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## Convergences: A Prospectus for Justice in a Global Market Society

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Convergences: A Prospectus  
for Justice in a Global Market Society

Frank J. Garcia\*  
Boston College Law School

“I live my life in widening circles that reach out across the world.”  
Rilke, “Book of Hours”

“...there is no place at all that isn't looking at you. You must change your life.”  
Rilke, “Archaic Torso of Apollo”

## I Introduction

This is an urgent time to be working in the global justice space, as old structures are challenged, and new ones imagined.<sup>1</sup> As I write this, the UK has just voted to leave the European Union, while at the same time thousands of refugees are dying as millions try desperately to get in.<sup>2</sup> These two facts are not unrelated—they have in fact converged,<sup>3</sup> partly through how the issues have been framed, and partly by their underlying substance. Some see in deeper ties and closer union a life raft out of chaos and through uncertainty into a better life; others see life's benefits

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<sup>1</sup> In Brexit, the EU system is facing perhaps the greatest crisis in its history, even as China launches a new Asian Infrastructure Investment Bank, perhaps its most important challenge yet to the U.S.-led post-war international system. That both were announced within days in the New York Times seems significant. Steven Erlanger, *Britain Votes to Leave E.U.; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html>.; Jane Perlez, *China-Led Development Bank Starts With \$509 Million in Loans for 4 Projects*, N.Y. TIMES (June 25, 2016), [http://www.nytimes.com/2016/06/26/world/asia/china-led-development-bank-starts-with-509-million-in-loans-for-4-projects.html?\\_r=1](http://www.nytimes.com/2016/06/26/world/asia/china-led-development-bank-starts-with-509-million-in-loans-for-4-projects.html?_r=1).

<sup>2</sup> Karla Adam & James McAuley, *Europe's harsh new message for migrants: 'Do not come'*, N.Y. TIMES (Mar. 3, 2016), [https://www.washingtonpost.com/world/french-british-leaders-meet-amid-migrant-crisis-concern-over-eu-exit/2016/03/03/9b0ee319-6128-4d06-b897-ef13a4044d31\\_story.html](https://www.washingtonpost.com/world/french-british-leaders-meet-amid-migrant-crisis-concern-over-eu-exit/2016/03/03/9b0ee319-6128-4d06-b897-ef13a4044d31_story.html).; Erlanger, *supra* note 1; Perlez, *supra* note 1.

<sup>3</sup> By “convergence” I mean, in the traditional sense, independent lines of development that have come together in a significant manner. I also mean to echo Lawrence Weschler's use of the word (following John Berger) in his fascinating book, to denote striking, interesting, curious, possibly portentous similarities, “coincidences” and discoveries. EVERYTHING THAT RISES: A BOOK OF CONVERGENCES (2006).

divided into smaller and smaller shares, a loss of control, the disappearance of the familiar, a new vulnerability to seemingly intractable problems of global scope.

Both views are right in their way. How we manage our connectedness, how we organize our governance, what kind of economic space we create, and how we *perceive* and *respond* to the fairness, unfairness, opportunity and losses engendered by these connections are key legal, political and normative questions, the answers to which will shape our global future.

By its nature, globalization is unsettling, as is any period of encounter, connection, enlargement and reorganization. Transforming borders and de-territorializing behavior,<sup>4</sup> globalization raises a host of questions and concerns about actors, powers, duties and freedoms fundamental to politics, law and justice. Underlying all of this are globalization's social and subjective effects: how do we construct identity (and stigma)? Who do we consider our "neighbor"? How can I preserve what I consider mine while responding to needs on an unimaginable scale? Where do my responsibilities end? Globalization is creating a social space within which it is difficult to isolate one financial system from another, developed countries from developing ones; and where notions of identity, loyalty, responsibility and obligation are fluid, evolving, and not easily reduced to membership in a national political community.<sup>5</sup>

Globalization has been famously characterized as a set of flows facilitated by infrastructure.<sup>6</sup> These flows—of information, capital, goods, ideas, people, images and more—and their infrastructure—physical, normative and symbolic—are on converging paths, as streams blend into rivers emptying into a larger sea. These convergences account in part for our sense of globalization as the compression of space.<sup>7</sup> Geographic constraints on commercial, social, political, legal and cultural arrangements recede, and people become increasingly aware they are receding. In real terms, boundaries become more porous – we know more about what happens beyond our boundaries, we project our desires, anxieties and fears more easily beyond our boundaries, our actions affect others beyond our boundaries in more

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<sup>4</sup> For a fascinating exploration of the notion of territory and its relation to statehood, and the "unbundling" effects of globalization, see SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (Princeton Univ. Press rev. ed. 2008).

<sup>5</sup> Both the UK vote and the current upheavals in US politics can be understood as urgent attempts to reassert the national community as the carrier and guardian of these values and opportunities. That much is understandable—the difficult question is whether or not this will work in a globalizing era. I suspect not, in which case these movements may prove to be a damaging nostalgia for a simpler time.

<sup>6</sup> See MANUEL CASTELLS, *THE RISE OF NETWORK SOCIETY* (1996). See generally *THE GLOBAL TRANSFORMATIONS READER* (David Held et al. eds., 2d ed. 2003).

<sup>7</sup> See JAN SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* (2nd ed. 2005); Jay R. Mandle & Louis Ferleger, *Dimensions of Globalization*, 570 *ANNALS AM. ACAD. POL. & SOC. SCI.* 8 (2000). See generally DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1990) (arguing that changes in technology have changed capital flow, politics and culture).

pronounced ways, and we are increasingly aware of these effects. Globalization intensifies our awareness of the world as a whole.

This essay is about these anxieties, questions and convergences—in particular about legal, economic and governance convergences, and their significance for the social relations and regulatory institutions shared life requires, creates and sustains. At the confluence of these economic, social, institutional, normative, theoretical and symbolic trends, all linked in one way or another to globalization, we find—in my view—an emerging global market society. Understanding what law and justice mean for this society requires that we work towards a nuanced understanding of the kinds of relationships, thick and thin, that globalization forms, and the kinds of obligations these relationships engender.

In particular, this essay is about the regulatory framework for that emerging society's economic relationships—international economic law—and the kinds of justice this law must safeguard and deliver for that emerging society to flourish. I will first outline a set of socioeconomic, regulatory and normative convergences within the global space today: the deepening of the global economy, the worsening of economic inequality, the thickening of global social relationships, the unification of international economic law, the emergence of global law, and the integration of global justice concerns into our ongoing conversation about development. These convergences point both towards the emergence of a global market society, within which our aspirations for development, freedom and justice must now take place; and towards the challenges such a society—our society—faces. I will then offer one view of what it will mean to meet those challenges: ensuring opportunity and fairness for everyone in a global market society, which means an approach to justice that is pluralist, relational and transactional. This is the regulatory and normative task of international economic law today.

## **II Convergences**

### **A The Global Economy is Deepening**

Contemporary data suggests the emergence of a global economy characterized by diminishing geographic segregation, decreasing discrimination according to source, and increasingly integrated global production processes.<sup>8</sup> The magnitude of global economic integration can be gauged by assessing both institutions and outcomes.<sup>9</sup> Removal of institutional impediments is a necessary condition for cross-border integration, and in this respect, institutions (and through them, states) have largely demonstrated a commitment to global economic

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<sup>8</sup> Peter Lloyd, *Global Economic Integration*, 15 *PACIFIC ECON. REV.* 71, 72 (2010).

<sup>9</sup> Aseem Prakash & Jeffrey A. Hart, *Indicators of Economic Integration*, 6 *GLOBAL GOVERNANCE* 95, 95-96 (2000).

integration.<sup>10</sup> Since at least 1991, states have liberalized the market for capital, with 85% of new investment policy measures in 2015 being favorable to investors.<sup>11</sup> The market for goods has long been the focus of global economic integration through the GATT/WTO system, which has dramatically reduced tariffs and border measures and actively addressed beyond-the-border discrimination of goods through the principle of national treatment.<sup>12</sup> While the market for labor has remained stubbornly restrictive,<sup>13</sup> taken as a whole states and institutions have worked assiduously to facilitate an integrated global economy.

While institutions facilitate and incentivize integration through policy-based efforts, ultimately key state and private actors must assess and respond to them, and for this reason it is significant that outcomes also demonstrate a deepening global economy.<sup>14</sup> Trade as a percentage of global gross domestic product rose from 27% in 1970 to 43% by 1995, and then to 59% by 2014.<sup>15</sup> Foreign direct investment has risen from approximately \$10 billion in 1970 to \$320 billion by 1995, and then to \$1.56 trillion by 2014.<sup>16</sup> This surge in FDI has in turn facilitated the development of global value chains, within which nearly half of world trade in goods and services takes place.<sup>17</sup> Therefore both in absolute and relative terms, and over time and to the present day, outcome-based indicators also illustrate the deep connections characteristic of a global economy.

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<sup>10</sup> Prakash & Hart, *supra* note 9, at 95.

<sup>11</sup> United Nations Conference on Trade and Development [UNCTAD], *World Investment Report 2016*, at xi (2016).

<sup>12</sup> Lloyd, *supra* note 8, at 78, 80. There are several factors that undermine the unconditional commitment by WTO members to the principle of national treatment for goods, including regional trade agreements, and exceptions for subsidies and government purchases. *Id.* at 80-81. Further, the market for services, which is within the WTO's purview, is not as completely integrated as the market for goods. *Id.* at 78-79. However, the WTO's virtually universal membership is itself a testament to states' commitment to global economic integration. Todd L. Allee & Jamie E. Scalera, *The Divergent Effects of Joining International Organizations: Trade Gains and the Rigors of WTO Accession*, 66 INT'L ORG. 243, 244-45 (2012).

<sup>13</sup> Lloyd, *supra* note 8, at 81; Prakash & Hart, *supra* note 9, at 104.

<sup>14</sup> Prakash & Hart, *supra* note 9, at 97.

<sup>15</sup> The World Bank, *Trade (% of GDP)*,

<http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?start=1970> (last visited July 15, 2016).

<sup>16</sup> The World Bank, *Foreign direct investment, net inflows (BoP, current US\$)*,

<http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2014&start=1970> (last visited July 15, 2016).

Between 1970 and 2014, FDI as a percentage of global GDP has risen continuously, from 0.5% in 1970 to 2% in 2014. The World Bank, *Foreign direct investment, net flows (% of GDP)*,

<http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2014&start=1970> (last visited July 15, 2016).

<sup>17</sup> World Trade Organization, *International Trade Statistics 2015* (2015),

[https://www.wto.org/english/res\\_e/statis\\_e/its2015\\_e/its2015\\_e.pdf](https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf). Global value chains allow firms to "do" the part of the process they are best at, using intermediate goods and services from elsewhere without having to develop a whole industry. Org. for Econ. Cooperation & Dev. [OECD], *Interconnected Economies: Benefitting From Global Value Chains* (2013).

This presents us squarely with a question that, together with the problems of migration and climate, is one of the most urgent challenges facing globalization today: what *kind* of global economy are we creating? There is reason for concern.

## **B Global Inequality is Worsening**

The problem of inequality is not new, yet globalization has intensified the nature of inequality today to astronomical proportions. The forces of inequality are global in nature and intensity.

To summarize some contentious statistics, overall we see a disturbing reversal of the 20<sup>th</sup> century trend towards growth with lower inequality.<sup>18</sup> Global inequality (between people, across countries) greatly exceeds national inequality (.70 Gini versus .40s for US, .20s and .30s for Europe).<sup>19</sup> While it may be that inequality *between* countries is decreasing and a lower percentage of the world's population lives in poverty (thanks largely to the gains in China and India), inequality *within* countries is increasing, at least partially offsetting reductions in global inequality. Depending how you read the data, it could be that domestic inequality entirely offsets reductions in global inequality—it could even be that overall inequality has increased despite the gains mentioned.<sup>20</sup>

Everything about globalization is having an impact on inequality and our responses to it. To begin with, major elements of the international economic law system favor the intensification of inequality at national and global levels. While trade has grown within this framework, and *may* decrease inequality in developing countries, such decreases come in part by *flattening* wages at the top; moreover, trade may be *increasing* inequality in developed countries by decreasing wages and offshoring jobs at the bottom.<sup>21</sup> Similarly, foreign investment increases inequality in developed countries by facilitating transfers of low-skill jobs outbound, increasing returns to capital; and inbound by increasing the skill premium (perhaps a good thing, but also promoting inequality through new elites).<sup>22</sup>

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<sup>18</sup> THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans.) (2014); Frank J. Garcia, *Capital in the Twenty-First Century*, 18 J. INT'L ECON. L. 188 (2015) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY*) (2014).

<sup>19</sup> Francois Bourguignon, *Inequality and Globalization: How the Rich Get Richer as the Poor Catch Up*, FOREIGN AFFAIRS, Jan./Feb. 2016, at 11; see also Dep't Econ. Soc. Affairs, *Inequality Matters: Report on the World Social Situation 2013*, U.N. Doc. ST/ESA/345 (2013) (reviewing recent trends in global inequality).

<sup>20</sup> Christoph Lakner & Branko Milanovich, *Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession* (World Bank Policy Research Working Paper WPS6719, 2013) (correcting for underreporting of high income levels across national data sets leads to significantly higher levels of global inequality (.76 as measured by national Gini coefficients)); see also Bourguignon, *supra* note 19 (noting this possibility).

<sup>21</sup> ERA DABLA-NORRIS ET AL., *CAUSES AND CONSEQUENCES OF INCOME INEQUALITY: A GLOBAL PERSPECTIVE* (2015).

<sup>22</sup> *Id.*

Moreover, regulation is complex and often least effective on a global level, and national regulation is under great pressure. To take just one example, the global structure for income taxation facilitates tax avoidance, which in turn depresses national budgets when states can least afford lost revenues.<sup>23</sup> At the ideological level, the dominant global regulatory ideology, neoliberalism, depresses national social welfare systems in both dominant and client states by labeling them either protectionist or unsustainable and dismantling them, exacerbating inequality and limiting the range of domestic policy tools through which to ameliorate it.<sup>24</sup>

Finally, global inequality is having domestic political effects, intensifying the reactivity of domestic politics and further complicating our policies towards inequality and political reform. One can see this in everything from the Euro crisis to Brexit to the reactionary nationalisms of U.S., French, Hungarian, Polish and Austrian politics, to list only a few examples.<sup>25</sup>

Even if such inequality trends were not themselves a problem (and there are many good reasons to consider them a problem, and a serious one),<sup>26</sup> there are significant distributive concerns raised by the pattern of allocations generated by the international institutions which today frame and regulate the global economy, in areas as diverse as taxation, access to capital, control over natural resources, the social costs of investment, to name a few. These trends raise a host of compelling social, political, legal and normative issues for international economic law since, as the regulatory framework of the global economy, all of these issues land in its lap, so to speak. There is much work to be done to ensure that the global economy works fairly for everyone.

### **C Global Social Relations are Thickening**

Globalization is also transforming human relationships in ways that affect our interconnectedness, the basis for solidarity, and the effective reach of our awareness, understanding and actions with respect to others. I can only summarize

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<sup>23</sup> OECD, *OECD/G20 Base Erosion and Profit Shifting Project* (2015), [www.oecd.org/tax/beps-explanatory-statement-2015.pdf](http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf); Hugh J. Ault, Wolfgang Schoen & Stephen E. Shay, *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 BULL. FOR INT'L TAX'N 275 (2014).

<sup>24</sup> See David M. Kotz & Terrence McDonough, *Global neoliberalism and the contemporary social structure of accumulation*, in CONTEMPORARY CAPITALISM AND ITS CRISES (2010) (documenting the hollowing out of the modern welfare state under neoliberalism).

<sup>25</sup> Gregor Aisch et al., *How Far Is Europe Swinging to the Right?*, N.Y. TIMES (July 5, 2016), <http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html> (graphically demonstrating the rise of nationalistic politics across Europe).

<sup>26</sup> See Dep't Econ. Soc. Affairs, *supra* note 19 (inequality poses serious threats to wellbeing of people at all levels of the income distribution); The World Bank, *Development Goals in an Era of Demographic Change* (2015) (inequality one of three top challenges to development today). See generally PIKETTY, *supra* note 18; JOSEPH STIGLITZ, *THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM* (2015); Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999).

here what I discuss at greater length elsewhere,<sup>27</sup> but in essence globalization is contributing to the emergence of elements of global community around a range of institutional practices and common challenges.

First, globalization is building communities of risk—David Held calls them communities of fate—around the shared challenges characteristic of global life today: the natural environment, poverty and inequality, security, etc. The intensification of global social and economic interaction—in areas as diverse as global finance, refugee crises, terrorism, climate change—create common interests and can contribute to the subjective awareness of a shared fate. This builds on what can be called a community of knowledge, created by global social media and the information revolution so characteristic of our everyday experience of globalization. Thanks to these infrastructures, we know so much—more than ever before—about how we collectively experience these and other risks, 24/7, around the globe, instantaneously. Finally, and perhaps most importantly, globalization is building a set of shared understandings and practices around how we respond to such risks and to globalization’s opportunities as well.<sup>28</sup> We see this in areas such as the use of markets and the regulation of markets through law and institutions (about which I will have more to say below), as well as in new and emerging regimes around challenges as diverse as climate change and global tax avoidance.<sup>29</sup>

Together this represents a fundamental shift in social organization on the planet.<sup>30</sup> One of the surprising features of this new global social space is how it resembles what we used to call “domestic” space, which also consists of regions of wealth, urbanization and industrialization, and regions of agrarianism, poverty and underdevelopment, all linked by an overarching framework of economic, legal, political and social networks of causality, influence and responsibility. We are in the habit of associating this “domestic” space with an identifiable community structured by a set of shared social norms and governance institutions. Because of globalization, we can no longer easily oppose this “domestic” space to the “international” space “between” communities, and insist that the latter lacks shared understandings and institutions. What we see emerging through globalization may in fact be a global community, or elements of it, within which global norms and

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<sup>27</sup> See generally FRANK J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES* (2013).

<sup>28</sup> See, e.g., Frank J. Garcia, *Between Cosmopolis and Community: Globalization and the Emerging Basis for Global Justice*, 46 N.Y.U. J. INT’L L. & POL. 1 (2013).

<sup>29</sup> OECD, *Base Erosion and Profit Shifting (BEPS)* (2013); Fiona Harvey, *Paris climate change agreement: the world’s greatest diplomatic success*, THE GUARDIAN (Dec. 14, 2015), <https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations>.

<sup>30</sup> See, e.g., Dirk Messner, “World Society—Structures and Trends,” in *GLOBAL TRENDS AND GLOBAL GOVERNANCE* (PAUL KENNEDY ET AL., EDS. 2001). Perhaps, if not a world of “us,” at least a world of “I and Thou”? See MARTIN BUBER, *I AND THOU* (Ronald Gregor Smith tans., 2004) (1937).

global institutions permeate and interweave with persistent (and valued) local spaces, communities and norms. It is all simultaneously local and global.<sup>31</sup>

In order to more fully understand the significance of this shift, we need to look at a few other related convergences on the regulatory level.

#### **D International Economic Law is Unifying**

As the global economy continues to deepen, formerly distinct areas of international economic law are converging into a single, unified body.<sup>32</sup> At the level of purpose and deep structure, trade and investment law both involve states making commitments to *each other* with respect to how foreign nationals' economic interests will be treated within the domestic legal system, for fundamentally similar reasons. Trade bargains address the question of how a foreign national's products will be treated on deployment, i.e., importation into and sale within the domestic market; and investment bargains similarly address how a foreign national's capital will be treated on deployment, i.e., establishment and treatment within the domestic market. Most importantly, the convergence of trade and investment is rooted in the evolution of complex global business forms in which both investment and trade in goods and services are deeply intermingled.

This deep convergence in aims is also evidenced through the emergence of shared doctrines,<sup>33</sup> overlapping institutional structures<sup>34</sup> and actors initiating

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<sup>31</sup> WAYNE GABARDI, *NEOGIATING POSTMODERNISM* (2000) ("glocalization is marked by the development of diverse, overlapping fields of global-local linkages . . . [creating] a condition of globalized panlocality . . ."); SASSEN, *supra* note 4.

<sup>32</sup> There is a small but growing body of literature analyzing the parallels between trade law and investment law and arguing their convergence. See, e.g., Tomer Broude, *Investment and Trade: the "Lottie and Lisa" of International Economic Law?*, in *INTERSECTIONS: DISSEMBLANCE OR CONVERGENCE BETWEEN INTERNATIONAL TRADE AND INTERNATIONAL INVESTMENT LAW* (2011); Roger Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35 (2013); Roberto Echandi & Maree Newson, *Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch*, 17 J. INT'L ECONOMIC L. 847 (2014); Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1 (2015). Not all commentators, however, fully accept the comparison or agree with the convergence thesis, for a variety of reasons. See, e.g., Nicholas Di Mascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 53-55 (2008) (contrasting the trade and investment regimes in terms of goals and political economies). However, in my view the similarities outweigh the differences.

<sup>33</sup> For example, national treatment obligations are incorporated into both multilateral trade agreements and investment treaties. Di Mascio & Pauwelyn, *supra* note 32, at 49. In doing so, many BITs have translated the term "like products," into "like circumstances." Alford, *supra* note 32, at 41.

<sup>34</sup> Investment arbitrators make frequent comparisons to WTO dispute settlement practices to clarify the meaning of national treatment tests. Alford, *supra* note 32, at 41 (citing *Methanex Corp. v. United States*, *NAFTA/UNICTRAL Trib.*, Final Award, 29-38 (Aug. 3, 2005), 44 I.L.M. 1345, 1446-1449, where NAFTA arbitral panel concluded that "like products" could not be construed to mean "like circumstances" after comparing WTO national treatment provisions with several NAFTA provisions). The adoption of national treatment in investment arbitration is indicative of a larger trend in which

enforcement across regimes.<sup>35</sup> Despite their different births, these bodies of law increasingly share common goals in preparing markets for globalization, integration, and promotion of both trade and investment.<sup>36</sup>

This convergence also reflects the deepening of the global economy, as the global commercial integration of goods, services, labor, intellectual property and capital comes to reflect more and more the way a “domestic” economy operates. Within a well-run economy, regulation covering these disparate aspects of economic activity are harmonized through legislative and administrative action and brought into as close a working relationship as possible, for efficiency reasons. The fact that international economic law is undergoing a similar process is both evidence of the larger convergences I am charting, and an opportunity to ensure in a coordinated fashion that global economic regulation is not only efficient in the narrow economic sense, but also efficient in the broader long-term sense, sustainably supporting a flourishing global society.

#### **D Global Law is Emerging**

The evolutions in international economic law are part of a larger process of law’s adaptation to the new global social reality.<sup>37</sup> Many scholars across the spectrum argue that international law and national law are no longer adequate as categories to embrace the new global totality of “law,” i.e., processes of authoritative norm-creation, urging us to analyze law as it is emerging in this global space through notions of transnational law, global law, legal pluralism, and so forth. Essentially, these scholars are responding to globalization’s impact on how norms are created and the kinds of norms that are emerging.

Through globalization, we see in addition to the usual abundance of “national” and “international” law-making, an increase in the number of bodies producing “softer” norms, often through transnational processes, that influence or guide state or private actor behavior or facilitate coordinated regulation by states.<sup>38</sup>

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trade and investment forums adopt similar language in both the drafting of agreements and subsequent decision-making. Puig, *supra* note 32, at 42; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 84 (2013).

<sup>35</sup> Recognizing both the increasing institutional overlap between these bodies of law and key strategic differences in norms, actors may initiate multiple enforcement actions across regimes in an effort to achieve their desired outcomes. Alford, *supra* note 32, at 48-49 (referencing Phillip Morris’ challenges in ISDS for a and in the WTO (through Hong Kong) against Australia’s recently passed law instituting plain packing restrictions); Andrea Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 Hastings L.J. 101 (2007); Puig, *supra* note 32, at 46.

<sup>36</sup> Alford, *supra* note 32, at 37.

<sup>37</sup> Or, as Zumbansen characterizes it, “attempts towards the development of an appropriately designed framework of legal analysis and regulation in light of a radically disembedded regulatory landscape.” *Transnational Legal Pluralism*, 1 TRANSNAT’L LEGAL THEORY 141 (2010).

<sup>38</sup> The Basel Accords and the Basel Committee process are a good example, as is the OECD’s BEPS

We can see such transnational norm creation in a number of areas spanning the waterfront of global social policy, from crime to tax to food safety and beyond.<sup>39</sup>

Transnational law scholar Peer Zumbansen describes these dynamics as spaces of individual, organizational and regulatory activity that evolve following functional imperatives, with little regard for jurisdictional boundaries, and are constituted through a complex overlapping of different national, international, public and private norm-creation processes.<sup>40</sup> In response, “traditional ‘national’ legal responses that draw on architectures of normative hierarchy, separation of powers and unity of law are likely to fall short of grasping the nature of the evolving transnational normative order.”<sup>41</sup> Even where we think we may see “national” norm creation at work, Saskia Sassen reminds us that the nature of the “national” itself is being undermined by globalization.<sup>42</sup> “National” norms are increasingly oriented towards global agendas and systems even though located within the national.<sup>43</sup> Globalization is thus “denationalizing the national” but in obscure ways that are better understood, she argues, if we free our analyses from the binary of global versus national.<sup>44</sup>

Because of these long-term trends, we cannot simply distinguish types of law according to their purported geographical source or effect—national or

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Project, both in collaboration with the G-20. *See, e.g.*, OECD, *supra* note 29; Ines Drumond, *Bank Capital Requirements, Business Fluctuation Cycles and the Basel Accords: A Synthesis*, in ISSUES IN FINANCE: CREDIT, CRISES & POLICIES (Stuart Sayer ed., 2010) (tracing the channels through which the Basel Accords influence central banking policy and therefore the domestic business cycle and overall macroeconomic stability). On the soft law phenomenon, *see* Shaffer & Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).<sup>39</sup> *See generally* Dirk Messner, *World Society: Structures and Trends*, in GLOBAL TRENDS AND GLOBAL GOVERNANCE 34-40 (Paul Kennedy et al. eds., 2002); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 305, 312-13 (2012) (cataloguing global social challenges calling for transnational approaches).

<sup>40</sup> Zumbansen, *supra* note 38.

<sup>41</sup> *Id.* at 153.

<sup>42</sup> Saskia Sassen reminds us that globalization is changing law even within what we are accustomed to thinking of as “national” legal spaces, in ways that defy traditional national versus “global” categories. Contemporary accounts of globalization focus almost always on the obviously global (such as the Bretton Woods institutions), but neglect the national. However, the transformation we call globalization is taking place within the national and reorganizing it, far more than our categorizations reveal. Sassen cites as examples NGOs working locally on global agendas, domestic institutions developing national monetary and fiscal policy but according to global norms, national courts using international human rights instruments. Through such mechanisms, both the national and the evidently global are destabilizing settled meanings and systems. *See* SASSEN, *supra* note 4, at 1-3.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> Sassen recommends instead that we examine both the national and the global through the perspective of trans-historical socio-legal categories and processes present in all societies from medieval times to the present and which coalesce into various “assemblages,” and offers three: territory, authority and rights. *Id.* at 401-23.

international—nor can we readily divide law’s universe into two systems, the national and the international. The business of law is becoming both transnational and global. It is transnational, insofar as it is, as Arjona writes “normativity that is not strictly dependent on the state.”<sup>45</sup> It is global, insofar as it is building a new legal architecture consisting of not only the “outputs” of this process, the range of hard and soft norms that together regulate behavior in this global space, but also “traditional” national and international sources and materials as well.<sup>46</sup>

This new legal architecture can be characterized a variety of ways. Rafael Domingo proposes seven principles shaping global law: justice, reasonableness, coercion, universality, solidarity, subsidiarity and horizontality.<sup>47</sup> Ziccardi Capaldo argues for a global law that governs relationships among legal systems, as well as the global communities of states and persons, according to four “pillars:” verticality and the sharing of decision-making processes; legality to address agreed global norms and values; integration of legal systems in the direction of global law; and collective guarantees to safeguard the values of global law.<sup>48</sup> Both Domingo and Ziccardi Capaldo agree that, whether through seven principles or four pillars, the global law system must function coherently to create a global order that embodies co-management between international and state actors to safeguard humankind’s shared interests.

Both transnational and global approaches to law share an assumption that law in a global age will be pluralist in nature. In my view, this is a defining feature of regulation in the new global space, and I shall have more to say about this below, but at this juncture I want to emphasize that this is not a static pluralism or simple diversity of types of law, but a dynamic pluralism involving the interaction of different types and sources of law, with manifold effects on different actors and in different spaces, and subject to contending ideologies.<sup>49</sup>

## **E Global Justice and Development Discourses are Transforming**

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<sup>45</sup> Cesar Arjona, *Anthropology and Transnational Legal Education: Some Ambitious Reflections Based on a Humble*, in *THE TRIALS AND TRIUMPHS OF TEACHING LEGAL ANTHROPOLOGY* 41 (M.C. Foblets, G. Woodman & A. Bradney eds., forthcoming 2016). I would also point towards Zumbansen’s definition of transnational law: “Transnational law is another name for transnational legal pluralism, for an—inherently interdisciplinary—inquiry into the nature of legal regulation of problems, which have long been extending beyond the confines of jurisdiction – both ‘inside’ and ‘outside’ of the nation state.” Zumbansen, *supra* note 38, at 55.

<sup>46</sup> See Frank J. Garcia, “Globalization’s Law: Transnational, Global or Both?” *THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE* 2015 (forthcoming).

<sup>47</sup> RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 154, 157-58 (Samantha Besson et al. eds., 2010).

<sup>48</sup> GIULIANA ZICCARDI CAPALDO, *THE PILLARS OF GLOBAL LAW* 17, 137, 171, 215 (2008).

<sup>49</sup> See PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012); Zumbansen, *supra* note 38. See generally GARCIA, *supra* note 27 (discussing the necessary role of pluralism in global justice theory).

The last convergence I want to trace involves our post-war discourse concerning the issues of fairness raised by complex socioeconomic activity and regulation, both “within” and “across” the “national.” Since the Second World War and the post-colonial era, much of this discussion has taken place within the rubric of development and, especially towards the latter part of the 20<sup>th</sup> century and into the 21<sup>st</sup>, the new rubric of “global” justice as well. These vital conversations are transforming from within and are merging, towards a new integrated “post-globalization” inquiry into justice.

Conventional development discourse has been trapped in certain contradictions and assumptions that are no longer viable, if they ever were. The very idea of development began in an unstable binary structure: we are the developed nations, you are not. To this it added a specific teleology: you want to be like us and to have what we have, in the way we have it—you exist to become us. Moreover, the dominant paradigm of development as economic growth is itself inherently unstable and contradictory, in that it implies that all countries can “develop” and that resources are inexhaustible, and both assumptions have proven wrong. Together this binary structure and the economic growth paradigm have largely determined the shape of development discourse for the past 60 years.

Global justice also investigates the subjects that development concerns itself with, and has also had its binary structures and assumptions. Rawls has written famously that justice is the first virtue of institutions.<sup>50</sup> By this he means that the fundamental question for institutional arrangements is whether or not they are just. The question of justice is thus natural to development as well, which has always been concerned with the institutions that set the terms within which development succeeds or fails, institutions that are themselves a subject of development.<sup>51</sup> However, as Gilbert Rist reminds us, justice discourse too has been marked by the binary structure, yielding a bifurcated vision for a just society: the democratic social welfare state in the countries of the North, and ‘development’ programs in the South.<sup>52</sup> For Rawls, investigating the justice of institutional frameworks, or what Rawls calls the “basic structure,” is a key task for political theory, but conceived of as a *domestic* inquiry.<sup>53</sup>

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<sup>50</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

<sup>51</sup> Of course development discourse has also been deeply influenced by other aspects of justice such as human rights, corrective justice arguments, and other norms that add legal depth and texture to both development discourse and the justice debate. See, e.g., KATHERINE YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012) (analyzing the dynamic processes at international and state levels that render economic and social rights in enforceable legal form).

<sup>52</sup> GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* (4th ed. 2014).

<sup>53</sup> For Rawls, beyond national boundaries, different fairness norms apply. See JOHN RAWLS, *THE LAW OF PEOPLES: WITH “THE IDEA OF PUBLIC REASON REVISITED,”* (4th ed. 2002); Pietro Maffetone, *The Law of Peoples: Beyond Incoherence and Apology*, 7 *J. INT’L POL. THEORY* 190 (2011).

Globalization has rendered such binary structures and assumptions unsustainable, for critics and advocates of justice and development alike. “North” and “South,” “developed” and “developing,” all of these binaries are increasingly blurred, challenged and deconstructed through globalization’s alchemical properties. To begin with, globalization dissolves the notion of territory. We can no longer easily determine what is “inside” or “outside” a bounded space, and the very idea of a bounded space, the limits and self-governability of legal or political communities are contested. Globalization thus challenges the viability of “domestic” policy, as it becomes increasingly difficult for any nation to map the boundaries of the “domestic,” and to maintain policy space and development momentum in the face of deepening interconnectedness.

The most visible effects are in the economy, where globalization raises profound questions for justice and development: how is the global economy affecting growth, returns on investment, production and employment patterns, innovation, and human capital investment within national and transnational economic spaces—in short, all of the social conditions of vital interest to development and justice alike? Economic globalization thus also highlights globalization’s governance effects: who is deciding economic policy and distributive policy, and for whose benefit? This illustrates how globalization also enlarges the set of institutions which justice must investigate. By institutions we now must include both domestic institutions, such as public and private law, the political process, and socioeconomic structures such as the market; and their international correlates such as international law and international organizations, together with the global market and its international and domestic regulatory bodies.<sup>54</sup>

Globalization is thus critically reconstructing the discourse around global justice and development, towards a new global post-development discourse around, simply, justice. If justice is the first virtue of institutions, and institutions are increasingly transnational in scope, then so too must the justice conversation be transnational.

### **III Opportunity and Fairness in a Global Market Society: At the Vanishing Point of Global Convergences**

Together, these convergences point to a newly emerging global space with key characteristics that both integrate and subvert our settled categories and create new opportunities for meaningful economic, social and legal activity. For one thing, the transnational space within which what we used to call development is supposed to take place, now resembles more closely what we think of as domestic space, than

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<sup>54</sup> In global justice theory these are referred to collectively as the “global basic structure.” See Andreas Follesdal, *When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic*, 16 *IND. J. GLOBAL LEGAL STUD.* 585 (2008); GARCIA, *supra* note 27, at 174 and sources cited therein.

it does our traditional accounts of the international context of development. Moreover, our ongoing investigation of justice, traditionally limited to national spaces, has found the very notion of national space exploded by and permeated with the global, dramatically expanding the boundaries for the justice conversation. And international economic law has grown from structuring the transnational economic relationships of national economies, into regulating an emerging global economy through global law processes.

Globalization is creating this space, but we have not yet fully recognized it or absorbed its implications, nor have we thoroughly examined and recast or rejected old tools and invented new ones.<sup>55</sup> A key element in our investigation into justice and international economic law will be to develop a nuanced understanding of the kinds of relationships, thick and thin, that globalization forms and the kinds of obligations they therefore engender and support, as well as an account of the relational and non-relational duties of a range of global actors. All of this means re-thinking the enterprise of development, justice, and the regulation of a global economy.

## **A Emergence of Global Market Society**

One way to characterize the society that is emerging is as a global market society. That it is *global*, can readily be seen from the effects of both globalization in general and the global economy in particular, both in terms of transactions and business practices on the one hand, and global regulation on the other, including global law. That it is based on the market model is also clear from the kinds of economic interactions it facilitates, by the institutions and regulatory structures employed to govern it (principally through international economic law), and by the ideology they follow.<sup>56</sup> That it is a global market *society* is perhaps the most controversial characterization of the three. Towards this end, I want to take a closer look at two fundamental sets of widely-shared practices which contribute to the kinds of shared understandings that signal deepening social ties: the ubiquity of the market as a socio-economic structure, and our shared approaches to regulating markets through institutions.

Markets and how we regulate them are central to our 21<sup>st</sup> century social reality: at this point in world history, it is possible to say that virtually all people live in some form of organized market economy.<sup>57</sup> Globalization has been both a

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<sup>55</sup> As Rist writes, “The point at issue is not the success or failure of this or that ‘development project’ but a general way of envisaging harmonious and equitable cohabitation of all those living today – and in the future – on this planet. *Supra* note 56.

<sup>56</sup> I use the term ideology here in its classical, if not neutral, sense, as favoring markets over other forms of socioeconomic organization, recognizing full well the more pejorative uses of the term in connection with neoliberalism and “free market” ideology, a mistake to which I will return below.

<sup>57</sup> This point is acknowledged across a range of perspectives towards markets. See, e.g., *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* (BETH SIMMONS ET AL. EDS. 2008); EDWARD S. HERMAN, *THE TRIUMPH*

facilitator and accelerator of this trend, and not without significant controversy. One way to view globalization is as the world-wide extension of the transition to market society that European culture went through in the 17<sup>th</sup> to 19<sup>th</sup> centuries.<sup>58</sup> This in itself can lead to two kinds of tensions. First, since market society's patterns of contractual exchange are corrosive of old status-based patterns and the power that flowed from them, globalization will be viewed as threatening to the old social order and challenged by those who benefited from entrenched social patterns or are less favored by the new dispensations.<sup>59</sup>

Second, to the extent that globalization is understood as extending a particular version of market ideology – under-regulated capitalism or the “Washington Consensus,” for example – globalization will be resisted as partisan by those who view this particular ideology as inimical to the interests of the non-capital classes.<sup>60</sup> I think this conflation of markets with neoliberalism is a mistake – one need only recall the changing patterns of regulatory action within essentially the same institutions (I am thinking here of oscillating trends in U.S. antitrust enforcement but there are many examples) in order to see clearly that institutions cannot be formally subsumed into whatever ideology currently holds sway within them. For our purposes here, it is the ubiquity of the market itself that is significant from the perspective of shared understandings and practices, not its often-controversial nature.

The widespread use of the market does not, of course, mean that all countries have identical interests with respect to markets, or identical forms of market society. To take just one example, the U.S. and Germany (two of the world's most developed countries) practice advanced capitalist forms of market economy that differ in important ways such as competition policy, labor-management relations, tolerance level for economic inequality among citizens, and social welfare policies.<sup>61</sup> The contrast is even more marked when one ventures beyond comparison between the U.S. and Western European market societies and looks at Asian capitalism, even Chinese capitalism.<sup>62</sup> Markets have been touted on instrumental grounds precisely

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OF THE MARKET: ESSAYS ON ECONOMICS, POLITICS AND THE MEDIA (1999).

<sup>58</sup> See Anthony Giddens, *The Globalizing of Modernity*, in THE GLOBAL TRANSFORMATION READER (Daniel Held & Anthony G. McGrew eds., 2000) (citing globalization as the global spread of modernity, with all of its characteristic features and complications).

<sup>59</sup> Giddens considers this an aspect of the cultural globalization that, together with industrialization and the rise of global media, has “torn the modern away from the traditional.” *Id.* at 65.

<sup>60</sup> This complaint is more a normative judgment about the global spread of under-regulated capitalism than a judgment on the global economy per se. See A. G. HOPKINS, GLOBALIZATION IN WORLD HISTORY 42-43 (2003) (dangers posed by weakened regulatory power over capitalist system).

<sup>61</sup> See ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2001); POLITICAL ECONOMY OF MODERN CAPITALISM (Colin Crouch & Wolfgang Streeck eds., 1997) (comparing Anglo-American, European and Asian models of capitalism).

<sup>62</sup> See POLITICAL ECONOMY OF MODERN CAPITALISM, *supra* note 67; see also YASHENG HUANG, SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA (2003); MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (2006); DALI YANG, BEYOND BEIJING: LIBERALIZATION AND THE REGIONS

because they can facilitate efficient transfers among people who do *not* necessarily share identical conceptions of the good.<sup>63</sup>

Nevertheless, insofar as globalization is extending and deepening the worldwide reliance on markets as a tool for organizing economic life, this in itself is a complex set of shared practices contributing to the emergence of a global market society, with shared understandings about socioeconomic organization.<sup>64</sup> While transnational activity by itself is no guarantee of a shared economic culture,<sup>65</sup> it is the convergence of a deepening global economy, thickening global social relations, and new forms of global regulation, which together point towards evolution of these deeper social forms.

This brings me to my second point, namely, the regulation of the market through institutions as a shared practice. What is truly distinctive about the emerging global economy is the shared recognition of the need for institutions regulating the market at a trans-national level.<sup>66</sup> Market society has certain institutional attributes—the need for bureaucratic regulation, recognition of private property, and functioning civil courts, to name a few—which by virtue of their significant spill-over effects, do contribute to the formation of important shared interests among participants that transcend strictly market activity.<sup>67</sup> Moreover, market societies all develop, even minimally, some set of social practices or domestic institutions capable of supplementing and mitigating the rigors of capitalism, for example by compensating the “losers” through some form of wealth transfer.<sup>68</sup> Raymond Aron has called such liberal pro-market norms the “germ of a universal consciousness” insofar as they have come to be held in common by developed and developing market states alike.<sup>69</sup>

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IN CHINA (1997); DAVID ZWEIG, *INTERNATIONALIZING CHINA: DOMESTIC INTERESTS AND GLOBAL LINKAGES* (2002).

<sup>63</sup> JON MANDLE, *GLOBAL JUSTICE* 130 (2006). This is one of the more promising aspects of a global market. The more sinister is a global race to the bottom through deregulation.

<sup>64</sup> ANDREW HURRELL, *ON GLOBAL ORDER: POWER, VALUES AND THE CONSTITUTION OF INTERNATIONAL SOCIETY* 42 (2007). In one sense, if we find the global market, we can presume an underlying set of global social and cultural relations. *See also* DON SLATER & FRAN TONKISS, *MARKET SOCIETY: MARKET AND MODERN SOCIAL THEORY* 102 (2001) (now a commonplace of economic anthropology and sociology that forms of economic organization are embedded in systems of cultural relations).

<sup>65</sup> SLATER & TONKISS, *supra* note 64, at 103-04 (warning that transnational economic activity can also thin out economic ties and the cultural embeddedness of economic activity).

<sup>66</sup> This does not mean, of course, that there is agreement on the nature of such institutions or on what ideology should guide their market regulation. *See, e.g.*, Deborah James, *Who Should Run the Global Economy?*, *AL JAZEERA* (Apr. 23, 2012), <http://www.aljazeera.com/indepth/opinion/2012/04/2012422104847102233.html>.

<sup>67</sup> SLATER & TONKISS, *supra* note 64 at 11-12 and 54-57.

<sup>68</sup> SLATER & TONKISS, *supra* note 64 at 120.

<sup>69</sup> Raymond Aron, *Clash of Globalizations*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 335 (David Held & Andrew G. McGrew eds., 2d ed. 2003).

Global market society is a contentious term when confused with current neoliberal market ideology, but a progressive term, in my view, when properly understood, in terms of individual and communal freedom and opportunity. As Sen has written, the freedom to participate in both the market for labor and the market for products is a key freedom, intrinsically and instrumentally, and therefore a cornerstone of development.<sup>70</sup> In order to protect freedom in markets, we need regulated markets, which means governance, i.e., shared normative principles embedded within institutions.

The emergence of a global market society thus has profound consequences for how we approach transnational problems of politics, economics and law.<sup>71</sup> In particular, it opens up new challenges and avenues for law and for what we have hitherto called global justice. The opportunity and fairness we seek in our domestic market societies we can now seek across national boundaries as well, in a coherent approach to law and justice.

## **B Opportunity and Fairness in a Global Market Society**

Gilbert Rist has written that one manifestation of the binary structure of development has been a bifurcated vision for a just society: the welfare state or social democracy in the countries of the North, and ‘development’ programs in the South.<sup>72</sup> Globalization presents us with the opportunity to re-integrate this vision and work towards what we consider to be a just society in both the North and the South. **Development, justice, freedom, opportunity, fairness, must now occur in a global social space.**

Justice can be understood as an investigation into right order. What makes a particular order “right” is of course a subject of deep disagreement, and Western and non-Western societies have been conducting conversations about justice for millennia, both within their own traditions and, increasingly, across traditions.<sup>73</sup> Globalization has now introduced a challenge to this conversation, namely that the “community” within which these conversations occur may well be transnational in nature, and consist of “communities within communities.”<sup>74</sup> In other words, to borrow Wilfried Hinsch’s phrase, we live in a “moral federalism” of multiple and partially overlapping normative communities, the most inclusive of which is, I am arguing, global market society.

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<sup>70</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 6-8 (1999).

<sup>71</sup> For one thing, it shifts the frame through which we try to understand relations between advanced market societies and societies still transitioning from traditional to market principles, such as most Middle Eastern societies.

<sup>72</sup> RIST, *supra* note 56.

<sup>73</sup> AMARTYA SEN, THE IDEA OF JUSTICE (2009).

<sup>74</sup> See JENS BARTELSON, VISIONS OF WORLD COMMUNITY (2009).

The opportunity, then, is to outline the contours of a new conversation about justice, within an expanded sense of the community for that conversation as both transnational and embedded in a global market society, a conversation in which the dualisms between North and South are overcome, and in which the institutions we investigate are global.

If we begin with the discourse of development as a way into our expectations and intuitions about justice, and look beyond its traditional binary narrative, we find at the heart of the enterprise two deeply human qualities: **aspiration**, our longing for a better life (as we understand it) both as individuals and as a community; and **respect**, our desire that our aspirations be individually and collectively recognized and supported. What we call development has always required both the freedom to define and choose that better life for ourselves, and a fair share of the resources needed to realize that life.

Taking the U.S. as an example (only because it is the society I know best), the core of what in domestic society is the equivalent of “development” (which has gone by many terms, most recently in the U.S. “community development”) has been a project to make sure everyone gets the fullest possible benefits of that society, i.e., we recognize, respect and support each member’s aspirations for the best life possible within that society. This involves a process of identifying and removing obstacles to both resources and social mobility, determining responsibilities and obligations on all sides, building capacity, and ensuring equal opportunity (meaning opportunities not blocked by discrimination or other barriers considered unfair by our society) in both access to social resources, and participation in social institutions such as politics and the markets for labor, goods and services.<sup>75</sup> Insofar as the U.S. experience is true of advanced market societies in general, fulfilling the promise of development, i.e., jointly realizing our aspirations, has meant ensuring **opportunity** and **fairness** for all.

As globalization collapses the boundaries between the local and the global, reimagining development—and justice—in a post-national environment means eliminating artificial national boundaries between “our” aspirations and “theirs,” and too-easy excuses for failing to express respect transnationally in ways we expect our projects to be respected at home. In normative terms, we must reframe “domestic” principles of justice for a new global social space. This means, first, that justice will involve opportunity. Second, it will involve fairness. And, third, in a market society, justice involves the terms of access to markets and the regulation of

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<sup>75</sup> See, e.g., OPPORTUNITY NATION MEASURE OF AMERICA, OPPORTUNITY SINCE 1970: A HISTORICAL REPORT (2014), <http://opportunitynation.org/app/uploads/2014/06/Opportunity-Nation-2014-Historical-Report1.pdf>; Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, (Nat’l Bureau of Econ. Research, Working Paper No. 19843, 2014).

markets. **Put simply, justice in the global space today is about ensuring opportunity and fairness for all in a global market society.**<sup>76</sup>

I recognize that there is a risk in foregrounding the market in an under-regulated global space, as many globalization critics rightly point out. However, by emphasizing markets I am not endorsing a neoliberal global order. On the contrary, I am suggesting that we take as given that economic globalization is leading globalization in general, acknowledge that governance institutions have not kept pace with the evolution of global markets (hence the apparent “neoliberal” moment<sup>77</sup>), recognize with Sen the centrality of markets for development and freedom, and focus on the need for robust legal and normative principles to shape and regulate this global economic space so that it creates opportunity and promotes fairness for everyone.

Ensuring opportunity and fairness in a global market society is not exactly “global justice,” in the traditional sense. The orthodoxy in global justice has been that either we promote justice for “our” society and something less for everyone else [communitarian/nationalist accounts of justice], a view that ignores the transnational relationships that globalization fosters; or we promote justice for “everyone” [cosmopolitan accounts of justice], but in ways that have ignored but not really eliminated the significance of national communities in our lives, or failed to account for the diversity of aspirations expressed through normative pluralism. Integrating globalization into both development discourse and justice discourse changes both.<sup>78</sup> Justice today means supporting communities to develop in a global space of interconnected yet diverse communities, all participating in global market society.

## **C Elements of Justice for a Global Market Society**

If we are going to approach questions of aspiration and respect on a global scale through a framework of justice as opportunity and fairness, such an approach to justice will have three elements: it will be **pluralist**, embracing the moral diversity of a truly global conversation; it will be **relational**, capitalizing on the social architecture of the new global social space; and it will be **transactional**, promoting consensual economic exchanges as a pragmatic, market-friendly approach to ensuring opportunity and fairness from the bottom up.

### **1 Justice is Pluralist**

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<sup>76</sup> I am obviously covering a lot of ground fast – if the reader can stay with the intuitions for the purpose of this essay, future work will go over this ground more slowly and thoroughly.

<sup>77</sup> See Slater & Tonkiss, *supra* note 65, at 138 (impetus for neoliberalism as a global ideology came in part from apparent disembeddedness of emerging global economic activity from national regulatory activity in the 1970s and 80s).

<sup>78</sup> GARCIA, *supra* note 27.

Post-globalization justice will by necessity be a pluralist endeavor. One consequence of globalization is that we are more aware than ever of the diversity in the world: a plurality of different traditions, cultures, and systems of value and belief.<sup>79</sup> Even within avowedly liberal societies, there is great disagreement on both ends and means within a largely liberal framework.<sup>80</sup> The genius, and the burden, of liberalism is to work towards a framework in which, paraphrasing Rawls, “a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical and moral doctrines” can exist over time.<sup>81</sup> This only becomes more complicated when the people (and peoples) who disagree must share an interconnected global social, environmental, economic, legal and political space.<sup>82</sup> Following David Rasmussen, one way to characterize this space is to extend Rawls’ characterization of democratic society as “a pluralism of incompatible yet reasonable comprehensive doctrines” to the global level: global society as “a pluralism of incompatible yet reasonable comprehensive doctrines.”<sup>83</sup>

In the face of such pluralism, we see two basic kinds of responses: continue to argue for the superiority of one particular claim or tradition, or recognize with John Gray that “the diversity of ways of life and regimes is a mark of human freedom, not of error,”<sup>84</sup> embrace a kind of global value pluralism, and seek to make the appropriate institutional and regulatory adjustments. While I am skeptical of the former approach, I must leave the philosophical debate between ethical monism and pluralism to the professional philosophers.<sup>85</sup> Instead, I am more of a pragmatic skeptic, closer perhaps to the spirit of Sen, who calls his approach plural grounding: determining whether a particular social change would enhance justice/reduce injustice by evaluating the change according to a range of different arguments or rationales for one option or another, towards a pluralistic set of arguments in favor of one specific choice or another.<sup>86</sup>

In a similar sense, I am skeptical that any one theory of justice, perhaps any one normative tradition, can capture the diversity of reasons, sympathies and

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<sup>79</sup> See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 3-57 (2012) (chronicling the facts of pluralism and their challenge for international law).

<sup>80</sup> The irreducible nature of certain core normative disagreements is central to Rawls’ later work. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 798-805 (1997) (“There are limits, however, to reconciliation by public reason . . . [U]nanimity of views is not to be expected. Reasonable political conceptions of justice do not always lead to the same conclusion; nor do citizens holding the same conception always agree on particular issues.”).

<sup>81</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xxvii (1993).

<sup>82</sup> For this reason, Kok- Chor Tan cites global diversity as one of the key challenges to the possibility of a global liberalism. *TOLERATION, DIVERSITY, AND GLOBAL JUSTICE* 9 (2000).

<sup>83</sup> D. M. Rasmussen, *Conflicted Modernity: Toleration as a Principle of Justice*, 36 J. PHIL. & SOC. CRITICISM 339 (citing *Political Liberalism*).

<sup>84</sup> JOHN GRAY, *TWO FACES OF LIBERALISM* 139 (2000).

<sup>85</sup> *Value Pluralism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/entries/value-pluralism/> (last visited July 15, 2016).

<sup>86</sup> SEN, *supra* note 76.

concerns that a truly *global* conversation about justice engenders and arouses.<sup>87</sup> Instead, I am of the view that we need as many of these reasons as we can have, and we need to respond to as many of these concerns as we can, in order to create the kind of global, transformative conversation that justice requires in a global space. This can be called a sort of global value pluralism—David Rasmussen calls it the emergence of toleration itself as a principle of global justice.<sup>88</sup> Either way, it is a matter of seeking the best arguments for justice, with the broadest consensus, towards a common goal.<sup>89</sup>

If we accept for the moment that the inquiry into justice will proceed according to a strong principle of toleration, then we can begin to engage in a searching and vigorous shared inquiry as to where we may be going as a global society, and where we should be going in terms of a just global society. At the level of international relations and global social structures, we can call this a kind of global political pluralism. It is not so much the search for comprehensive doctrines that can be established at the global level, as it is constructing a conversation, a kind of global public reason, involving the views of different comprehensive doctrines and different cultures' experiences of modernity.<sup>90</sup>

Within this conversation, I acknowledge that cosmopolitanism makes an important contribution, but not a trumping one. Cosmopolitanism may indeed offer a compelling universal vision with a coherent institutional agenda for institutional reform, but this is not the same thing as a universally *held* vision or a universally *agreed* agenda for institutional reform.<sup>91</sup> For a truly global conversation about justice, we must keep in mind what Mirsepassi and Fernee have called “open” cosmopolitanism, as “beyond ontological dogmas constructing one unique and triumphant civilizations over all others. By this new cosmopolitanism we mean a privileging of living experiences over the gray stillness of imagined eternal structures. It is a broad and shared view of human experience, concerned with how people live their lives, and finding dignity rooted in everyday life.”<sup>92</sup>

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<sup>87</sup> However, I agree with David Rasmussen that this kind of pluralism need not undermine a cosmopolitan view of the world, only the idea that such a view can itself be legitimized by a comprehensive doctrine. Rasmussen, *supra* note 86.

<sup>88</sup> *Id.* at 345.

<sup>89</sup> Sen's approach, which he calls plural grounding, involves determining whether a particular social change would enhance justice/reduce injustice, by evaluating the change according to a range of different arguments or rationales for one option or another, towards a pluralistic set of arguments in favor of a specific choice or another. These arguments can be based on theories of justice that themselves yield divergent conclusions yet are reasonable arguments. Implicit is a view on the proper purpose of global justice argumentation: convict as many of us as possible of the need for action, on the widest possible range of reasons. SEN, *supra* note 76.

<sup>90</sup> Rasmussen, *supra* note 86.

<sup>91</sup> GARCIA, *supra* note 27.

<sup>92</sup> TADD GRAHAM FERNEE & ALI MIRSEPASSI, ISLAM, DEMOCRACY, AND COSMOPOLITANISM: AT HOME AND IN THE WORLD 201 (2014).

If we look closely at how people live their lives, we are also reminded that communitarianism offers us its own vision of human good, but from a different direction: a vision for the intensity and intimacy of human bonds – how individuals *in fact* live in community, how these bonds come about, how essential they are to justice and indeed to human life, and in a sense how precious they are. This central fact of human social life also plays an essential role in any global account of justice, and also helps explain the persisting importance of local communities and their resistance to certain forms of globalization. Communities resist what they perceive, rightly or wrongly, to be undermining the basis for their shared life.

In other words, we should not be too quick to undermine the importance of national communities, since it was within national communities that solidarity, the moral and emotional commitment we form to the good of others, is nurtured. It is also important to remember that cosmopolitanism and communitarianism do not live hermetically sealed from each other in a static universe – quite the contrary: globalization is dynamically transforming this conversation as it does many others.<sup>93</sup>

## 2 Justice is Relational

This brings me to my second point, that a post-globalization approach to opportunity and fairness must make full use of the transformation of the global social space. As described above, globalization is re-creating the social basis for transnational obligations of justice, by transforming human relationships in ways that affect our interconnectedness, the basis for solidarity, and the effective reach of our awareness, understanding and actions with respect to others.<sup>94</sup>

The fact that the global space includes many different kinds and levels of relationship among a range of actors invites another kind of pluralism, a global normative pluralism. David Held describes it as recognition of “the multilevel and multilayered nature of human associations in which we already live.”<sup>95</sup> Mathias Risse engages this kind of relational pluralism through what he calls pluralist internationalism, the view that there are multiple grounds of justice (*reasons* why claims of justice apply to certain populations) rooted in different kinds of relationships, with membership in a state having a privileged position, but within other grounds that also impose obligations, such as common humanity, common

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<sup>93</sup> Evaluating this conversation from this perspective, I would venture to say that the path towards global justice may well be that people in deep, well-functioning communal relationships across the globe grow to share a cosmopolitan ideal of justice. But that would be a kind of socially developed cosmopolitanism, an empirical cosmopolitanism, rather than a theoretically imposed or determined one. Garcia, *supra* note 28.

<sup>94</sup> See *supra* notes 27 to 31 and accompanying text.

<sup>95</sup> DAVID HELD, *COSMOPOLITANISM: IDEAS AND REALITIES* (2002).

ownership of the earth, membership in the global order, and subjection to the global trading system.<sup>96</sup>

How far can these different kinds of emerging global relationships take us? What kind of justice is possible in a global market society comprised of many normative communities? My own approach is something of a hybrid. I agree with Risse's pluralist mapping, but am less interested in the tight match of duties to situations that he aspires to in his more "architectural" or structural style. Instead, I am more interested in trying to listen to the *way* we talk about global justice among ourselves, what I am calling the rhetorical *modes* of justice.<sup>97</sup> There may well be specific approaches to justice—specific rhetorical modes—that best suit different relationships or institutions and in different contexts, which can therefore also strengthen our arguments, in Sen's plural grounding sense.

To explore the normative significance of these global relationships, I want to introduce here the notion of **Justice as Relationship**, one of the rhetorical modes of justice in which we speak of just behavior as a function of the relationships one finds oneself in with others.<sup>98</sup> There are two variations, depending the kind of relationship: Justice as Shared Enterprise, where the relationship is a cooperative scheme for mutual benefit; and Justice as Community, in which the relationships go more deeply into shared understandings and identity. What they have in common is that the nature of the relationship and its shared commitments informs the obligations of justice. I believe these relationships are strongest in certain structures and relationships (the global economy, for example), and weaker in others (security, for example), a gradient that leads to the kind of differentiated normative pluralism Risse is mapping.

For the global economy, the interesting question is whether this level of relationship can lead to fairly robust distributive principles that could be justified on contractarian, cosmopolitan, even communitarian grounds. In my view, globalization is creating the possibility of opportunity and fairness as shared norms within a global market society. Such principles may not perhaps be as robust as Rawls' Justice as Fairness in domestic societies, but they may be more robust than David Miller's or Michael Walzer's thin moralities (this remains to be explored).<sup>99</sup> I

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<sup>96</sup> Different grounds are rooted in different kinds of relationships and are associated with different principles of justice, and produce obligations of justice of different sorts with respect to different domains of justice. For example, in his view, transnational distributive obligations exist across the range of domains, but they are stronger within states than beyond states, because of the difference in the texture of the social relationships involved. See MATHIAS RISSE, *ON GLOBAL JUSTICE* (2012).

<sup>97</sup> GARCIA, *supra* note 27.

<sup>98</sup> *Id.*

<sup>99</sup> Garcia, *supra* note 28. Alternatively, it may be that the Duty of Assistance best captures the current state of the global community's obligation towards burdened members, as Pietro Maffetone has argued. Pietro Maffetone & Ryan Muldoon, "Two Views of Assistance," (unpublished manuscript on file with author).

also recognize that the world as we find it is far from a fully functioning community, even in the global economy, and we can certainly have a robust debate on whether the glass is half full or half empty. But my fundamental point is that globalization means the “glass” is filling up: as argued above, transnational relationships are becoming thicker over time.<sup>100</sup>

The important conclusion here is that within this thickening social space, arguments for justice that build on relationships and the duties they create may be stronger and more persuasive than arguments trading solely on a single non-relational view, such as cosmopolitan arguments, which by their nature depend on a deeper shared normative consensus. Justice as Relationship can be a powerful mode of justice in the new global space, because interconnectedness across boundaries is the defining feature of our current globalization.

### 3. Justice is Transactional

If we are to proceed along a relational model of justice, then one of the most basic kinds of relationships to be considered within a market society is the market-based transactional relationship itself. This kind of interaction can take very simple forms, yet be profoundly transformative over time, since the terms of the exchange—the freedom *to* participate in it and the freedom *within* it—are deeply tied to both opportunity and fairness, and hence to the needs and goals of a market society. It is no surprise, therefore, that a conversation about justice for a global market society must address markets, market structures, market relationships and market behavior.

In this connection I want to introduce another mode of justice, what I am calling the **Transactional Mode of Justice**, in which just behavior is considered a function of the nature and norms of a specific transaction (like a purchase, contract or treaty). This mode presupposes no other relationship but that one, and derives its norms internally from the transaction itself. At best, it gives us an alternative approach to more structural outcomes we might associate with a just global order, but through an understanding of what economic exchange means, and of which behaviors reinforce or undermine the nature of commerce itself. If we are committed to ensuring opportunity and fairness for a global market society, then I argue elsewhere that understanding how consent—consensual economic exchanges—are at the heart of market behavior helps us understand the kinds of exchanges we need to protect and promote in a global market society, and therefore the kinds of international economic lawmaking we need in order to support consensual economic transactions.<sup>101</sup>

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<sup>100</sup> See *supra* notes 27 to 31 and accompanying text. SEE ALSO HELD, *supra* note 98, at 29-32 (economic globalization, trade, finance and the creation of governance mechanisms are deepening relationships).

<sup>101</sup> GARCIA, *supra* note 27.

The idea of consent is no stranger in political theory and debates about justice. It also features directly in political theories of global justice as well, as for example in the work of David Held, in which consent is the third of four core cosmopolitan principles.<sup>102</sup> However, Held and others speak here of consent as essentially political consent, as the basis for non-coercive collective political agreements and governance.<sup>103</sup>

I want to take “consent” in a different direction. I am not speaking here of consent as an abstraction or as a political value; I am talking about consent as a tangible element of everyday economic relations, a constitutive element in what makes trade “trade,” for example, and not simply as a value that makes coercive relations politically legitimate. In other words, I am interested in the role of consent in the economic space, as the basis for non-coercive *economic* transactions, agreements and governance. In doing so, I rely primarily on the work of Simone Weil, the 20<sup>th</sup> century French philosopher, known for her frank examination of the role of consent and its absence in distinguishing between economic transactions and economic oppression.

Taking “trade” as paradigmatic of economic exchanges more generally,<sup>104</sup> the key to the nature of trade *as* trade is consent: trade consists of bargained-for consensual exchanges. I am not speaking about the legitimation of trade regulation, I am speaking of what makes it **trade** and not something else: predation, coercion, or exploitation, all economic transfers if you will, but not trade. Weil writes that one cannot seek consent where there is no power of refusal. Thus, where there is no power to refuse, there is no trade because there can be no consent.

At the private-party level, contract law recognizes this difference through the concept of duress as a defense to the finding of a contractual obligation. In other words, where one party’s consent to enter into a contract was not freely given, but was given under some form of pressure, the law will not recognize this as a meeting of minds and will not find a contract – it will find something else. In international relations, we call this economic domination or colonialism: an economic benefit flows from one party to the other, but it is not mutual in a meaningful sense, and most importantly, it is not consensual. Rather, the economic benefit in these cases is achieved through power inequalities as expressed by economic or military force. Such transactions are not consistent with the nature of trade as outlined above; they are, instead, a form of wealth extraction in the purest colonial sense.

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<sup>102</sup> David Held, *Cosmopolitanism: Globalisation tamed*, 29 REV. INT’L STUD. 465, 470-71 (2003).

<sup>103</sup> HELD, *supra* note 98, at 71; *see also id.*

<sup>104</sup> The bulk of my own explorations of consensual exchange has been in trade, as the field I know best, but I have recently begun extending this analysis into investment as well. *See* Frank J. Garcia, Lindita Ciko, Apurv Gaurav & Kirrin Hough, *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT’L ECON. L. 861 (2015).

Short of such outright predation, we can recognize other situations in which consent is weakened or undermined, involving coercion or exploitation. The common thread is that parties are not freely consenting to a mutual, bargained for exchange of value, so what may look something like trade is not in fact trade but something else. Participants in any of these three transactions will see economic value exchange hands, and society may reap some economic benefit, but this occurs under conditions involving the absence or impairment of consent.

Identifying what is trade from what is not trade opens another avenue towards justice, but not in terms of principles drawn from political theory. Instead, the norms arise from the nature of the social practice itself. Parties who might otherwise disagree on substantive principles of justice, might still agree that fair exchanges, meaning consensual exchanges, make sense as a regulatory goal. Thus over time a series of consensual bargains can, in the aggregate, construct a more fair economic system, because the law will protect participants' freedom to consent to bargains they consider fair, and reject bargains they consider unfair.

A consensual basis for a 'fair' economic system has an intuitive market-based appeal that can make it useful for structuring a global market system. Insofar as markets thrive on consensual exchanges, so a global market society will thrive on a shared global understanding of the role of consent in exchange. The Transactional Mode of justice can thus help meet the need in a global market society for a pragmatic and market-friendly approach to economic fairness, which can have a positive influence independently of the reforms to larger more institutional relationships foregrounded by Justice as Relationship.

#### **IV Conclusion**

In this essay I have sought to identify certain patterns or convergences within the global space, and to outline what I see as the opportunities they open up for increasing fairness in global economic life. Globalization's erosion of binary structures and assumptions opens new opportunities, even as it creates new challenges and forces us to confront long-standing ones. We can no longer rely on the line between a developed versus developing "world" or "national" versus "global" justice to privilege our share of the gains from global markets through different standards of justice and permanently oppositional stances and strategies. Instead, globalization is making it possible—and necessary—to consider one world, in which all of us are members of multiple communities of aspiration and respect, local communities within larger communities, all within the largest possible community, which I have suggested is an emerging global market society.

I have also offered a rubric—opportunity and fairness—which in my view can help structure an integrated and pluralist conversation about justice in a global market society, and organize our efforts to realize our aspirations at all levels in the global space: local, national and global. In my view, opportunity and fairness apply equally to domestic and global institutions, though perhaps in different ways and

with different implications depending on the nature of the underlying social relations. In other words, ensuring opportunity and fairness globally means we need to determine the duties states have towards each other, the duties international organizations have in their own distributive functions, and the responsibilities of state, international organizations and other market actors towards enhancing the opportunity and fairness of domestic institutions for their own and each other's citizens.

Operationalizing opportunity and fairness also requires an integrated approach. We should embrace the new regulatory possibilities that convergences within international economic law open up, ensuring that the emerging global law of an emerging global market society is both internally coherent and anchored by norms of relational and transactional justice at both global and local levels. We cannot afford to lose the power of state-centric theories of justice such as Justice as Fairness as we make the move towards a global market society. Working from an integrated global perspective, the hope is that we can articulate norms and arguments that may gain broad acceptance and form the basis for effective advocacy, implementation and enforcement, and nurture the kind of transformative conversation that justice requires in a global space.