–40 (providing a comprehensive discussion of the estimated impacts of various degrees of global warming on various parts of the world).

their situations improve.¹⁷⁶ Assume Countries A and B are about to enter a fifty-year contract with respect to cleaning the lake they share. There are significant asymmetries between the two countries' economic positions. Country A's economic position is much better than Country B's position, but in recent years B has reported higher levels of economic growth. Policymakers of both A and B expect that, over the long run, both economies will continue to show the same pattern of economic growth until their economic positions eventually converge. Country A's residents (and leaders) are willing to invest in public goods such as clean water. They also understand that B will only be willing to commit to a much smaller investment because it prefers to invest in providing universal electricity to its citizens. However, A's residents care about their relative payoff and are willing to pay more money to clean the lake only because they assume that their sacrifice is similar to the sacrifice made by B. If B's economic position improves and its obligations under the agreement remain low, it will be able to channel more revenues to invest in infrastructure or to reduce taxes. Better infrastructure and lower taxes may attract business investments into B at the expense of A, which will in turn further increase B's level of growth. A therefore seeks to provide country B only with a provisional reduction in its respective obligations, which would be contingent upon B's lower economic ability. Given the uncertainty as to A's and B's precise economic positions in the course of the next fifty years, A and B are expected to disagree on this point. This uncertainty will not only increase the costs of reaching an agreement, but if A and B are concerned about their relative payoffs, uncertainty could lead them to adopt lower sub-optimal standards. In contrast, correlating A's and B's obligations with their economic positions would provide an automatic graduation, which would be sensitive to the relative payoff function of both countries.

Fourth, people often *wrongly* associate the term "insurance" as necessary only with some type of coverage against an exposure to an unlikely yet very costly catastrophe. The concept of insurance, however, includes much more than these types of major events and should be thought of as a way to deal with any type of uncertainty. There is indeed a very low probability that the United States will become as poor as Niger, but the chances that its economy might decline relative to those of countries such as Brazil, China, Indonesia, and India – even if any of those are unlikely to become better off than the United States in the foreseeable future – is quite high. The speed and amount of this relative decline are both highly uncertain and depend on factors that we simply do not know (for example, What would be the impact of governments' debt crises around the world? Is there a real-estate bubble in China?). Because there is a lot of uncertainty with respect to all

¹⁷⁶ HONKONEN, *supra* note 10, at 351.

of these issues, a well-designed insurance framework would go a long way to undertake binding long-term contractual obligations as part of a cooperative scheme.

Finally, all the examples in this analysis have used bilateral settings for simplicity. However, bilateral agreements are easier to renegotiate and to police, so A and B may be less concerned about taking substantial, long-term, bilateral obligations. In the multilateral context, negotiation and defection are both very costly, and it is hard, in terms of compliance costs, to tailor country-specific provisions to which all parties will agree. Furthermore, as previously mentioned, many successful coordinative multilateral arrangements are likely to be introduced by a small number of influential countries.¹⁷⁷ All these factors increase the uncertainty with respect to countries' relative payoffs and may discourage them from taking substantial long-term obligations under multilateral agreements. Policymakers in the leading countries that form the core agreement would be wise to reduce these uncertainties by adopting a transparent framework that correlates countries' obligations with their economic abilities. This would provide policymakers in other countries with an assurance about their relative payoffs and would encourage them to join the agreement.

In summary, correlating countries' economic well-being with their obligations would serve a distributive-insurance goal that would allow them to reliably predict changes in their relative obligations. This, in turn, would allow them to undertake more substantial obligations under international agreements and to improve the provision of international public goods. As Part III.E illustrates through the example of international agreements about climate change, the question of how to account for future changes in countries' relative economic well-being is most likely to be part of the conflict between developed and emerging economies. In this setting the likelihood of continuing high levels of economic growth in emerging economies imposes a lot of uncertainty with respect to the relative economic positions of various countries in the next few decades.¹⁷⁸

D. Theoretical Implications

From a theoretical perspective, this article's analysis supplements the fairness-perception approach and points to some potential deficiencies of the division-of-labor approach. From a policy perspective, it highlights that, because policymakers view fairness considerations as promoting only a redistributive (or legitimizing-redistributive) function, the stakes of

¹⁷⁷ *Supra* notes 140–142 and accompanying text.

¹⁷⁸ The difficulty of dealing with uncertainty may be less important in the context of the least developed countries—such as many Sub-Saharan African countries that have only low growth prospects.

developed and developing countries with respect to them are incorrectly polarized. This polarization has resulted in differential regimes that grant developing countries special treatments by applying a very vague notion of distributive fairness. Most importantly, they frequently do not provide any insurance function. This lack of insurance function can partly explain states' tendencies to commit themselves only to shallow and ineffective multinational obligations.

Correlating countries' economic abilities with their obligations under international agreements will help promote more stable international coordinative regimes. Under this analysis, rational policymakers will seek to incorporate redistributive-fairness considerations in long-term international agreements. There are some similarities between this article's approach and the fairness-perception approach. Both of them depart from the notion that states act primarily to serve their own interests, and both of them reject the notion of the egoist-realism approach that states have a one-dimensional preference for material benefits. My insurance approach and the fairness-perception approach view states as potentially sophisticated players with diversified preferences that would be willing to coordinate to meet those preferences.

However, unlike the fairness-perception approach, this article's approach stresses that the importance of distributive-fairness considerations in international agreements does not depend on the existence of an exogenous, amorphous (irrational) public demand for them. This is a major contribution since much of the skepticism and criticism about fairness-considerations is that they are enigmatic, unclear, and biased.¹⁷⁹ This article argues that if the insurance function of fairness considerations is recognized, this concern can offer a better, more concrete focal point that will serve both redistributive-legitimization and insurance functions.

This article's approach sharply contrasts with the conclusions of the division-of-labor approach by arguing that the incorporation of fairness considerations may actually help achieve credible and stable regulatory solutions on important issues such as environmental regulation. The division-of-labor approach maintains that fairness considerations should be addressed separately so as not to jeopardize efforts to achieve the optimal provision of public goods. This, in my opinion, represents a fundamental misconception about international relations. There is a strong case for the division-of-labor approach in a domestic setting,¹⁸⁰ where the state operates

¹⁷⁹ See *supra* notes 76, 157 and accompanying text.

¹⁸⁰ 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 (2000) (arguing that efficient redistribution should be done solely through the tax-transfer regime). For a different view, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472 (1980) (arguing that, in certain cases, contract law is an

as a central decisionmaking entity.¹⁸¹

The international setting is very different because there is no central accountable political entity. Thus in an international arena, where agreements are made independently from one another, the notion put forward by the division-of-labor approach is counterproductive. Because political elites are typically measured by their ability to promote domestic objectives, international policymakers should be skeptical about the idea that international redistribution can be seriously addressed as a separate matter.¹⁸² Hence, they should insist that the redistributive and insurance functions of distributive-fairness considerations be part of every agreement—so as to hedge the uncertainty associated with the agreement. This insistence should facilitate rather than jeopardize optimal agreements in a world where there is no central international decisionmaking authority. In such a setting, sovereign states, which are rationally risk-averse and skeptical about the distributive preferences of other countries, will agree to undertake more ambitious long-term burdens only if they can insure their relative payoffs.

The main policy implication of this analysis is that the whole concept of differential treatment, which is considered the cornerstone of international fairness considerations as they are applied today, should be fundamentally reformulated. Differential treatment mechanisms emphasize developing countries' need for development. They provide developing countries with more accommodating rules, which recognize their need to first develop strong private and public sectors before taking on the same level of

effective way to promote distributive justice); Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 179 (2003) (arguing that the distinction between state tax and regulatory actions tend to blur at the margin).

¹⁸¹ Because this central entity is in charge of providing many types of public goods, it makes sense to provide them all in the most optimal way. Domestic wealth redistribution is just another potential public good, which, as in the international setting, carries insurance, redistributive, and legitimization functions. Hence, if distributional objectives can most optimally be met when they are regulated separately (e.g., via the tax-transfer system), the state should do so. In the domestic setting, unlike the international one, redistribution comes as part of a mixture of public goods for which the government is politically accountable. The government could therefore be held accountable for how much it promotes a certain public good and for the tradeoffs it makes between that public good and other public goods it offers until it satisfies its residents' demands. Furthermore, in cases where the state provides a reasonable social safety net, this would encourage individuals and firms to take ambitious (and risky) contractual obligations. The division-of-labor agenda is therefore both possible and in some ways even desirable in a domestic setting where there is a single political body that is in charge of markets' regulation, provision of market goods, and redistribution.

¹⁸² Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 299 (2004) ("[T]he Poor recognize that the 'ideal' separate welfare system is just that—an [unattainable] ideal.").

obligations as developed countries.

This approach is sometimes justified, especially when a certain country does not have the institutional capacity to undertake certain obligations under a multilateral treaty. However, this approach also has some key disadvantages. First, it relies on the vague distinction between developed and developing countries. In the process of doing so, it groups countries that may have little in common in terms of their current situations and their growth prospects. Many international agreements that prescribe differential treatment refer to two or three blocs — developed, developing, and least-developed countries.¹⁸³ While many agreements rely on this categorization, the categories are often left unspecified and vague.¹⁸⁴ Furthermore, categories are sticky, and many (developing) countries tend to view the privileges associated with them as absolute rights rather than as modifications that should expire once the grounds for differential treatment cease to exist.¹⁸⁵ Second, rather than reducing levels of risk, the differential treatment framework increases the uncertainty because there is no concrete agreement as to whether differential treatments should be temporary or permanent features of the international regime.

E. Policy Implications and Suggestions

Instead of offering vague benefits based upon a crude bunching of states into categories — “developed” and “developing” — negotiators should aim to find a reasonable way to measure states’ relative economic abilities. There is no one measure of countries’ economic abilities, so the measurement should probably be developed from a complex metric, which would include GDP per capita, level of unemployment, intra-nation inequality (or the number of people living in poverty), and various infrastructure and development indexes. While none of these measurements independently capture the notion of economic ability in its entirety, a combination of them can provide a sense of countries’ relative levels of economic development as well as reduce chances for moral hazard or reporting manipulation. Hence, instead of seeking to refine the developed/developing distinction, policymakers should recognize that economic ability is a continuum and seek to provide reasonable formula to place countries on it. Given the difficulty of drawing interpersonal, and

¹⁸³ HONKONEN, *supra* note 10, at 179; Chang, *supra* note 88, at 557.

¹⁸⁴ HONKONEN, *supra* note 10, at 184, 189 (suggesting that the basis of categorizing countries has not been well specified under the climate change regime); Chang, *supra* note 88, at 557 (stating that the distinction between developed and developing categories is not well-defined, whereas the category of least-developed countries has a more concrete definition).

¹⁸⁵ HONKONEN, *supra* note 10, at 185; Chang, *supra* note 88, at 556–57 (stating that developing countries have strongly opposed the notion of graduation).

international, comparisons, this formula should not seek theoretical perfection but should rely instead on reasonable and easy-to-observe factors.

The strongest support for this article's analysis of the necessity of recognizing the insurance function of redistributive-fairness considerations is current reality. As they are employed today, multinational agreements are very difficult to negotiate and slow to adapt to changing circumstances.¹⁸⁶ Multilateral agreements also feature an inherent tradeoff between the broadness of participation and the depth of obligations.¹⁸⁷ Today, most multinational agreements exhibit broad participation and shallow obligations because states are afraid to enter into agreements with substantial burdens without being able to control their future exposures to them.¹⁸⁸ The result is unsatisfactory—even though there are many multilateral agreements with high participation, many important global public goods remain severely underprovided because of the uncertainty.¹⁸⁹ Therefore, because participation is not enough, policymakers' efforts to improve the provision of public goods should gravitate toward increasing the depth of obligations.¹⁹⁰ The main challenge that policymakers face is providing a framework that allows for deeper obligations without significantly reducing participation or compliance. The fairness-insurance function would reduce the rigidity of multinational agreements by allowing them to better cope with, *though not eliminate*, the uncertainties associated with entering such agreements. Harnessing the risks associated with these uncertainties in an effective way would allow policymakers to take on more ambitious obligations and to promote a more beneficial coordinated framework.

The most visible example is the climate change context, which is governed by two leading legal instruments: the Kyoto Protocol — a weak agreement that sets broad standards — and the Copenhagen Accord (followed by the Cancun Agreement) — a materially incomplete agreement that avoids most of the compliance and burden-allocation issues. The Kyoto Protocol directed at reducing emissions prescribes binding, yet very low, standards for most developed countries.¹⁹¹ Furthermore, it allows them to buy emission credits from developing countries without setting any obligatory targets for emission reduction on developing countries. The

¹⁸⁶ Blum, *supra* note 27, at 352.

¹⁸⁷ *Id.* at 351. An optimal multinational agreement in a second-best reality would have to account for both broadness and depth of the agreement to reach the best possible result. Finus & Maus, *supra* note 59, at 801.

¹⁸⁸ Blum, *supra* note 27, at 350.

¹⁸⁹ HURRELL, *supra* note 21, at 229.

¹⁹⁰ BARRETT, *supra* note 3, at 292.

¹⁹¹ POSNER & WEISBACH, *supra* note 3, at 62–63.

exclusion of major emitters like China, India, and Brazil from the regime puts a huge question mark over the whole attempt to limit climate change.¹⁹² The low commitment undertaken by developed countries, along with the unwillingness of the United States to commit to any emission-reduction obligation under the agreement, can partly be explained by the futility of bearing significant costs to support an agreement that is ineffective in reducing global warming.¹⁹³

The recently negotiated Copenhagen Accord adds only vague (and shallow), open-ended obligations without setting any new concrete emission-reduction targets for countries.¹⁹⁴ Rather than prescribing emission targets and compliance measures, the Copenhagen Accord's framework adopts a bottom-up approach in which each country unilaterally defines its own commitments and actions.¹⁹⁵ Although the Copenhagen Accord's framework has had some achievements, the pledges undertaken by countries are far from putting the world within the agreement's professed target of limiting the increase of global temperature to two degrees Celsius.¹⁹⁶

To date, to comply with the Kyoto Protocol, some developed countries have reduced their emissions and some have purchased emission credits without having any concrete proof that these purchases actually have reduced the emissions of the countries they were purchased from. Without a concrete plan for sharing the burden of reducing emissions, the Copenhagen Accord looks like an empty declaration. And emissions continue to grow.¹⁹⁷

Reaching an agreement on climate change is not an easy task—it requires serious investment in compliance mechanisms, investment in geo-engineering and low-emission technologies, lower growth rates, and substantial reduction in the standards of living of many countries. Fairness considerations are not the only reason why it is difficult to strike a multilateral agreement with respect to climate change, but the role they have played in the form of providing differential treatment has been part of the problem and not part of the solution. The Kyoto Protocol's attempt to achieve distributive fairness through a perverse set of differential treatment provisions is a bone of contention between countries—with major developing countries not willing to give it up, and major developed

¹⁹² Bortscheller, *supra* note 112, at 50.

¹⁹³ POSNER & WEISBACH, *supra* note 3, at 64; Bortscheller, *supra* note 112, at 51.

¹⁹⁴ POSNER & WEISBACH, *supra* note 3, at 193–97 (describing the Copenhagen Accord); Cantley-Smith, *supra* note 3, at 278.

¹⁹⁵ Bodansky, *supra* note 41, at 11–12.

¹⁹⁶ *Id.* at 16–17; Rob Dellink et al., *Costs Revenues, and Effectiveness of the Copenhagen Accord Emission Pledges for 2020* 13 (Org. Econ. Co-operation & Dev. Env't Working Paper No. 22, 2010); Leal-Arcas, *supra* note 141, at 1–5.

¹⁹⁷ Cantley-Smith, *supra* note 3, at 281.

countries (namely, the United States) not willing to sustain it.¹⁹⁸

This does not have to be the case. Instead, fairness considerations could be an element that facilitates developing countries' participation without reducing the effectiveness of the climate change regime.¹⁹⁹ Fairness considerations could be stated in neutral terms that correlate countries' levels of obligation to reduce emissions with their economic ability. This type of arrangement would meet the fairness-perception function and the insurance function and would thus make it easier to reach effective multinational agreements. Allowing poorer countries to meet lower emission standards would make production in them cheaper and promote investment in them. To some, especially those advocating the division-of-labor approach, this may seem inefficient. However, under the analysis of this article, this is the cost of the redistribution-insurance function. As economic activity in developing countries rise, so would their relative obligations under the international agreement, which would increase their relative production costs—until reaching equilibrium. In this way, the terms of the agreement provide an insurance function because the other countries would also modify their obligations in correlation with their relative increase (or decrease) in economic abilities. The annual modification to each country's respective obligations would not require either the costs of research and development or complexity of international negotiations that would otherwise accompany the need to renew fixed, short-term arrangements.

Climate-change regulation is perhaps the most visible and critically underprovided public good that can benefit from comprehensive multilateral agreements. It is, however, only one of many issues in which fairness considerations could facilitate coordination through their legitimizing-redistributive and insurance functions. International trade, corporate tax competition, global crime control, and labor regulation are but a few of the undersupplied international public goods that can benefit from introducing these fairness considerations.

CONCLUSION

This article identifies a major lacuna in international relations and international law theories: When considering distributive-fairness considerations in the context of international agreements, both disciplines only address their redistributive and legitimizing functions but fail to

¹⁹⁸ BARRETT, *supra* note 3, at 369, 383, 387; Orts, *supra* note 141, at 210-11 (reporting that the difficulty of resolving the various fairness issues associated with allocating the cost of mitigating emissions is one of the key problems in achieving an international agreement).

¹⁹⁹ This does not rule out the possibility that some special type of country-specific side payments may still be required to get the coordination of certain major polluters, such as the United States, India, and China.

address their insurance function.

This failure is interesting as a theoretical matter but disturbing from a policy perspective. To the extent that a (closer to) optimal provision of international public goods requires long-term reliable commitments, recognizing the insurance function and incorporating fairness-considerations is a crucial component in the success of future agreements. Furthermore, the incoherent way in which distributive considerations are implemented today—via vague differential treatment arrangements that rely on insensitive categories to bunch countries as either developed or developing—provides little (if any) insurance value. This lack of insurance function has had devastating effects with respect to the underprovision of certain international public goods—such as environmental protection with respect to climate change. Rather than promoting long-term coordination, distributive considerations have inhibited cooperation and made it hard for countries to take on substantial long-term obligations. While there are many impediments to solving climate change issues, the unwise (non)utilization of fairness-considerations' insurance function explains some of the main difficulties of reaching a viable and effective agreement.

This does not have to be the case. A proper recognition of fairness considerations' insurance function, and a proper incorporation of them into international agreements, would allow countries to undertake substantially higher obligations. This could make international agreements a much more effective tool and would allow governments to better address their residents' demands for public goods in an increasingly interrelated and interdependent global economy.