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Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions

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SHARED RESPONSIBILITY REGULATION MODEL FOR CROSS-BORDER REPRODUCTIVE TRANSACTIONS

“The correct regulative principle for anything depends on the nature of that thing.”

I. Introduction

The term “cross-border reproductive transactions” refers to the phenomenon of tens of thousands of people who travel from one country to purchase reproductive services from suppliers in other countries, in order to have a child. Medical tourism used to refer to the travel of patients from less-affluent countries seeking better healthcare in industrialized countries or in neighboring countries with superior healthcare standards. Today the journey is more likely to be in the opposite direction, as patients travel from industrialized countries to less affluent countries seeking affordable, high-quality treatment or alternative medicine.

The process of globalization has changed the challenges to and promises of fertility services markets. In traditional surrogacy, the surrogate provided an egg and a womb. With the advancement of technology, gestational surrogacy now enables transportation of wanted genetic material, which will determine the physical and bodily characteristics of the child, from anywhere in the world. Fertilized eggs can be transferred across borders, and any healthy woman can carry the pregnancy regardless of the child's genetic characteristics.

The trigger for patients to seek cross-border fertility treatment is often a restriction on reproductive options by regulatory means, for example when certain categories of patients are denied access to a particular service by law, usually due to political, religious, or ethical considerations, or even due to the need to allocate resources between medical treatments.

1 JOHN RAWLS, A THEORY OF JUSTICE 29 (1971).
2 F. Shenfield et al., Cross-border Reproductive Care in Six European Countries, 25 HUM. REPROD. 1361, 1365 (2010) (estimating that in Europe alone 11,000-14,000 patients travel for reproductive treatments annually). For more definitions of the phenomenon, see Marcia C. Inhorn & Pasquale Patrizio, Rethinking Reproductive “Tourism” as Reproductive “Exile”, 92(3) FERTIL. STERIL. 904, 904 (2009); Guido Pennings, Reproductive Tourism as Moral Pluralism in Motion, 28 J. Med. Ethics 337, 337 (2002); Richard F. Storrow, Quest for Conception: Fertility Tourists, Globalization and Feminist Legal Theory, 57 HASTINGS L. J. 295, 300 (2006). Cf. Kerrie S. Howze, Medical Tourism – Symptom or Cure?, 41(3) GA. L. REV. 1013, 1014 (2007). The terms "medical tourism" and "health tourism" often refer to treatments that have been planned in advance to take place outside a patient's usual place of residence. A "medical tourist" is one who travels to a foreign country to consume medical services.
The collapse of barriers in the era of globalization has facilitated the access of citizens to new, exterritorial suppliers of reproductive services, eggs, and womb services.\(^4\) Cheap and fast means of travel, the availability of services, the amount of information on the internet, and the possibility of sharing medical practices — all make the process safe, accessible, and easy to carry out. My research analyzes the phenomenon of cross-border reproductive transactions specifically between consumers, i.e., intended parents from affluent countries, and suppliers of reproductive services, the majority of whom are egg sellers and surrogate mothers from lower-middle-income countries.

Lower-middle-income countries, such as India and Thailand in the case of surrogacy and Romania in the case of egg sale, appear to be attractive places to carry out transactions. A lower-middle-income country provides cheap but high-standard private healthcare facilities for consumers from affluent countries, relatively short waiting times, English-speaking providers, and world-famous tourist destinations.\(^5\) In Thailand, at least 30 clinics provide full clinical services for assisted reproduction, some of which serve foreign patients, and increasingly since 2004, when the Thai government launched a deliberate strategy to encourage foreign medical travel to Thailand. The Thai medical tourism industry was estimated to be worth US$4.3 billion in 2012.\(^6\) The surrogacy industry in India, with a total population of 1,252,000,000 people,\(^7\) is booming. Where the state is unable or unwilling to comply with its duties towards its poor citizens, the advantages of cross-border reproductive markets are especially attractive to women who lack other equivalent options of earning

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\(^4\) I have chosen to use a different term, “supplier,” in order to emphasize the commercial, commodified, and industrial aspect of surrogacy and egg sale, and to avoid camouflaging commercialization as softer terms such as “donor” or “worker” often do. While “provider” may be more idiomatically correct, it is used in the professional jargon to describe Health Maintenance Organizations (HMOs) and other institutional actors which provide health services to the public. We sometimes forget that surrogacy and egg sale are not just technological procedures provided by third parties, but involve another woman whose bodily labor is the “service.” I am not sure that “supplier” faithfully represents their significant and meaningful role, but I have tried to differentiate it from providers of technological services. Accordingly, I use the term “consumers” for intended parents, except in relation to recognition of legal parenthood, in which I use “intended parents.”


money. There are more than 600 IVF clinics in both rural and urban areas in almost all the states of India, providing an estimated 60,000 assisted reproductive treatments a year. The Akanksha clinic in Anand, for example, was reported to have employed 167 surrogates who have delivered 216 healthy babies since 2003. The surrogacy industry was estimated to be worth US$60 billion worldwide in 2008, having grown 150 percent during the last few years. These markets pose new challenges, requiring a change in concepts of justice and responsibilities to fit new, modern, global needs. Aiming to suggest a model for comprehensive regulation, I will consider who should bear responsibilities for the correct conduct of the market and, in particular, towards suppliers of reproductive transactions, egg sellers and surrogates.

Markets in fertility services can be described, according to Young as structural injustice, meaning “social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities.” Fertility transactions often reflect socioeconomic disparities between suppliers and consumers. This injustice is pointed to by many feminist arguments that state that reproductive markets reinforce the traditional hierarchical gendered division of labor and gender stereotypes and embody the perception of women as socially inferior to men, turning women’s services into something that is used.

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9 FRANCES WINDDANCE TWINE, OUTSOURCING THE WOMB: RACE, CLASS AND GESTATIONAL SURROGACY IN A GLOBAL MARKET 17 (2011).

10 Andrea Whittaker, Cross-Border Assisted Reproduction Care in Asia: Implications for Access, Equity and Regulations, 19 REPROD. HEALTH MATTERS 107, 107 (2011). India and Thailand are major hubs for international assisted reproductive care, although Singapore, Malaysia and South Korea are increasingly important as destinations. Id. at 108. On cross-border reproductive transactions as an industry, see Katarina Trimmings & Paul Beaumont, General Report on Surrogacy, in INTERNATIONAL SURROGACY ARRANGEMENTS 439, 444 (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter INTERNATIONAL SURROGACY ARRANGEMENTS].


and controlled by others. These arguments are aggravated by the structural injustice between consumers from affluent countries and suppliers from lower-middle-income countries. The current situation reflects economic (lack of) power, leads to an infringement of the rights of women suppliers of reproductive services within the transaction and results in structural injustice in the market. Structural injustice is not the result of the individual act but rather part of a global industry relying on women who live in circumstances of injustice. It cannot be understood in individual terms or in light of private transactions alone, as an individual act, but as part of a systemic practice, an industry.

The need to remedy the structural injustice is clear and obvious. Up to now, suggestions for regulative models have been few. Most of them have focused on the interests of children and intended parents, insufficiently attentive to the interests of suppliers of fertility services. They were abstract and difficult to implement, either suggesting international regulation, or calling for unilateral action, which I find insufficient.

Universal principles of justice may be an appealing moral vision, but they must rely on common understandings, where the current regulation expresses disharmony. Drafting universal rules might be difficult, especially with regard to the issues of reproduction, family, and parenthood, which are personal, socially and culturally-based issues. Such decisions vary between different societies which have different understandings of basic norms, practices, and traditions that define what justice is. Moreover, universal regulation of cross-border reproductive transactions would probably be more attractive to consumers’ states that accept some sort of commercialization of reproductive services, even if restrictedly. Politically, it may be hard for countries that completely ban the supply of reproductive services nationally to regulate a market that they consider intrinsically unethical or wrong however it may be conducted. These countries would find it difficult to collaborate with any international norm that does not condemn the procedure. Others could agree on general understandings regarding relevant human rights, such as


Tobin, supra note 3, at 344.
requirements of proper medical standards and the demand for informed consent; however, I am not sure whether this common ground could justify extended duties of justice that are above a minimal threshold. The reality reflects a lack of consensus in a pluralistic, multicultural world.

In light of the right to sovereign self-determination to regulate according to national values, I will first relate to the independent responsibilities of states. Strong concerns regarding the morality of consumers’ states’ policy arise when their reproductive policy in the domestic sphere is inconsistent with their policy in the international sphere. Many countries ban or restrict the commercial provision of reproductive services in their territory, yet when their citizens buy these services across the border, these states’ laws and policies approve of market transactions (that would be considered illegitimate domestically) by acknowledging parent-child relations and granting entry visas or citizenship to the resulting child. I will argue that a national-international consistency model, which requires consistency between each state’s domestic and its global policies, could be sufficient to overcome the moral problem of such a detour. Yet, as I show, even if states’ policies exhibit such consistency, unilateral action on their part is insufficient to ensure coherent ethical regulation, to guarantee a proper way of conduct, or to sufficiently protect the suppliers of reproductive services. It may imply good intentions on the part of states, but it will not remedy the negative implications of cross-border reproductive markets. Since unilateral action is insufficient, I propose what I believe is a transformative model to regulate cross-border reproductive transactions through shared responsibility.

This paper proposes an applicable shared responsibility model for regulation, based on the model suggested by Iris Marion Young and Christian Barry that makes it possible to assign duties to all involved, according to measures of entanglement in the unjust structure and their ability to remedy it. This is the first model that I know of, which is attentive to all aspects of the phenomenon and offers a multileveled way of regulation, including unilateral

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aspects, transnational aspects, international aspects, and new collaborations between actors. It suggests some remedies for exploitative transactions, but also aims to correct the structure of injustice that sustains inequalities which is reflected in cross-border markets.

I will present the parameters of the shared responsibility structure: engaging parameters and assigning parameters. Engaging parameters determine who the relevant responsible actors are, according to the extent that they have contributed to bringing about an unjust situation, and according to the causal connection to the action. Assigning parameters assign different kinds of duties according to the way in which each associate is connected to another, the power relations between different positions, and the site where associates have the capacity to change. My research identifies four focal points for addressing cross-border reproductive transactions in order to minimize the negative impacts on consumers, suppliers, resulting children, as well as their states: joint action regarding legal parenthood and the nationality of the child; the professional field, to ensure universal norms of proper medical standards; the contractual field, to avoid violation of women’s and children’s rights, as well as a model of fair trade to better divide the benefits from transactions; and lastly, a general global commitment to the reduction of poverty and the improvement of procedural tools to promote procedural justice in institutions that sketch the global order. This paper first elaborates on each mechanism, and then specifies what action each actor is expected to take as part of the joint action in order to comply with the recommendations and promote more desirable transactions.

II. National morality – national-international consistency model

Under the current legal situation, consumers’ countries are exempt from any responsibility towards foreign suppliers. Strong concerns regarding a double standard arise when consumers’ states’ domestic policy regarding reproductive transactions is inconsistent with their policy regarding such transactions in the international sphere. States have the freedom to choose reproductive policies which express the price that society is willing (or refusing) to pay in exchange for having families through cross-border transactions, in accordance
with their national moral and political values. National policies are traditionally applied within the context of the territorial state and limited to this territory. States are free to have different, independent policies, not necessarily compatible with the norms of other states, free from any moral judgment of the international community on their form of governance and domestic affairs. In the absence of international regulation regarding fertility treatments, states are neither subject to international restricting norms, nor committed to ensuring that their own domestic norms are consistent nationally and internationally.

In spite of the sovereign right to self-determination, from a moral point of view, global and domestic transactions for reproductive services are substantially similar. Both solve the problem of the same consumer, using the same practice, with the help of either a local or foreign supplier. Ethically, unless we can justify a moral difference between national and international contexts, some consistency should be maintained between the national and international definitions of proper conduct. Many national justifications for restricting eligibility for reproductive services should be relevant when transactions cross borders: if the reason that reproductive transactions are restricted is, for example, that these transactions are wrong or immoral, then since the subject of the transaction is the same – the justification should stay the same: they would be immoral whether the supplier is local or foreign. If the reason for restricting eligibility is in order to protect suppliers from potential exploitation or violation of human rights, in order to deny foreign suppliers the entitlement to the same care they receive domestically, we must show that differences between the domestic and international contexts demand different standards, or else core principles should be universally applied rather than geographically limited. Unless the mere existence of a border justifies different ethical values, it is hard to imagine how considerations regarding cross-border reproductive transactions might change, aside from the price.

However, not all legislation expresses national-international normative consistency. On the contrary, many countries ban or restrict the commercial provision of reproductive services in their territory, yet when their citizens buy these services across the border, these states’ laws and policies approve of market transactions (that would be considered illegitimate

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domestically) by acknowledging parent-child relations and granting entry visas or citizenship to the resulting child.\textsuperscript{19} For example, in spite of the domestic ban on commercial surrogacy in the UK, since a court-approved “parental order” is required, in practice courts have recognized the parenthood of consumers who paid “significant” payments (that are illegal in the UK) at least in two cases of transactions, carried out in the Ukraine and California.\textsuperscript{20} Germany, France, Holland, and New Zealand demonstrate a similar inconsistency when nationally restricting or banning commercial surrogacy,\textsuperscript{21} while accepting the results of cross-border reproductive transactions through acknowledgement of the legal parenthood and nationality of the resulting children.\textsuperscript{22}

The same is true with egg sale. The Italian government stated that the reasons for enacting the ban on donor gametes are the affirmation of the heterosexual couple as the only appropriate manner of family formation and fears of harms to the children and society.\textsuperscript{23} Their interest should have been to prevent such transactions across the border as well, or at least reduce them, as this interest does not change whether the child is a result of a domestic or foreign gamete. Nevertheless, in spite of potential “harms to the children and society,” the law acknowledges such children and does not impose any difficulties on couples who employ a foreign third-party gamete.

While consumers’ countries may not be responsible for private transactions that their citizens make overseas, they could affect the market. According to Benvenisti’s model, when deciding whether to allow or forbid the supply of reproductive services domestically, they have a duty to weigh the interests of foreign stakeholders if it is within their power to

\textsuperscript{19} INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 514-18.
\textsuperscript{20} Human Fertilisation and Embryology Act, 2008, c. 22, § 54(8) (Eng.) enables courts to consider whether no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants when authorizing a parental order. See Denis Campbell, Couples Who Pay Surrogate Mothers Could Lose Right to Raise the Child, THE GUARDIAN, April 5, 2010, http://www.guardian.co.uk/uk/2010/apr/05/surrogacy-parents-ivf.
\textsuperscript{22} For acknowledgement of parenthood in spite of the public policy in Germany, see INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 140; in the Netherlands, see id. at 287; in New Zealand, see id. at 307-08. See generally id. at 122-23.
\textsuperscript{23} Storrow, supra note 2, at 306-07.
First, when consumers’ states consider adopting reproductive policies that trigger cross-border reproductive transactions, they should respect to some extent the principle of proportionality in policymaking. Proportionality places limits on legislative power, requiring that laws that address matters of great human importance – like reproduction – be carefully considered and that the means employed by the law be the least intrusive for achieving the objective. The duty should oblige states to be attentive to the interests of others elsewhere, to morally weigh the interests of other associates and express those interests within policies. Consumers’ states may be expected to do whatever is in their power in order to avoid passing on negative externalities to other countries. This means that not every self-interest is equally acceptable and not every policy may be considered proportional. Regarding national transactions, a state may legitimately decide to ban all forms of assisted reproduction, but once it permits some forms, it must do so on a nondiscriminatory basis. In cases where some groups are allowed services and others are denied, the principle of proportionality may be good reason to demand equal national provision, since national provision could be better controlled when nationally regulated and would reduce cross-border transactions and the concerns of exploitation. Alternatively, states may be required to consider the eligibility of citizens for adoption arrangements and social parenthood, or at least to provide incentives and information regarding adoption similarly to what they offer regarding medical options. Providing medical solutions

24 Benvenisti, supra note 16, at 297.
26 On proportional measures according to state policy, see id. at 542 (mentioning that in making this assessment, courts consider various factors such as the importance of the legislation to the state, the prevalence of similar laws in other jurisdictions, the likelihood of conflict with other states’ laws, and the extent of the connections between the offence, the parties responsible for the offence, and the regulating state); Tobin, supra note 3, at 325.
27 See S.H. and Others v. Austria, No. 57813/00, Eur. Ct. H.R. § 116-17 (2010) (recognizing a similar conclusion when a petition against Austria challenged the ban on any use of gamete donations for IVF. The purpose of the ban was to prevent the exploitation of egg providers and the discriminatory selection of embryos based on genetic traits. Balancing these interests against competing interests, the European Court of Human Rights ruled that although the motivation for this prohibition was, among other things, the protection of egg suppliers, the decision should be subject to developments which the legislature would have to take into account in the future, or else it would be disproportionate.); Penning, supra note 2, at 338 (offering to abolish all forms of restrictive and coercive legislation as the easiest way to minimize the travel out of the country); Tobin, supra note 3, at 349.
28 See, e.g., Peter J Neumann, Should Health Insurance Cover IVF? Issues and Options, 22 J. HEALTH POLY., POLY ’S & L. 1215, 1232 (1997) (suggesting that adoption and incentives that drive people to use medical options rather than pursue social parenthood should be reconsidered).
without social ones may serve as an incentive for couples to pursue one path and cannot necessarily be considered the “least intrusive means” of achieving the aim of parenthood.

Consumers' states have further opportunity to influence when deciding if and how to recognize the consequences of cross-border reproductive transactions. In order to satisfy the ethical demand for consistency, we could suggest a model according to which states ensure that the transactions made by their citizens are consistent with their domestic (proportional) normative commitments and derive from their own domestic political morality. Whatever values a state chooses to adopt through national law, believing them to be normatively preferable, should be reflected in its citizens’ conduct in the global sphere. If the state bans markets in reproductive services, it should refuse to acknowledge the results of transactions that its citizens make with foreign suppliers; if surrogacy arrangements are domestically justified only under certain conditions and standards, the terms of foreign transactions should express the national standards even when the transaction is with a foreign supplier, or else states should not accept the results of such contracts.29 Also, policies should be restricted, when their implications contradict the rights of the resulting child.

Before I evaluate whether this is indeed a desirable model, I will consider the legal tools needed for the execution of this idea.30 As a unilateral step, I can think of two legal tools that could express the commitment of consumers’ states to their national values and standards in a consistent way: criminalize actions they disapprove of, and condition the registration of children on transactions being made under satisfactory standards. In the following part I will argue that none of the unilateral tools is sufficient on its own to remedy structural injustice.

1. Criminalization and Extraterritoriality

Societies sometimes ban the sale of goods whose supply they wish to discourage, even if the market could be an efficient instrument for the distribution of these goods.31 Some states nationally criminalize different aspects of egg donation or surrogacy. Laws may pose difficulties by criminalizing consumers for purchasing these services (e.g., France, New

29 See infra conditional registration, sec. II.2.
30 For advantages and disadvantages, see infra, sec. II.3.
31 SATZ, supra note 13, at 189.
Zealand), by imposing civil liability, or by criminalizing physicians or mediators who assist or advise patients (France, Germany, South Africa). According to the principle of consistency, a state that bans an act domestically would be required to criminalize the same act performed across the border.

Extraterritoriality permits a state to prosecute its citizens for activities undertaken overseas according to several principles: the protective or security principle, the passive personality principle, and the nationality principle. Nevertheless, it is doubtful whether reproduction-related issues can be justified as subjects of extraterritoriality. According to the first principle, the protective principle (also known as the objective territorial principle), a state may criminalize acts committed abroad by a foreigner whose actions overseas have deleterious consequences within the state. Although it is hard to justify criminalization of reproductive transactions on the basis of its obvious reasoning - state security, harmful effects may be considered. However, as long as the categorical harms of these procedures are debatable, and there is potentially an acceptable way to perform these practices, there is no moral ground for the radical application of the extraterritorial protective principle. The second principle, the passive personality principle, is used to assert jurisdiction over persons who harm a state’s nationals living abroad. The passive personality crime is irrelevant since no crime is committed against consumers. If anything, it is consumers who motivate an offence.

However, the third principle, the nationality principle (or active personality principle), prescribes jurisdiction based on the nationality of the actor and could be helpful. This method is being used to condemn severe behaviors, especially against children, and could

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33 INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 464; Storrow, supra note 25, 539.
35 Storrow, supra note 25, at 542.
37 Storrow, supra note 25, at 542.
38 E.g., The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, in an effort to fight child sex tourism; or the Convention
be used in countries where commercial reproduction seems especially severe. For example, in 2010, item 231 of the Turkish Penal Code banned cross-border transactions involving third-party donation of sperm or eggs, on the grounds that it is illegal to “change or obscure a child’s ancestry.”

Turkey consistently applies this morality wherever Turkish citizens make use of a third party’s gamete, nationally or internationally, and criminalizes citizens who acquire gametes, as well as mediators, physicians and donors who assist Turkish reproductive travelers. Two Australian states, New South Wales and Queensland, have also criminalized residents for being involved in any commercial surrogacy arrangements, including overseas, reflecting a consistency with state laws which only allow altruistic surrogacy.

There are a few problems with the nationality principle: first, some states limit the extraterritorial criminal laws only to specific crimes such as homicide, sedition or treason. Second, it usually requires double criminality, meaning that the offence also be an offence in the foreign jurisdiction. But destination states, being chosen for their permissive regulation of the supply to foreign consumers, are exactly those which do not ban the industry. Thus, it is harder to justify interventions that conflict with the sovereignty of the destination country in which such activities are legal.

Third, enforcement of offences such as the purchase of eggs abroad is almost impossible, since proving the offence was committed would require a physical inspection of pregnancy or invasive procedures upon

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42 *Queensland Surrogacy Act 2010* (Qld) S 54 (AustL).
the return of consumers to their country. Such inspections violate citizens’ bodily rights, their reproductive health rights, and their right to privacy. Preventing the travel has been suggested as an alternative to criminalizing the transaction. However, it seems to disproportionately violate the freedom of movement and to face practical enforcement difficulties. It is doubtful whether the state can justify restricting the travel of citizens to privately purchase reproductive technologies in other countries, especially where it is legal. Considering that this is a private decision regarding the personal family sphere and that their right to reproduce is not fully fulfilled within the state, consumers are entitled to privately decide on these matters. The criminalization of consumers might further exclude the infertile socially, add a criminal stigma to their misery, and it may cause further protest on behalf of consumers.

Instead of criminalizing consumers, we might consider criminalizing the professionals who assist consumers, or criminalizing the mediators who perform certain procedures domestically, but this would also be hard to justify. Practically, physicians from consumers’ countries sometimes perform the procedures in destination countries, as we learned in 2009, when Romania charged several Israeli professionals with engaging in the egg trade after buying human eggs from local women and implanting them in Israeli women. In this example, the physicians’ actions were in violation of Romanian law that prohibits payment for human ova and organs, therefore the destination country (Romania) pressed charges, not

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48 Van Hoof & Pennings, *supra* note 36, at 551. E.g., Rick Lawson, *The Irish Abortion Cases: European Limits to National Sovereignty*, 1 EUR. J. HEALTH L. 167, 175 (1994) (reporting a case in which an Irish 14-year old rape victim was restrained from leaving Ireland for nine months in order to prevent her from obtaining an abortion in Great Britain in 1992. This injunction was later overturned, with the statement that the restraint imposed on the applicants was disproportionate to the aims pursued, and that the freedom to obtain and make available information relating to services lawfully available in another state could not be restricted. It hasn’t changed the ban on abortion.).

49 Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT’L L. 1, 48 (2011) [hereinafter Cohen, *Medical Tourism and Global Justice*] (arguing that when people pay out-of-pocket for medical (not reproductive) services, for the state to restrict them from doing so appears less convincing, especially if this is their only way to get the service). I think that cross-border reproductive transactions, which involve another person, rather than simply medical devices, raise different considerations regarding the intervention of states, which change the normative conclusion, although criminalization certainly is not the best method.

50 Whittaker, *supra* note 10, at 113.
Organ trade is serious enough and would probably be an offense even in destination states that have permissive regulation. However, when certain acts are considered lawful in the destination state, or if doctors do not perform the procedure themselves but merely recommend the option to consumers, extraterritorial criminalization of physicians would be unjustifiable.

The criminalization of mediators imposes the risk that such practices might appear in the black market, which would worsen the position of suppliers due to lower standards and lack of monitoring. Moreover, the mediators are not necessarily within consumers’ states’ jurisdiction. Many foreign mediators work online outside the scope of consumers’ states’ jurisdiction and may act in accordance with their own domestic laws. Eventually, scholars argue, all attempts to impose criminal prohibitions are doomed to fail and are mainly symbolic.52

2. Conditional recognition

Lack of harmonization between countries with regard to the registration of the legal parenthood and nationality of the child raises administrative opportunities for consumers, but also difficulties. This option relates to surrogacy transactions, rather than to egg sale, since it occurs when intended parents return with a new baby. Nationally, all states have citizenship laws, which as a default acknowledge the citizenship of their citizens’ offspring.53 However, most countries, including many destination countries, grant parenthood to the woman who gives birth.54 In these cases, the legal parenthood of intended parents must either be acquired when they return to their home country, or is established in

54 For exceptions, see El Codigo Civil de Tabasco [CCiv] [Civil Code] art. 347 (Mex.); Ukraine. The family code of Ukraine art. 123(2) (Ukr.) (intended mother is considered to be the legal mother).
the state of birth and then must be confirmed by the consumers’ state.\textsuperscript{55} When such transactions are inconsistent with national policies, states can either impose difficulties on returning citizens due to violation of public policy by refusing to issue a passport or visa to the child, or the grant of citizenship. Problems may arise when the child needs traveling documents and the legal parenthood of the intended parents is yet to be determined,\textsuperscript{56} or when the consumers’ state refuses to recognize a foreign legal action relinquishing the surrogate of her parental rights in destination countries (a birth certificate or court order regarding the legal parents).\textsuperscript{57} Yet, many states which ban or restrict commercial surrogacy choose to overcome the ideological difference through effective recognition of the outcomes of the transaction, in spite of inconsistency with policies regarding commercial surrogacy, by demanding some proof of the genetic connection between the resulting child and at least one of the intended parents.\textsuperscript{58}

Conditional registration can be used to enable consumers’ countries to efficiently monitor the contracts, consistently balance the interests of the children, the intended parents, the suppliers and their own interests. Their role in the procedure of acknowledging legal parenthood or nationality can ensure only the registration of children born through contracts that meet sufficient standards according to national values. In line with the national-international consistency demand, this option could be open only to states which enable the provision of eggs or surrogacy services domestically.

Indeed, several cases have challenged patterns of kinship and status in the cross-border context.\textsuperscript{59} The interesting case of baby Manji involved Japanese parents transacting in India. According to Indian law, a birth certificate requires the names of both mother and father. In Manji’s case, a month before the baby was born, the intended parents, the Yamadas, divorced. The courts have been unable to make a clear statement regarding who

\textsuperscript{55} \textit{INTERNATIONAL SURROGACY ARRANGEMENTS}, supra note 10, at 504.  
\textsuperscript{56} Richard F. Storrow, \textit{Travel into the Future of Reproductive Technology}, 79 U. MO. KAN. CITY L. REV. 295, 305 (2010) (“Citizens of several European and Asian countries, including the UK, France, Germany, Spain, Belgium and Japan, have been refused travel documents for their children by their consular officials abroad upon suspicion that the children were the result of international commercial surrogacy.”); \textit{INTERNATIONAL SURROGACY ARRANGEMENTS}, supra note 10, at 506-07.  
\textsuperscript{57} Storrow, supra note 25, at 543. E.g. Belgium, \textit{INTERNATIONAL SURROGACY ARRANGEMENTS}, supra note 10, at 69; France, id. at 122; Japan, id. at 250; Holland, id. at 293.  
\textsuperscript{58} \textit{INTERNATIONAL SURROGACY ARRANGEMENTS}, supra note 10, at 514-18.  
is to be deemed the baby’s mother, because the contract was not legally binding with regard to parental responsibilities. Yamada’s ex-wife (the intended mother) refused to travel with him to take possession of Manji. The anonymous egg donor (the genetic mother) had neither rights nor responsibilities toward the baby. The responsibility of Mehta (the gestational mother) ended when the baby was born, after she had relinquished her rights. Eventually, the Rajasthan regional passport office issued Manji an identity certificate as part of a transit document. The certificate did not mention nationality, mother’s name or religion, and it was valid only for the travel to Japan. It was the first such identity certificate issued by the Indian government to a surrogate child born in India. Japanese authorities stated that Manji could become a Japanese citizen “once a parent-child relationship has been established, either by the man recognizing his paternity or through him adopting her.” In spite of his genetic ties to his father, until now (2014), there is no evidence regarding the legal recognition of baby Manji’s status by the state.

The lesson to be learned from the Manji case is that the conditional registration tool is no less problematic than criminalization. First, since in many cases of cross-border transactions the fathers are genetically connected to the children, it will be hard to justify not acknowledging parent-child relationships even if the surrogacy was unethical, especially in countries in which the parenthood of the father is genetically grounded. Genetic connection, which is the common grounds for granting a parental order, is independent of the ethical or legal consideration regarding the procedure.

Second, conditional registration that might end in infringement of the child’s rights will be hard to justify. States must ensure the implementation of human rights in accordance with their national law and their obligations under the relevant international instruments in this field. As part of the Convention on the Rights of the Child, any child has a right to be registered immediately after birth (art. 7), to preserve his or her identity, including

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60 Points, supra note 5, at 5.
61 Id. at 7 (“Nearly a year after her birth, no evidence had surfaced that Baby Manji’s legal status in Japan had changed.”).
63 In many states, intended fathers are acknowledged on genetic grounds. INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 506-07, 519. Often in these countries the intended mother has to adopt because the registered mother in the birth certificate is the surrogate.
nationality, name and family relations as recognized by law, without unlawful interference (art. 8), to enter their own country with his or her parents (art. 10), and not to be subjected to arbitrary or unlawful interference with his or her privacy and family (art. 16). The Convention on the Reduction of Statelessness states that a Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that State (art. 4). According to this convention, a state may refuse to register a child who is registered in the destination country or in another country. Such a refusal will not leave the child stateless, and will not necessarily be considered a violation of human rights. However, when the citizenship laws in destination states do not grant citizenship to the resulting child (e.g., in Russia), a refusal by consumers’ countries to register the child might violate the child’s right to citizenship. Aside from all the above mentioned considerations, refusing to register children born out of cross-border surrogacy transactions would discriminate against these children compared to other genetically connected children, which is a violation of the convention on the Rights of the Child, and considered disproportional.

To conclude, the underlying purpose behind conditional registration is usually deterrence – to prevent future travelling. However, I doubt this purpose could be achieved through conditional registration, since usually the international obligation of the authorities to secure the rights, safety and interests of a particular child outweighs public policy considerations and strict rules. Ultimately, many cases that were put to this test resulted in states allowing registration in spite of procedures that do not align with their own values,

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66 Yasmine Ergas, Thinking ‘Through’ Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy, in INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 427, 431. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] (Arret Mennesson) 1re civ., April 6, 2011, Bull. civ. I, No. 370 (Fr.) (Twins were brought from California by their French parents. The transcription of their birth certificates had been initially allowed but subsequently annulled. Since the French provision did not cancel the Californian recognition of the children’s filiation nor prohibit them from living with the intended parents, it was not considered a violation of their family rights, or against their best interests.).
67 Convention on the Rights of the Child, supra note 64, art. 2.
68 Convention on the Rights of the Child, supra note 64, art. 3. See Millbank, supra note 43, at 197 (doubting whether the categorical exclusion of children born through paid surrogacy from legal parentage is sufficiently justified or effective).
and/or regardless of the ethical considerations concerning the specific transactions.\(^\text{69}\) The processes of granting legal parenthood and nationality enable inconsistency rather than minimize it. It is hard to imagine which contract would not be accepted on these grounds. As long as the intended parents can get a child, imposing administrative difficulties will not necessarily deter future transactions, thus the effectiveness of this tool in ensuring ethical conduct of the market is questionable.\(^\text{70}\)

### 3. National-international consistency model – advantages and disadvantages

A national-international consistency model is appealing. First, the demand for consistency has a strong normative base. It strengthens the view that the legitimacy of all states’ actions, both domestic and international, derives from the same set of national core political principles. Whether a state has the authority to act in an international context must be justified normatively as part of a political theory that grants it sovereignty, thus granting it also legitimacy to act domestically even on actions performed beyond the border.\(^\text{71}\) Consistency would allow consumers’ states to stick to their own morals, supporting national and socially-based values, by maintaining a moral-normative coherency between domestic and international policies. It can be established without a global normative consensus on what the right conception of justice is, without agreeing on the social meanings of reproduction, family, assisted reproduction, bodily labor, etc., and even without formal global institutions.\(^\text{72}\) Consistent regulation can serve as an incentive to raise

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\(^{69}\) See, e.g., X & Y (foreign surrogacy) [2008] EWHC 3030 24 (fam) (U.K.); Ellison and Anor & Karnchanit, [2012] FamCA 602, para. 87 (AU) (acknowledging parentage as being in the best interests of the children, and stating it was too late to inquire into the legality of the arrangement); Tian v. Canada (Citizenship and Immigration), 2011 CanLii 75008 (Can. B.C) (The Immigration Refugee Board (IRB) noted that the payment may have exceeded the surrogate’s reasonable expenses and that the surrogacy is “likely” contrary to the laws of both Canada and China, but this finding had no impact on the decision.); Claire Achmad, New Zealand, INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 308 (reporting a case (KR and DGR) in which the court claimed that policy considerations are not part of its authority and did not consider the way the procedure had been conducted abroad, and another case (BWS) in which the court acknowledged the consent of the surrogate although such consent could not have been acknowledged in N.Z.); France, INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 439, Belgium, id. at 514.

\(^{70}\) But see Cohen, How to Regulate Medical Tourism, supra note 46, at 16 (stating that if the rule is well-publicized and strongly enforced, it may achieve high enough levels of deterrence and the number of children who end up being “surrogacy exiles” is close to zero).

\(^{71}\) For description of a similar, vertical thesis, see Lea Brilmayer, Justifying International Acts 22 (1989).

the medical standards in destination states that have relatively low standards. If the latter wanted to conduct transactions with foreign consumers from states with higher standards, destination countries would be obliged to measure up to higher normative demands and raise the threshold for acceptable terms of contracts in order for consumers’ countries to register children born through safe and ethical contracts.

On the other hand, the global-pluralism advantage of this model is also its weakness. A mechanism that incorporates pluralistic national legislation might be ethically insufficient and unsatisfying if it fails to rise above a certain level of commitment to protecting suppliers of reproductive services, and leads to a race to the bottom regarding rules of conduct and medical standards.\footnote{Pennings, \textit{supra} note 2, at 338-39 (arguing that a permissive universal rule according to which all states allow their citizens to receive services in other states might result in regulation according to the level of the most permissive country). \textit{See also} Martha C. Nussbaum, \textit{Creating Capabilities: The Human Development Approach} 42 (2011) [hereinafter Nussbaum, \textit{Creating Capabilities}] (acknowledging that the threshold might be easy to meet but less than what human dignity requires).} In consumers’ countries whose national conduct is poor, although consistent transactions might answer the demand for consistency, they will keep resulting in structural injustice and exploitation. On the normative level, the model saws off the branch on which the universal norms of human rights rest. In the absence of some acceptable framework of minimal standards in this model, it is imbedded in and dependent on domestic theory only. Many of the standard arguments for civil and political rights rely on universalism and hence necessarily hold that some rights have a universal scope. A global justification of justice between the state and other states or with regard to foreigners should be embedded in some international aspects, rather than stem from domestic political relations between a state and an individual.\footnote{Brilmayer, \textit{supra} note 71, at 29.} Moreover, the consistency model does not provide any argumentation as to why non-liberal states should be obliged to pursue liberal “just” foreign policies.\footnote{Barry, \textit{supra} note 17, at 233 (arguing that little can be achieved if no one feels morally compelled to struggle for reform of unjust rules).} This model is based on global tolerance toward all policies and could imply a requirement of tolerance even toward non-liberal values and policies.\footnote{But see Thomas Nagel, \textit{The Problem of Global Justice}, 33 PHIL. & PUB. AFF. 113, 135 (2005) (discussing whether liberal states are obliged to tolerate non-liberal states or to try to transform them, or not. Nagel argues that liberal states are not obliged either to tolerate non-liberal states or to try to transform them, because the duties of justice are essentially duties to our fellow citizens.).} Governments of liberal states should act tolerantly in their
dealings abroad, in the same way their citizens expect them to act domestically. Yet global liberal justice can only exist when liberal states are obliged to it by virtue of the fact that they are liberal. In the absence of a common ideological ground, there is no normative argument for requiring non-liberal states to adopt this model. Pressure to take part in these transactions might be sufficient to push them to do so voluntarily, but it may be futile in ameliorating at least some of the cross-border reproductive transactions between liberal and non-liberal states, for example between consumers from the West and women from China.

The legal tools I have considered as part of a state’s duty to consider its domestic policies – extraterritorial criminalization and conditional legislation – either are symbolic or violate the rights of children. It is important to note that even if these tools can ensure a consistent national-international policy, they cannot necessarily guarantee a proper way of conduct, and are thus an inefficient solution to the problem of structural injustice resulting from global reproductive markets. In light of all these reservations, I do not think that unilateral tools alone are suitable for regulating the case of cross-border reproductive transactions. In the following I will argue that joint actions between associates could advance more desirable transactions. Globalization forces us to elevate the level of analysis beyond the state and reevaluate the responsible bodies. Effective implementation to deal with the unjust effects of cross-border reproductive transactions would require the application of several approaches, national and transnational, on behalf of all stakeholders: consumers, women suppliers, governments, professional international institutions, etc. In the following part I will suggest my model of a desirable regulation for cross-border reproductive transactions, based on shared responsibility.

III. The shared responsibility model

Iris Marion Young, a professor of political science, has been looking for a way to conceptualize the responsibility for producing structural injustice in order to remedy it. She notes that the common model of guilt or fault for harm is usually unfit to deal with the situation, since it demands the assessment of intentions, motives, and consequences of actions.77 In most cases of structural injustice, it is impossible to trace which specific actions of which specific associate causes which specific parts of the structural processes or

77 Young, supra note 12, at 118.
their outcomes.\textsuperscript{78} For example, we could challenge destination countries for channeling their healthcare budgets to target foreign consumers’ demands instead of providing essential primary healthcare for their own citizens, and not acting in the best interest of their citizens. Although the medical centers are often built with private money and not at the government’s expense, public policies that seek to encourage the supply of services to foreign patients draw professional staff that could have been part of the public healthcare system.\textsuperscript{79} However, it is unclear whether the foundations of reproductive markets come at the expense of public resources that should fund the public healthcare system. Supporters of medical tourism state that revenues generated from treating international patients can be used to cross-subsidize publicly funded healthcare.\textsuperscript{80} It may also be a tactic to reduce emigration of healthcare providers to wealthier nations, as it helps prevent the export of skilled healthcare workers out of the country.\textsuperscript{81} In light of these arguments it seems that background injustice may cause unjust effects that, although predictable, cannot be blamed on one specific actor.\textsuperscript{82} The need to trace a direct relationship between the action of an identifiable entity and harm might let bodies of power that are involved in causing injustice, albeit indirectly, off the hook. Young claims that although we cannot blame all contributors, it is inappropriate to dismiss them.\textsuperscript{83} In view of the difficulties of pinpointing a single body or entity accountable for the injustices that occur, I tend to agree with Young that this model does not fit cases of structural social injustice.

Structural injustice is a consequence, the result (or a side effect) of actions of many persons and of many legitimate (or at least acceptable) practices, rather than an individual action as

\textsuperscript{78} Id. at 115.

\textsuperscript{79} See, for example, in the case of Thailand and India, A.B. Ramirez de Arellano, Patients without Borders: The Emergence of Medical Tourism, 37 INT’L J. HEALTH SERV. 193, 196-97 (2007); Leigh Turner, ‘First World Health Care at Third World Prices’: Globalization, Bioethics and Medical Tourism, 2 BIOSOCIETIES 303, 320 (2007).

\textsuperscript{80} See, for example, in the case of Singapore Turner, supra note 79, at 314. The cross-subsidize argument mentioned here is probably less relevant to reproductive services such as egg donation and surrogacy and more relevant to medical healthcare. Reproductive services are usually provided through private clinics, and this money does not enter the health system but rather reaches private hands.

\textsuperscript{81} Id. at 314.

\textsuperscript{82} Young, supra note 12, at 120. See also JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 266 (2013) (mentioning background injustice that occurs even though nobody acts unfairly or is aware of how the overall result of many separate exchanges affects the opportunities of others. Economic agents are not required to follow rules that can prevent these undesirable consequences, since they are often so far in the future, or so indirect, that restricting them would be an excessive burden.).

\textsuperscript{83} Young, supra note 12, at 118.
required in the blame model. For example, consumers’ states have a right to choose a reproductive policy allowing cross-border transactions, while the destination states have right to allow or forbid such transactions in their territory. It is the combination of national regulation in consumers’ countries, insufficient protection in destination countries, and the decisions of individuals in the context of globalization and the neo-liberal international regime that results in injustice and negative implications.

Young and Christian Barry (a political philosopher), each offer somewhat similar models of shared responsibility for justice, which are suitable for the cross-border reproductive markets. Based on their parameters (some unique and others overlapping), I offer a slightly refined model. I suspect that market failure and externalization of negative implications are partly the result of the absence of a cooperative procedure that enables cooperation between bearers of responsibility. Joint action is necessary. The solution should be multileveled and structural, a result of connection and cooperative action, as no single participant can change the injustice on his own. My model takes into consideration responsibility for justice of different kinds of associates, from different states, different background conditions and social positions, in a special context of interaction as a basis for the commitment to justice. In this section I will present my model. I will start with the parameters of the shared responsibility model and then apply them to the case of cross-border transactions.

1. Engaging associates – who bears a duty?

The engaging parameters locate the involved associates, and explain why they are assigned responsibilities (who are the contributors to injustice?). According to the engaging parameters, in the case of harms resulting from structural injustice, all associates directly and indirectly interconnected through a process should bear some responsibility for the injustice because of their actions or because of the benefit they gain from an unjust structure.

84 For the need for concentrated cooperative action, see Anne Donchin, Reproductive Tourism and the Quest for Global Gender Justice, 24 BIOETHICS 323, 332 (2010).
a. Accountability and benefit

The accountability parameter allocates responsibility according to the extent that associates have contributed to bringing unjust situations about, and according to the causal connection to the action (Young and Barry mention a principle of contribution). Accountability is the common ground between the shared responsibility model and the classic blame model, a parameter that links the responsibilities of associates to the unjust structure. The difference is that the blame model looks at unacceptable behavior to inflict punishment or to exact compensation for past misbehavior, and at times it might seek prevention of the occurrence of future similar events, while the purpose of the accountability principle is not to blame but rather to correct and prevent ongoing structural injustice, hence associates are responsible not in the sense of mal-intention, but in the sense of a duty to work within their capacity to remedy these injustices. The benefit parameter is based on the gain each contributor gets from the unjust situation (privilege or beneficiary principle). It relates to the amount of responsibility: the higher the gain, the greater the responsibility. Direct gain will result in greater responsibility, but indirect gain would also mean that a contributor has some responsibility. The actors that benefit more are usually those who have the capacity to change the structure in their favor.

Accountability and benefit parameters redirect attention from the consequence to the contributors, from those who experience justice and injustice to those who produce them. The pragmatic advantage of the engaging parameters is significant. While the blame model

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85 Barry, supra note 17, at 228; Young, supra note 12, at 119 (assigning responsibility when one’s actions within social connection contribute to injustice).
86 Young, supra note 12, at 120.
87 Id. at 114 (“All the persons who participate by their actions in the ongoing schemes of cooperation that constitute these structures are responsible for them, in the sense that they are part of the process which causes them. They are not responsible, however, in the sense of having directed the process or intended its outcomes.”).
88 Barry, supra note 17, at 229 (Beneficiary – the one who has benefited more from the injustice is assigned greater responsibility. Measured either compared to an agent’s position before the unjust arrangement was put in place, or if the arrangement had not been instituted, or if a fully just scheme would have been instituted); Young, supra note 12, at 128 (arguing that whoever benefits more from structural injustice should be considered more liable).
must prove exploitation in order to find the responsible bodies, the focus on accountable associates makes it possible to minimize vague evaluations (and disagreement) regarding the actual effect of suppliers’ vulnerability on their autonomous decision (in order to determine exploitation), or what should be fair to citizens of one country in comparison to another. Next, I will review the engaged associates in the case of cross-border reproductive and continue explaining what sort of responsibility each contributor bears.

2. Who the engaged contributors are in cross-border reproductive

Responsibility in the current global order is divided between national, supranational, nongovernmental and private associates, all at different levels of development. Duties to justice should be assigned, accordingly, to international institutions (including professional organizations and NGOs), states (consumers’ and destination states), and individuals from different states: parties to the transactions (consumers and suppliers), physicians, clinics and mediators.91

Institutions are engaged, because they structure and are structured by common activities in the global sphere.92 The interactions within these activities are mediated by institutions so that individuals can enjoy relationships.93 Institutional rules and roles enable members to do things together without necessarily sharing personal relationships. Institutions create the value necessary to pursue a common goal, grant recognition between fellow associates, and provide the necessary social coordination needed to sustain social relationships. Conditions for the health industry’s growth are supported by the neo-liberal agreements negotiated in international trade organizations; health organizations control medical hazards; human rights institutions ensure that health rights and women’s rights are not violated. Since the hegemonic existence of the market in our current lives provides the obvious setting for cross-border reproductive transactions, international institutions that facilitate international women’s right, trade, travel, health standard-setting, accreditation of foreign hospitals,

91 For stakeholders that benefit from the structure, see Donchin, supra note 84, at 330; Points, supra note 5, at 3, (“Infertility clinics, healthcare providers, medical tourism companies, the broader tourism industry, the Indian government, and the women who provide surrogacy services all profit from this industry.”).
92 For the inclusion of institutions on a social relationship-based ground, see Jonathan Seglow, Associative Duties and Global Justice, 71 J. MORAL PHILOS. 54, 57 (2010).
the training and credentialing of foreign doctors (including in developing countries) all should be included. As such, institutions are expected to weigh the impact their policies have on others according to the type and area of their involvement. I believe that a desirable policy requires cooperation between international institutions that specialize in these matters, and between these institutions and states.

The focus on international institutions is not separate from the accountability of states, which are globally and nationally entangled in the global governance. Shared responsibility analysis exposes more connections between national and international economic systems. I find several kinds of responsibilities of states (both consumers’ and destination) that engage them in the practice of cross-border reproductive markets. Some responsibilities apply on each country towards their citizens, thus consumers’ countries will have responsibility due to actions within their direct authority in regulation of family related policies complementary to the responsibilities that destination countries have to suppliers. States are also accountable for the domestic implementation of international law. States are accountable for the negative consequence that national policies have beyond their borders. Some responsibilities of consumers' countries are indirect, due to their interest in the market states are accountable for their share in designing the international order, and should be held responsible for changing it when it is unjust. Other duties are residual and occur only since destination countries do not comply with their own. The benefit parameter may be another justification for assigning responsibility to the states that benefit from the current global order. Destination states gain the income and consumers’ states gain access to reproductive services. In view of states’ gains and interests in cross-border reproductive transactions, destination and consumers’ states should not be let off the hook. As associates, both have duties towards their citizens, towards each other, and towards fellow associates who are each other’s citizens. They should therefore share the responsibility for the unjust structure that cross-border reproductive transactions create.

Consumers bear direct responsibility for consumption choices that sustain exploitation. Since the transaction is supposed to benefit its parties, some sorts of duties apply between

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94 Though several evaluative bodies are used to assess institutional quality, the Joint Commission International is now the dominant global player in the international hospital accreditation business. For international accreditation, see Turner, supra note 79, at 311; Cohen, Medical Tourism and Global Justice, supra note 49, at 36.
them regardless of nationality. Additional individual responsibility stems from familial relationship which should assign some eligibilities to be treated justly. The involvement of foreign women in the process of reproduction, has implications for the resulting children’s right to know their biological parents, for future medical possibilities that might be connected to the egg donor or surrogate, etc. The model assigns certain duties between consumers and suppliers for their share in the industry, i.e., the specific transactions they are involved in. Individuals hold the additional responsibility for electing their government representatives and indirectly for the policies that they establish. Yet, individual contribution to the world order creates normatively weaker duties, and individual effort to address unjust structures might be futile. Finally, physicians, private clinics and mediators are other associates, all contribute through their professional and economic roles. All earn their fees from such transactions and have a lot to gain. These associates should be liable for their professional or business role in the industry and for their general contribution to the structure.

The added value of the shared responsibility model is, first, that the scope of associates is wider and includes actors that the blame model might have dismissed or neglected. It allows us to examine how all these parties are entangled in cross-border processes. Second, the shared responsibility model is not limited to direct causal connections and thus avoids letting those who are beyond the borders, or indirectly involved, off the hook. This inclusion is helpful even when the unjust situation stems from an unfortunate combination of legal actions resulting in injustice; where the number of associates responsible for a certain situation has increased to the point that it is doubtful whether a single associate, even a state or an international institution, could remedy the injustice by itself; or where multiple contributors are assigned only a small amount of responsibility and effectively no

95 Compare Pogge, Responsibilities for Poverty, supra note 90, at 74 (assigning responsibilities to citizens of the developed countries for supporting politicians that are willing to shape global institutions to support their interests, rather than help foreign victims of the current institutions), with David Miller, National Responsibility and Global Justice, 11 CRITICAL REV. INTL. SOC. & POL. PHILOS. 383, 385 (2008) (claiming that such a responsibility is a matter of degree according to the ability of citizens to control the direction in which their society is moving and the viable external conditions that a state faces in important areas of decisions such as economic and social policy. When the public sphere is privatized, it is doubtful whether states truly represent all populations in the national sphere, hence citizens are held responsible.). But see id. at 387-88 (2008) (ultimately, individual responsibility should be symmetric. If we assign such responsibility to consumers, people in poor states should be held responsible for their situation and their votes.).

96 Donchin, supra note 84, at 330.
one bears the responsibility to correct the injustice. These parameters are therefore more compatible with how associates are involved in the global legal, social, and economic networks. Each associate is personally responsible for outcomes in a partial way, therefore bears an independent responsibility to remedy injustice, different in nature and scope. Accordingly, engaging one associate according to this parameter does not dismiss other duties that stem from other relations, and the responsibility of one associate is not reduced if another is failing its own responsibility. Having clarified how each associate is engaged, I will next elaborate on the sort of responsibilities each should have.

3. Assigning duties

After recognizing the associates engaged, assigning parameters relate to the sort and the amount of responsibility that each associate bears, and to the site where they are expected to take action.

a. Capacity – how to assign duties

Both Young and Barry mention the capacity to make a change (the capacity or power principle). The capacity parameter requires each associate to be accountable for the sort of things that are within their capacity to change in consideration of the scope of possible action of each associate, according to position of power. Young claims that contributors should focus on injustices where they have a greater capacity to influence structural processes. This is a very effective and practical condition, because it transfers many responsibilities from individuals to stronger associates, taking into consideration their unbalanced powers. Those institutionally and materially situated to be able to do more to affect the conditions of vulnerability, such as states and institutions, have greater duties.

Although I agree that change may be difficult to achieve without the involvement of strong associates, I have two reservations: first, capacity will always lead us to the same strong actors (governments, international institutions, or the strong actors in the market), as these

97 Barry, supra note 17, at 222; Dahan et al., supra note 89, at 449.
98 For capacity to alleviate unjust conditions, see Barry, supra note 17, at 230-31. On power, see Young, supra note 12, at 127.
99 Benvenisti, supra note 16.
100 Young, supra note 12, at 127.
101 Id. at 106.
associates hold powers regardless of the specific case. The mechanism must ensure that in
spite of the many duties assigned to these strong associates, weaker associates are not
dismissed from acting within their capacity, and that all injustices that powerful associates
are engaged in will somehow be addressed and not neglected. Second, Young assumes that
often the more interest one has in the results of a process, the more power one has to
change it.\footnote{Id. at 128.} This point was justly criticized by Dahan et al., arguing that the greatest
interest often belongs to the victims, who do not necessarily have the greatest power to
remedy the structure and should not be assigned greater responsibility.\footnote{Dahan et al., \textit{supra} note 89, at 457.} The interest of
associates may, however, prioritize the projects within their capacity.\footnote{See Young, \textit{supra} note 12, at 129 (suggesting prioritization according to the ease of recruiting support and
collective actions, which could also be seen as a form of power).} With many sorts of
duties attached to each associate, each would probably focus on those in which he has the
greater interest (and capacity) to decrease injustice.

\textbf{b. Connectedness - what kind of duty?}

Barry mentions the condition of \textit{connectedness} – the allocation of duty on the basis of
special relationship.\footnote{Barry, \textit{supra} note 17, at 229.} I read this parameter as articulating the different kinds of duties each
actor is expected to bear due to the special roles that connect each associate to another,
rather than how each associate is connected to the injustice (the connection to the case of
injustice is a preliminary engaging criterion rather than a parameter for assigning
responsibilities). The connectedness parameter makes it possible to assign different duties
in different circumstances of relationship according to different levels of commitment to
justice, and different values.\footnote{See David Miller, \textit{Reasonable Partiality towards Compatriots}, 8 ETHICAL THEORY & MORAL PRAC. 63, 72
(2005) (arguing that the final weight of a duty would be the product of two factors: the content of the duty,
and the closeness of our attachment to the people to whom the duty is owed).} When one actor is less involved, his duties are less stringent
as a result. The possibility of scaled degrees of connectedness, hence scaled degrees of
cooperation, allows room for flexible normative principles which can improve compliance
and be more effective.

This parameter makes it possible to assign responsibilities according to infrequently
acknowledged relationships: between nation-states and international institutions and
between individuals and international institutions who regulate the trade regime. Transnational, state, institutional, and private responsibilities all go hand in hand.\textsuperscript{107} When the focus is on the meaning of the relationship between associates, an additional aspect of recognition and consideration of other associates is promoted. Some duties may relate to rights, care, etc. rather than to purely legal, economic or contractual economic fairness.

Moreover, this parameter enables us to change the bearer of a specific duty according to the context of each case. For example, it can be argued that the Third World is not limited to places that are beyond the borders of Western states. Migrants and the poor in developed countries perform similar labors, which are similarly devaluated by consumers. The difference between national and international regulation would be the bearer of responsibility. In a domestic surrogacy transaction the entire responsibility for the framework of markets lies with the state and its institutions (both to provide basic capabilities and to ensure just conditions for transacting due to the state commitment towards people who are within its territory), in cross-border markets some of the same responsibilities might be shared with international institutions or with other associate states.

IV. Shared responsibility and the need for joint action - Recommendations

The shared responsibility model does not assume one proper way of behavior, but offers alternative interpretations. Personally, in light of the evidence on growing demand, I doubt that banning these markets would be practically possible; realistically, therefore, my goal is not to abolish these markets with this model. This is a liberal solution, based on the understanding that for practical reasons it would be better to accept a certain form of the market. I prefer a more proportional solution, rather than decrease the autonomy of suppliers or the opportunity that they may have to profit from such transactions. Instead, this model aims at changing the balance of the market. Rather than leaving suppliers with the choice of living in poverty or entering into a transaction in which they are unrecognized, I suggest leaving the choice in the hands of consumers: either to use reproductive services while granting the suppliers recognition for their contribution, or not to use the services.108 Pursuant to the demand that all associates involved be protected, suppliers be recognized and their position in the market empowered, legitimate transactions are likely to become more expensive.109 I would hazard a guess that if suppliers were to gain a certain level of recognition and a fair distribution of benefits, “desirable transactions” would not be as profitable for consumers and the demand will decrease.

Reforms advanced at one level may modify or subvert goals at another level, and thus might work at cross-purposes, rather than in a clear or unitary direction.110 I am aware that the administrative facilitation that my model affords for a desirable contract may boost the industry instead of restricting it, especially for those who support my argument that current exploitation stems from the way these transactions are currently being carried out. Enhancing the protection would encourage more transactions and probably enhance the

108 Cf. WALZER, supra note 14, at 61 regarding guest workers ("Democratic citizens, then, have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done. And those are their only choices.")
109 Cf. id. at 176 (arguing that higher payment is a direct consequence of hiring (recognized) fellow citizens for hard work, previously done by Others and sold at lower cost).
legitimacy these markets have. Nevertheless, I believe that the entire framework I suggest is sufficiently moderate to balance the boost.

The conclusions of my research raise four focal points for addressing cross-border reproductive transactions in order to minimize negative impacts on consumers, suppliers, resulting children, as well as their states: legal parenthood and nationality of the resulting child, proper medical standards, proper terms of the contracts, and wider consideration of the international legal order and background injustice due to poverty. In the next page you will find a scheme of each associate’s duties, followed by elaboration on the four focal points and the specific responsibilities and roles each associate should assume in each area.
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| **Destination countries** | Joint cooperation for agreements to minimize disharmony of legal parenthood and nationality | Enforcing proper medical standard according to internationally recognized standard (might require equalizing the standard for local citizens who give birth to their own babies). | 1. Negotiate fair trade model. 2. Supportive legislation that promotes international standards of human rights and fair trade. | 1. Ensuring capabilities and safety nets for the poor (Sen, Nussbaum), through meaningful work or welfare programs. 2. Participation in international regulation. |

| **Consumers’ countries** | Consideration of national policy according to the principles of consistency and proportionality issues. (Hague convention model) | If destination countries do not have enough resources to secure a market under minimal standard, consumers’ countries might be required to assist. | 1. Negotiate fair trade model. 2. Supportive legislation that promotes international standards of human rights and fair trade. 3. Revision of contracts in light of human rights and fair trade. | 1. Striving to change the international structure. 2. Participation in international regulation. |

| **Individual associates** | Responsibility for personal choices. | Responsible for contracts that safeguard the rights of suppliers. | 1. Responsibility for personal transactions. 2. Consumer pressure for fair trade | |

| **NGOs** | Representation of individuals in the international process. | Representation of individuals in the international process. | Representation of individuals in the international process. | |
1. Legal Parenthood and the nationality of the child

Legal parenthood and the nationality of the children resulting from cross-border surrogacy transactions are probably the most difficult issues to coordinate. On one hand, nationality concerns are national decisions which do not rely on a universal rule. On the other hand, these decisions are directly connected to the human right to plan a family and to children’s rights, which are universal norms.\footnote{Sharon Bassan, \textit{Can Human Rights Protect Surrogate Women in The Cross-Border Market?} HAGUE ACADEMY LAW BOOKS (forthcoming, 2015).}

I suggest that a child could have a few registered associative relationships: the genetic, the gestational, and the intended. States would have a duty to register them, and this registration would assign compatible duties. It could support states’ duties according to human rights norms. Registering the supplier as biological/genetic mother should grant the child at least one nationality according to most nationality policies, hence indirectly may also support children’s rights; it will reduce cases of statelessness, ensure the future right of the children to obtain information about their origin, and be fruitful in cases where medical knowledge of genetic origin will be needed to treat the resulting child.

Registration in itself will not solve the problem without parallel recognition by other states. Recognition of parenthood and registration of nationality both require some comity among various foreign institutions and an understanding between states, similar to the understanding regarding international adoption.\footnote{Hague Conference on Private International Law, \textit{Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption}, 32 I.L.M. 1134 (1993) [hereinafter \textit{Hague Convention on the Protection of Children}].} Comity expresses legal reciprocity, the extension of certain courtesies to other nations, particularly by recognizing the validity and effect of a jurisdiction’s executive, legislative, and judicial acts.\footnote{On comity, see Storrow, \textit{supra} note 25, at 543.} The shared responsibility model could therefore assign duties to states to engage in these efforts to address recognition of cross-border reproductive transactions. There are two alternative legal tools that could be helpful here: an international convention or multilateral agreements. A convention would provide a framework of international cooperation and
could establish procedural rules that would facilitate the process. Such a convention would suggest procedural rules for acknowledging public records regarding legal parenthood, by assigning responsibilities to states and authorities, and ensuring that the rights of children are upheld. I think that a convention could be efficient once common understanding is reached. In the meanwhile, taking into consideration disharmonized concepts, I find multilateral agreements more committing. They make it possible to articulate regulation based on a specific understanding between specific countries, and thus have greater potential to gain legitimacy. This tool would enable consumers’ states to uphold their policy, and minimize problems that require ad hoc solutions.

Some efforts are currently being made on a diplomatic level. In 2010, the Consuls General of eight European states wrote a joint letter to a number of clinics in India to request that they cease providing surrogacy options to their citizens unless consumers had consulted with their embassy on these matters first. The United Kingdom has issued a new guidance for prospective parents looking at cross-border reproductive care, urging them to ensure they are fully aware of the facts and are well prepared before starting. The Israel embassy in Bangkok sent a query to the Thai Ministry of Foreign Affairs regarding the hiring of Thai female nationals to act as surrogate mothers by Israeli nationals in order to make sure that the procedure is acceptable, and to verify that the child will not remain stateless. In a parallel effort, for example, the Indian bill has conditioned the eligibility to purchase services on proof from consumers that the resulting child will be permitted entry,

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114 See generally, INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 533-540. Cf. Hanna Baker, A Possible Future Instrument in International Surrogacy Arrangements: Are There ‘Lessons’ to be Learnt from the 1993 Hague Intercountry Adoption Convention, in INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 411, 420-21 (describing the convention regarding international adoption as both an administrative tool as part of private international law and a human rights instrument).


117 Letter no. 1403/2756 from Ministry of Foreign Affairs, Bangkok, to the Embassy of Israel, Bangkok (Dec. 12, 2013) (on file with the author) (clarifying that the law grants Thai citizenship to any child born to a Thai mother. Additionally, the letter states that Thailand does not yet have specific regulation on this issue, but an act that had recently been drafted explicitly prohibited commercial surrogacy. therefore at that time the Thai position neither supported nor encouraged the phenomenon, and considered it in contravention of the Thai Anti Human Trafficking Act B.E. 2551 (2008)).
that they can register the child as their child, and that the children will be granted citizenship in the consumers’ state.\textsuperscript{118} Finally, in order to create a better balance between the interests of the concerned actors, as well as a higher ethical standard, the Hague Conference on Private International Law (HCCH) is currently investigating the prospects of the adoption of international instruments on cross-border surrogacy transactions.\textsuperscript{119} I hope that my recommendations may be of use.

\textbf{2. Proper medical standards}

In cross-border markets it is unclear what the ethical and professional standards are. According to some reports, reproductive services are supplied in high-level facilities in developing countries and pose fewer risks to public health than other treatments provided as part of medical tourism.\textsuperscript{120} Nevertheless, the oversight of health, safety or professional credentials in clinics that supply reproductive services to foreigners may be limited to national and regional registries, and even where the practice is regulated – it is sometimes under-enforced. The safeguards to protect the health of suppliers vary.\textsuperscript{121} At least in some of the destination countries, where accreditation is voluntary, there is no control over non-accredited fertility clinics which choose not to be associated with the registries.\textsuperscript{122} The

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    \item\textsuperscript{120} See Robert K. Crone, \textit{Flat Medicine? Exploring Trends in the Globalization of Health Care}, 83 ACAD. MED. 117, 120 (2008) (reporting (regarding general medical tourism) that patients are treated by highly skilled doctors, sometimes with better technical novelty than is available elsewhere); George Palattiyil et al., \textit{Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work}, 53 INT’L SOC. WORK 686, 687 (2010) (arguing that the services delivered are comparable with similar services provided in the developed countries, but prices are much cheaper. Some hospitals and universities are globally recognized ‘brands,’ and partner with clinics in destination countries, where they fly both patients and doctors from the country of origin, to enjoy cheap services of the same quality.).
    \item\textsuperscript{121} Bassan, supra note 111.
    \item\textsuperscript{122} See Andrea Whittaker, \textit{Challenges of Medical Travel to Global Regulation: A Case Study of Reproductive Travel in Asia}, 10 GLOBAL SOC. POL’Y 396, 400 (2010). E.g., Florencia Luna, \textit{Assisted Reproductive Technology in Latin America: Some Ethical and Socio-cultural Issues, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION: REPORT OF A MEETING ON “MEDICAL, ETHICAL AND SOCIAL ASPECTS OF ASSISTED REPRODUCTION” HELD AT WHO HEADQUARTERS 31, 38} (E. Vayena, P. Rowe \& G. David, eds., 2001), available at http://www.who.int/reproductive-health/infertility/7.pdf [accessed 8 Oct 2008]; Pennings, supra note 2, at 337 (in Belgium, for instance, the policies concerning assisted reproduction differ considerably between secular hospitals and Catholic hospitals). For registration uncertainty in India, compare CENTER FOR SOCIAL RESEARCH, supra note 8, at 23; Lal, supra note 8 (reporting 600 IVF clinics in both rural and urban areas at almost all states of India) with Sheela Saravanan, \textit{An}
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result is that non-accredited clinics have total discretion over how to run their clinics and which services to offer, and they are free from official oversight.

Supplying reproductive services in the absence of proper medical care, supervision, or follow-up endangers suppliers and the resulting children, and violates their rights to health. This situation is undesirable for both parties to the transactions, as well as for their countries. Medical complications can burden the healthcare systems in both consumers’ and destination countries. First, when the standard of care does not rise to the standard in the consumers’ country, complications to suppliers might burden healthcare systems in destination countries where the complications occur. Second, the children born from the procedure might receive unsatisfactory care, or import diseases into consumers' country. The latter might have to internalize the medical harms caused by insufficient standard of medical care in destination countries. In addition to being ethically required, clear professional guidelines could benefit all associates that are potentially harmed.

As long as services such as egg sale or surrogacy are provided, destination states must ensure that the practice does not endanger the health of suppliers and is provided according to professional and ethical guidelines. No treatment, whether through reproductive services transactions or other, should violate the suppliers’ health rights. This is an obvious condition, part of the right to health. I do not find these recommendations innovating, but rather, find it scandalous that they are not yet incorporated in current transactions. A proper medical standard should ensure a minimal threshold for such procedures and be incorporated in contracts of cross-border transactions. I assume that professional standards

Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India, 8 PHIL. ETHICS & HUMAN. MED. 1, 1 (2013) (reporting about 3000 registered clinics across India offering surrogacy services, according to official figures).

Regarding the self-interest of developed countries in the regulation of the medical services market, see Cohen, How to Regulate Medical Tourism, supra note 46, at 13; Cohen, Medical Tourism and Global Justice, supra note 49, at 16. See, e.g., Françoise Merlet, Regulatory Framework in Assisted Reproductive Technologies, Relevance and Main Issues, 47 FOLIA HISTOCHEMICA ET CYTOBIOLOGICA S9, S12 (2009) (relating to different levels of safety that jeopardizes both consumers’ countries and suppliers); Turner, supra note 79, at 318 (arguing that it is possible that advertising as well as information provided by the clinic minimizes the risks and exaggerates the benefits in order to encourage consumers to pursue treatment, ad is thus unreliable).

For human rights as the minimal threshold, see THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 25 (2nd ed., 2008). On the content and substance of the right to health, see Aeyal Gross, The Right to Health in an Era of Privatization and Globalization - National and International Perspectives, in EXPLORING SOCIAL RIGHTS 289, 295 (Daphne Barak-Erez & Aeyal Gross eds., 2007).
that determine the minimal conditions for a safe procedure should and could be universal, since good medical practice does not depend on cultural or national values. Although standards typically are not backed by sanctions, international institutions, such as the WHO or other professional organizations, could set helpful professional standards of medical care.125

An ethical concern may arise if the standards applied to naturally pregnant women who deliver their own children in destination countries, are lower than the standards for those who are carrying a pregnancy for foreign women. Generally, the access to sexual and reproductive healthcare services in destination countries should improve for all women.126 From the perspective of the right to health, states are obligated to provide measures to minimize all barriers interfering with access of women to healthcare services (including affordable prices, information and education, and the obligation to respect, protect and fulfill women’s rights to healthcare both in public and private systems).127 Destination states should use their authority to apply the international regulations to raise the minimal threshold (preventive, promoting, and remedial action) and enforce proper standards in clinics that provide reproductive services, empower suppliers to make informed decisions by providing them with critical information about the procedure, and improve their capability of understanding the meaning of decisions they make regarding their bodies.128

125 Cohen, How to Regulate Medical Tourism, supra note 46, at 19.
126 The role of the state is to act in order to provide equal, nondiscriminatory access to the benefits of health services to all individuals, see Economic and Social Council, ICESCR General Comment No. 14 (The Right to the Highest Attainable Standard of Health), UN Doc. E/C.12/2000/4, art. 12 (Aug. 11, 2000) (the state should adopt a public health strategy, addressing the health concerns of the entire population, including those whose poverty, disabilities, or background make them the most vulnerable; provide measures to eliminate barriers that women face in gaining access to healthcare services, including affordable prices (art 12(1)(21)); ensure information and education and enforce the obligation to respect, protect and fulfill women’s rights to healthcare both in public and private systems (art 12(1)(13-14)). States are also obligated to respect the negative aspects (freedoms) of the right to health, to refrain from directly or indirectly interfering with the enjoyment of a right by denying or limiting access, by blocking equal treatment for all people, or by enforcing discriminatory practices or prohibiting third parties to deprive its people of the guaranteed right.). See also Audrey R. Chapman, Globalization, Human Rights, and the Social Determinants of Health, 23 BEOETHICS 97, 102 (2009).
128 See, e.g., Donchin, supra note 84, at 326 (calling for a greater duty to explain the risks than that of women who are undergoing treatment to circumvent their own infertility, because these women are being treated for another’s benefit, and the treating clinic has a powerful incentive to maximize benefits to those who pay their fees. For example, she mentions a duty to tell egg donors in advance that they might have difficulty conceiving in the future or might give birth to a child who develops a disability.).
The ability to ensure minimal professional standards would require improving the position of the poor in the structure by the provision of medical treatment to all women, and might depend on the amount of needed resources.\textsuperscript{129}

International law confronts this problem. The obligations of states according to human rights mechanisms are relative to their levels of development and available resources.\textsuperscript{130} Besides “core obligations” associated with the right to health,\textsuperscript{131} the International Covenant on Economic, Social and Cultural Rights includes an article which lays a duty on lower-middle-income countries to take steps to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the covenant by all appropriate means, including particularly the adoption of legislative measures.\textsuperscript{132}

This may imply that in poor and lower-middle-income countries with limited ability to protect health rights, the duty to ensure the standard of care should be lower than in affluent countries.\textsuperscript{133} The right to reproductive health may contribute a notion of the core duties that states owe women. In cases of severe deficit, the duties of destination states require a consideration of the overall allocation of resources to healthcare, rather than only on national resource allocation within healthcare.\textsuperscript{134} When resources are few, the failure of destination governments to provide a minimal threshold of human rights for their citizens compromises their responsibility to prevent the violation of health rights. However, destination states should not be exempt from these core duties, in spite of limited resources, when they fail to allocate resources.\textsuperscript{135}

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\item See, e.g., Tobin, supra note 3, at 346 (regarding the costs of the measures required to ensure that a woman provides her fully-informed and free consent).
\item Chapman, supra note 126, at 102.
\item For accountability for reasonableness regarding resource allocation in developing countries, see NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY, chap. 10 (2008).
\item See Amartya Sen, Why health equity?, 11 HEALTH ECON. 659, 661 (2002).
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Accordingly, a shared responsibility model requires a foundation for more extensive international assistance and cooperation. The fact that destination countries should alleviate the harms caused by cross-border reproductive care but fail to do so ought not to prevent consumers’ countries and international institutions from fulfilling their commitments. The same article that differentiates the duties of low-resource countries from those of rich ones implies the residual responsibilities of states, particularly those with greater financial and technical resources, to assist and cooperate beyond their borders.\textsuperscript{136} It emphasizes the importance of international financial aid and technical assistance for implementing the rights in the Covenant. Consumers’ state duties may include tax-financed official development aid, paid by clinics or doctors that mediate cross-border reproductive transaction services, to ensure that suppliers have medical insurance, according to just principles.\textsuperscript{137} This would not release destination countries from their duties to promote relevant public goals and allocate resources among their own citizens.

While the required medical standards for performing egg recruitment or an In Vitro Fertilization (IVF) procedure in a surrogate apply to any procedure anywhere across the globe and should be universal and professionally-based, the terms of the contract require more flexible regulation and may be open to negotiation between associates, with the understanding that there is some room for contextual interpretation. In the next part I will suggest possible tools for ensuring desirable terms of contract.

\textsuperscript{136} Chapman, supra note 126, at 103 (arguing that article 2 of the International Covenant on Economic, Social and Cultural Rights emphasizes the importance of international financial aid and technical assistance for implementing the rights in the Covenant. It also implies the human rights responsibilities of states, particularly those with greater financial and technical resources, beyond their borders.); Hilary Charlesworth, Christine Chinkin & Shelley Wright, Feminist Approaches to International Law, 85 AM. J. INT’L L. 613, 645 (1991) (calling for expansion of state responsibility to incorporate responsibility for systemic injustice based on international conventions).

\textsuperscript{137} For a tax from rich countries regarding medicines, see generally NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 117 (2011); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE 316 (2006) [hereinafter NUSSBAUM, FRONTIERS OF JUSTICE] (arguing that rich nations ought to give a minimum of 2 percent of GDP to poorer nations. A mechanism should be developed to transfer this money to suppliers in other countries or to advance their interests.); Cohen, How to Regulate Medical Tourism, supra note 46, at 17; Thomas Pogge, Access to Medicines, 1 PUB. HEALTH ETHICS 73, 76-78 (2008). See, e.g., About, UNITAIDS, http://www.unitaid.eu/en/who/about-unitaid (last visited Feb. 19, 2014) (29 countries have voluntarily chosen to impose on airlines departing from their countries a tax on departing passenger tickets collected by the airlines set by the country in order to fund UNITAIDS, a NGO aimed at scaling up access to treatment for HIV/AIDS, malaria and tuberculosis, primarily for people in low-income countries. Similar funding could be directed to medical insurance of suppliers, or women’s health funds in destination countries.). The problem remains with transactions that are constructed online through international brokers.
3. The terms of the contract

The shared responsibility model provides understandings of fair transactions for reproductive services. There might be legal regulations that are able to minimize some of the concerns regarding exploitative conditions and help reduce the negative impacts of cross-border reproductive transactions. Known information regarding the current exploitative practice of surrogacy transactions, can teach us regarding many of the aspects that contracts should address, including the process of informed consent, the price, living standards of surrogates during pregnancy, basic freedoms (the right to movement, the right to control of their bodies), family visiting rights, medical insurance, screening processes of potential suppliers, medico-ethical considerations such as a neutral personal doctor for suppliers, translators for the surrogate (unrelated to the clinic treating the intended parents), the supplier’s right to complain or press charges, the surrogate’s assimilation back in her community after birth, and more.138 My proposal regarding regulation of contracts is based on two concepts: basic human rights demands and a fair trade model.

a. Human rights protection

Aside from a few, most of the terms should and could be universal, as they regard basic rights that should not be violated, such as women’s and children’s rights, health rights, and reproductive rights.139 The advantage of using human rights is that this international legal instrument offers substantive and practical benefits140: it is based on a common ground for understandings and cooperation and clarifies an acceptable universal benchmark, while allowing contextual national interpretation. Human rights provide a mechanism to fight the failure to provide them and an enforcing system that could be effective. This mechanism enables international monitoring on one hand, possibly with the help of international institutions as part of a global strategy, but on the other hand, by addressing individual claims it relates to individuals rather than to states.

138 I will elaborate on the content of desirable contracts in the Israeli example, infra sec. IV.4.
139 For human rights implications of cross-border surrogacy transactions, see Bassan, supra note 111; Ergas, supra note 66, at 428.
140 On the use of international human rights as a legal instrument, see Chimni, supra note 107, at 14-15; Ergas, supra note 66, at 429.
At the international level, a political mechanism should allow professional and human rights organizations to resist powerful political and economic interests that may compromise human rights in order to promote neo-liberal considerations.\footnote{See, e.g., Kelley Lee et al., Bridging the Divide: Global Governance of Trade and Health, 373 LANCET 416, 420 (2009) (suggesting that budget funds in the WHO should be forthcoming to strengthen the organization’s capacity to engage more actively in trade and health issues).} There are some international legal tools related to health and trade that could be of use. The WHO’s International Health Regulations encourage states to implement health measures, in accordance with their relevant national laws and obligations under international law, in response to specific public health risks or public health emergencies of international concern.\footnote{WHO, INTERNATIONAL HEALTH REGULATIONS, art. 43 (2\textsuperscript{nd} ed., 2005), available at \url{http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf?ua=1}.} Based on evidence of risk and unsafe practices, this could be a ground for international regulation, requiring that health measures be more restrictive of trade in reproductive services and based on international standards, among other considerations. The Framework Convention on Tobacco Control could inspire such a legal framework, given the similarity in the concern that liberalizing the trade might encourage consumption.\footnote{The WHO Framework Convention on Tobacco Control, June 16, 2003, 2302 U.N.T.S.166. See LAWRENCE, supra note 131, at 296.} The framework convention should not prevent states from entering into compatible multilateral agreements, and should encourage governments to adopt measures beyond those required by the convention.

\textbf{b. Safeguards for negotiable elements}

While medical standard and human rights issues should be cogent and cannot be compromised, other issues within the contract are negotiable and could be left to choice within a framework that safeguards minimal thresholds. Contracts should leave room for negotiation according to individual, national, or cultural values, as long as they express responsibility towards all associates including consumers, suppliers and the resulting children. Regarding surrogacy, living arrangements could be, for example, such a topic. It is in the interest of the clinic that surrogates live in better pregnancy-related conditions, and do not have sexual intercourse with their husbands (which might expose them to diseases). The clinics also receive additional payment for the surrogate’s food and accommodation.
from the intended parents.\textsuperscript{144} This solution is not necessarily negative. It may be compatible with the surrogates’ interest in minimizing the negative stigma in their communities, and they might want to accept it.\textsuperscript{145} Such an arrangement may express recognition of suppliers’ needs, and respect for their position. Price is another example of a negotiable term; although it may be flexible, a minimal sum for payment should be considered. The pursuit of personal or national interests is legitimate, but regulated standards similar to fair trade standards of conduct, should and could be drafted with regard to the negotiable elements in the transaction. Some bilateral agreements have begun to do so regarding migrants’ rights in response to pressure from advocates and from countries of origin.\textsuperscript{146} Similar pressure could provoke such a move regarding cross-border reproductive contracts for eggs and surrogacy services.\textsuperscript{147}

States should join forces and agree on a threshold of minimal medical, ethical and safety conditions that will safeguard the parties’ basic rights and provide a framework of negotiation in order to minimize the possibility of exploitation. State intervention represents society’s position regarding fair terms and its commitment to allowing the transactions to take place only if the results of the transactions are fair.\textsuperscript{148} It is not considered paternalistic, nor does it diminish the associates’ autonomy.\textsuperscript{149} Rather, it is justified due to the acknowledgement of asymmetry in bargaining positions had the intervention not taken place,\textsuperscript{150} especially in light of the mentioned evidence of the current negative implications. It is questionable whether destination states will actually be willing to engage in international agreements that deprive them of the power they have over “their”

\textsuperscript{144} CENTER FOR SOCIAL RESEARCH, supra note 8, at 52.
\textsuperscript{145} Saravanan, supra note 122, at 8 (reporting that some surrogates were happy to stay in the surrogate home and escape daily household chores or domestic problems); SAMA–RESOURCE GROUP FOR WOMEN AND HEALTH, BIRTHING A MARKET: A STUDY ON COMMERCIAL SURROGACY 39, 123 (2012), available at http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf.
\textsuperscript{146} Jennifer Gordon, People are Not Bananas: How Immigration Differs from Trade, 104 NORTHWESTERN UNIV. L REV. 1109, 1127 (2010) (explaining that some agreements inform migrants of their rights, while others include enforcement mechanisms for those rights).
\textsuperscript{147} See also Donchin, supra note 84, at 330 (reporting that lately some destination countries that had offered access to foreigners for medical care are considering regulation to reduce access, e.g., Poland and other Eastern European destination countries).
\textsuperscript{148} WALZER, supra note 14, at 60.
\textsuperscript{149} Anita L. Allen, Surrogacy, Slavery, and the Ownership of Life, 13 HARV. J. L. & PUB. POL’Y 139, 141 (1990) (arguing that as long as the state is requested to acknowledge, let alone enforce, surrogacy contracts, one cannot argue that regulating the practice is paternalistic).
\textsuperscript{150} See Dahan et al., supra note 89, at 453.
women’s reproductive capacities. Yet, I believe that in light of the declining control that lower-middle-income countries suffer from in the free market, many destination states will have an interest in collaborating in order to protect the fundamental rights of their women and reclaim their former power over “national reproductive capacities.” By recognizing that suppliers of reproductive services are the most economically and emotionally vulnerable party to the transaction, states should ensure that the parties’ participation in the market is conducted under “fair conditions,” as is the case with other protective legislation such as labor legislation, on behalf of minors, and other disadvantaged parties. Following is a suggested general framework for such fair standards.

A possible tool could be borrowed from the concept and practical model of fair trade. Coffee bean pickers, surrogates and egg sellers are the people behind the scenes. The fact that surrogates and egg sellers provide a service rather than sell a product is irrelevant for the sake of the proposed model. Similarly to fair trade, and just as coffee bean pickers should be safeguarded in their work, surrogates should be safeguarded while providing their service. Moreover, if we find it important to protect those who pick our coffee beans, this should apply all the more when it comes to those who provide the genetic material of our babies to term, or carry our babies. Under fair trade principles, there are some sectors in which governments supervise and control the legitimacy of quality criteria of imported products, for example, the 1993 French establishment of an obligatory government-supervised organic certification scheme. Quality, in this sense, refers not only to safety that safeguards consumers, but also to cultural and ethical qualities, sensitive to both the social and environmental needs of individuals and populations in the places of

151 Heather Widdows, Border Disputes Across Bodies: Exploitation in Trafficking for Prostitution and Egg Sale for Stem Cell Research, 2 INTL J. FEMINIST APPROACHES TO BIOETHICS 5, 9 (2009) (discussing the analogy of labor law as justified for state intervention, due to recognition that workers are vulnerable and prone to exploitation. Labor relations are protected by legal restrictions and limitations on working conditions, and involve judicial intervention in settling industrial disputes.).

152 For a suggestion of principles of fair trade in surrogacy services, see, e.g., Casey Humbyrd, Fair Trade International Surrogacy, 9 DEV. WORLD BIOETHICS 111, 116-18 (2009). See also Nir Eyal. Global Health Impact Labels, in GLOBAL JUSTICE IN BIOETHICS 241, sec. 3 (Ezekiel Emanuel & Joseph Millum eds., 2012), available at http://peh.harvard.edu/events/2013/global_health_footprint/PDF/Eyal_GHILs.pdf (suggesting the creation of a global labeling or accreditation standard that audits facilities and informs medical tourists of how attentive a facility is to healthcare access concerns regarding the local population).

manufacture. Conceptualizing a fair standard model based on the fair trade idea and practice could therefore be helpful to ensuring ethical standards in the procedure, in addition to medical safety.

Solidarity-based multilateral agreements and voluntary work by professional organizations have proven successful regarding health worker migrations. One possible model to examine in voluntarily coordinating multinational concerns is the WHO’s Global Code of Practice on the International Recruitment of Health Personnel, which was drawn up in order to promote voluntary principles and practices for the ethical international recruitment of health personnel. The code specifically relates to the responsibilities and rights of recruitment practices (including when doing so from countries facing a critical shortage). It determines, for example, a limitation on recruitment in accordance with the needs in the personnel’s own health system (art. 4.2) on one hand, and the equal rights and responsibilities of recruited migrant health personnel and the domestically trained health workforce (art. 4.5) on the other. Such a code could jointly condemn certain conduct while requiring consideration of foreign actors, and it could also support an information exchange system and establish a network of national authorities.

Contextualization requires interaction between society and the political institutions. Theoretically, there should be an option of using the inputs of states in the international political structure in order to consider broader considerations through activities such as public workshops, public debates, etc. From bottom to top, states should be actively involved in designing international norms, and allowed to voice concerns and reservations, considering the particular stake a state has in the subject – whether it is a consumer state, a surrogate state, an egg-donor state, or a combination of them. It has been suggested, for example, that in order to shape and manage trade policies that affect health, the WHO should work with ministries of labor, education, finance, foreign affairs, trade and

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154 Id. at 421; Lee et al., supra note 141, at 420.
156 Id., at art. 7.
commerce to provide training on health-related implications of trade agreements, and improve everybody’s knowledge and capacity to operate within their states.157

According to the shared responsibility model, individuals are not exempt from duties. Regarding negotiable terms, specific individuals’ duty may be relatively narrow and include mainly the duty to design the terms of their specific transaction, and to ensure fair distribution of benefits. As private consumers, they hold capacities and power to influence the market and change unjust terms, using their economic muscle to demand fair contractual terms and raise awareness of injustice, when necessary. Even strong associates have an incentive to take part in a “clean” practice, and most would consciously choose not to exploit if they had enough awareness. Nevertheless, changing a beneficial structure would naturally clash with the interest not to change.158 Young believes that external pressure could drive powerful associates (such as consumers) into action to change unjust situations.159 She uses the sweatshop example (consumers would not like to buy something produced in a sweatshop, thus manufacturers are pressured to act justly), and this argument is also deployed by many other fair-trade activists. I am skeptical regarding Young’s assumption that beneficiaries of an unjust process would voluntarily adapt to changed circumstances, at least in the case of infertility. People may not buy coffee picked under exploitative terms and settle for the second-best choice of coffee, but not being able to have children any other way involves heavier suffering. Moreover, greater consideration of suppliers will increase the price of non-exploitative transactions, and may leave transactions unaffordable for many. Nevertheless, I am happy to find that my skepticism has proven to be too pessimistic, at least in the sense of consumers’ willingness to participate in ethical transactions. An Israeli initiative called “Responsible Surrogacy” is meant to expose potential consumers of cross-border surrogacy to information about the ethical aspects of the procedure, with the hope that it will drive consumers to demand

157 WHO, EVERYBODY’S BUSINESS, STRENGTHENING HEALTH SYSTEMS TO IMPROVE HEALTH OUTCOMES – WHO'S FRAMEWORK FOR ACTION 10, 17, 23, 32 (2007), available at http://www.who.int/healthsystems/strategy/everybodys_business.pdf. On the importance of improving coherence across different sectors through, for example, interministerial committees, see Lee et al., supra note 141, at 421.

158 A.J Julius, Nagel’s Atlas, 34 PHIL. & PUB. AFF. 176, 192 (2006) (recognizing that the richest people in the world might oppose his theory since they have too much to lose).

159 Young, supra note 12, at 127. See also Renard, supra note 153, at 423 (arguing that consumers will be willing to pay more for if they are guaranteed that ethical manufacturing is in order or a price premium will actually reach producers).
agreements that incorporate these considerations. The motivation for this project stems from the understanding of intended parents that the moral responsibility lies with them, and that their stand may lead to changes in the procedure in favor of all involved. I find it to be a good example of incorporation of individual duties.

c. Monitoring

A framework for fair transactions raises a need for international regulation of individuals’ relations within the global market. Some trade-related cooperation would have to take place. In the current international order it is unclear which institutions should be assigned the authority to monitor cross-border transactions and suggest adaptations. Since cross-border reproductive transactions involve medical procedures, economic transactions, and women’s bodily services, collaboration between women’s organizations (such as UN Women or others), the WTO or the World Bank, and the WHO seems a fruitful direction and could offer imperative points of connection between trade and health in general, and regarding reproductive services in particular. Regulating health-related trade probably exceeds the current mandate of the WHO – the prevention of disease migration. The roles of the World Bank and WTO also do not necessarily cover all these rights. Nevertheless, these institutions are concerned with capacity-building within these countries, which can be used as a common framework for collaboration.

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160 PUNDEKAUT ACHRAIT [RESPONSIBLE SURROGACY], http://www.r-surrogacy.org/ (last visited July 20, 2014). A website that discusses many areas in which ethical problems may taint the contract making it undesirable for the surrogate in order to raise the consciousness of, as well as market pressure on, potential consumers.

161 See, e.g., THE CENTER FOR POLICY ANALYSIS ON TRADE AND HEALTH http://www.cpath.org (publishing a list on globalization and health, and posting brief descriptions and contact information for additional key organizations attempting to address the public health effects of global trade).

162 Cohen, Medical Tourism and Global Justice, supra note 49, at 50-51.

163 International Bank for Reconstruction and Development Articles of Agreement, THE WORLD BANK, art. IV, sec. 10 (Feb. 16, 1989), available at http://web.worldbank.org/WEBSITE/EXTERNAL/EXTabOUTUS/0, contentMDK:20049603~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708~isCURL:Y,00.html (stating that political affairs fall outside the realm of factors that the World Bank and its officers are authorized to consider). See Chapman, supra note 126, at 107-08 (arguing that there is no basis in international law for arguing that human rights promotion is within the mandate of the World Bank and the WTO).

164 See Procedural Decisions of the Committee on Economic, Social and Cultural Rights, Decisions adopted by the Committee at its eighteenth session, U.N. Doc. E/1999/22, para. 515(7) (1998) (“Effective social monitoring should be an integral part of the enhanced financial surveillance and monitoring policies accompanying loans and credits for adjustment purposes. Similarly the World Trade Organization (WTO) should devise appropriate methods to facilitate more systematic consideration of the impact upon human rights of particular trade and investment policies.”). See also Building Trade Capacities, WTO,
and UN Women fit more naturally with issues that lie at the heart of cross-border reproductive markets. Both are committed to monitoring wider systematic progress, and their goals and functions may justify intervention in regulating and monitoring cross-border reproductive transactions. Moreover, extensive intervention by these two organizations, rather than the WTO or the World Bank, may prevent the further commercialized perception of the procedure and better express the relationships and contextual needs behind markets in women’s bodily services.

Monitoring the market effectively requires international as well as national cooperation. If we want all associates to fairly enjoy the opportunities that the market has to offer, coordination between international institutions and national bodies is needed. International institutions, for example, have important roles to play in supporting governmental actions: UN Women must support intergovernmental bodies in their formulation of policies, global standards and norms, help member states implement these standards, standing ready to provide suitable technical and financial support to those countries that request it, and forge effective partnerships with civil society. The WHO similarly defines among its roles the establishment and maintenance of effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and other organizations in order to assist governments, upon request, in strengthening health services. The WHO can use its capacity to collect data from member states as part of its country analysis to provide consistent, comparable information about cross-border...
reproductive transactions and their effect on women suppliers’ health that could help to maximize the potential of successful duties.  

Fair terms of reproductive services provision could be monitored by international institutions, but cannot be achieved without parallel enforcement by states. The burden of ensuring that the transaction has not exploited the conditions of poverty in the destination country should lie on consumers, but the obligation to demand and monitor that conditions are compatible with the international standard is an obligation of the state. Consumers’ states can revise contracts and make sure that they comply with the standard safeguards, as done domestically, for example, in Australia (VIC, WA and, by practice rather than legislation, ACT), Greece, Israel, and South Africa, which revises contracts including ethical approval of the process. Today some countries review contracts retrospectively, as part of the process of granting legal parenthood or nationality (e.g., Brazil, Mexico, Holland). However I think that a procedure that revises the contracts ex ante could better ensure just terms rather than after a child is already involved. I suggest that any procedure carried out abroad require prior approval from a revising committee ensuring the terms of the contract, and not begin before such approval is granted. Otherwise, the state will find itself confronted with children resulting from undesirable surrogacy procedures but unable to do anything to minimize the damage.

Regulating a framework for fair terms of transactions for reproductive services would probably be more attractive to consumers’ states that accept some sort of commercialization of reproductive services, even if restrictedly. Politically, it may be hard for countries that nationally completely ban the supply of reproductive services to regulate a market that they consider intrinsically unethical or wrong. However, due to the fact that even prohibiting states would acknowledge the resulting children due to the implications that such trade has for children’s rights, I think these duties are not voluntary and should engage any state,

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168 On the collection of information (e.g., statistics and standards), see, e.g., Hague Convention on the Protection of Children, supra note 112, at art. 7.
169 For the Spanish case, see Storrow, supra note 25, at 544.
170 PERMANENT BUREAU, supra note 53, at n. 63.
171 Mexico, INTERNATIONAL SURROGACY ARRANGEMENTS, supra note 10, at 271, Holland, id. at 287.
172 Tobin, supra note 3, at 344.
whichever national policy it holds.\textsuperscript{173} As long as its citizens are involved in cross-border reproductive markets, they become associates and should bear this duty.

\textbf{4. The Israeli example}

Israel, with growing experience with multinational surrogacy, is the first country to legislate surrogacy and one of the first countries to urge the international community to develop a multilateral response to the difficulties arising from the disharmonized regulation between different jurisdictions.\textsuperscript{174} An interesting draft bill submitted recently in Israel would amend the law in a noteworthy attempt to confront the difficulties that stem from cross-border surrogacy transactions.\textsuperscript{175} Many principles mentioned in this paper are reflected and implemented in this proposal. Article 1 reflects consistency, as it applies the law to any surrogacy arrangement for Israeli citizens, carried out in Israel or anywhere else. Articles 2 and 7 specify minimal medical standards (limitations on the number of transactions each surrogate can take part in, and on the number of trials that can be carried out each time). Article 6 recommends separation of the medical staff between the intended mother and the surrogate. It is meant to ensure that the surrogate’s best interests are the sole consideration for her medical staff and that the professional staff does not suffer from a conflict of interest. Reflecting proportionality, the bill equalizes the eligibility of all citizens for domestic surrogacy, enlarges the national pool of potential surrogates and suggests including married women as potential surrogates, in addition to single women, although it does not ban cross-border transactions (maybe due to the acknowledgement that the state will not be able to enforce it). By meeting the principle of proportionality cross-border transactions will not be abolished, but their rate may decreased in favor of a safer domestic procedure, subject to Israeli monitoring and standards.

Nevertheless, some demands are missing from the regulation of domestic surrogacy and should be taken into consideration. In an ethical contract, the surrogate should be recognized and her agency respected in the decision-making regarding her body. Currently the rights of the surrogate to choose her physician, to make decision over her body, or to

\textsuperscript{173} Humbyrd, \textit{supra} note 152, at 116 (arguing that a framework for ethical surrogacy arrangement should be mandatory rather than optional).
\textsuperscript{174} Baker, \textit{supra} note 114, at 412.
\textsuperscript{175} Draft Bill Amending the Law of Agreements to Carry Embryos (No. 2), 2014, HH 916 (Isr.).
terminate the pregnancy, are not specifically stated. An embryo, or a fetus, albeit not made from the gametes of the supplier, is nonetheless connected to her body, to which she has the only right. This balance should be kept even within a surrogacy transaction. Suppliers should be free to regret their decision, yet be paid for their effort until that point, without being considered liable for breaking the contract. Also missing are any possible relations between the surrogate and the resulting child: neither her right to get any information about the child, nor the right of the children to information (similar to adoption arrangements). Additionally, the draft bill provides a limitation on the payment to the surrogate, while leaving intact all the other payments that switch hands as part of the procedure. Physicians, clinics, mediators, all can gain an unlimited amount and their interest in finding loopholes remains intact. Only the opportunity of the surrogate, the weakest associate, is limited. If the rationale behind this article is not to expose women to exploitation, it would be better to remove the financial incentives of mediators, and to set the payment made to surrogates as a minimal threshold. The draft bill does not appoint any national monitoring body to make sure that the procedure is conducted properly, not generally, and specifically not of mediators.

A specific subsection in the draft bill relates to cross-border transactions and expresses a certain commitment to critical aspects of justice. First, articles 17H-I relate to the terms of the contract, demanding that the surrogate sign the contract before the first treatment, that information regarding the meaning and consequences of the treatment be given to her and that she freely consent to the procedure, that the surrogate get a copy of the contract, that the contract not contradict the law in the destination country (including legal eligibility of foreigners for domestic surrogacy services and the demand that domestic laws in destination states acknowledge the child as the consumer’s child), that consumers be obligated to take the resulting child in any case and not be able to reject it (due to abnormalities, disabilities, etc.), that the contract protect the rights of the foreign surrogate

176 Humbyrd, supra note 152, at 117 (recommending that payment must be independent of pregnancy outcome, such as miscarriage, voluntary abortion, stillbirth or disabled child).

177 It is hard to determine what is considered a fair price. A minimum price might reduce exploitive conditions towards the supplier by giving them better payment for their work; however, it might raise objections on the part of infertile patients incapable of paying higher amounts. These people would not be able to recourse to the market to fulfill their right to reproduce. A possible suggestion may be to set a minimum price, or to determine that suppliers get no less than 50% of the value of the transaction.
regarding her body regarding termination of pregnancy and other issues. The draft bill also states that statistical information regarding the number of applications and actual procedures carried out should be transparent. Although I am not sure that the state can ensure the extraction and enforceability of all these demands, I find moral value in the requirement to revise them. Although I am not sure that the state can ensure the extraction and enforceability of all the above mentioned demands, the bill reflects a serious intent to confront the challenges posed by cross-border transactions. It will hopefully reduce the number of cross-border transactions and increase the number of nationally, better monitored, domestic transactions.

There are several important issues, currently either missing or insufficiently addressed, regarding which I would recommend improvement. The draft bill avoids mentioning preliminary criteria for a foreign surrogate, as it does for Israeli surrogates, and I recommend stating them. Most importantly, the draft bill does not relate to the implications for the child or its intended family of illegal procedures carried out across the border other than criminalization of all involved. Which authority should be responsible for the child in case intended parents are penalized and put in jail? Administratively, in order to comply with the right of the child to certain information regarding the surrogate, it is suggested that a registry of all associates (suppliers, consumers, mediators) be kept. I also suggest that the foreign surrogate be informed, in addition to all the abovementioned information, of her right to complain about any misconduct at the Israeli embassy.

In this section I have tried to show that under a just structure cross-border reproductive transactions would be less objectionable. Nevertheless, the bill still reflects the existing power imbalance, as it fails to abolish the commercial incentives of mediators who profit from the bodily services of poor women. The draft bill proposes that mediators and agencies involved in cross-border reproductive transactions be accredited after their proper conduct is ensured. Although this practice is quite common, I do not recommend it. Former experience shows that the licensing of certain mediators assigns great power to private entities and may involve corruption or advance commercial benefits to the chosen agencies. There is no justification for further commercializing the procedure by promoting the financial interests of mediators. The most significant improvement the Hague convention
suggested regarding international adoption at the time was to administratively control mediators and replace “for profit” entities with “nonprofit” ones.\(^\text{178}\) I argue that such procedures should be carried out by state institutions or by nonprofit NGOs, similar to those who administrate adoption in Israel.\(^\text{179}\) Taking a page from the 1993 Hague Convention on Adoption, it may be useful to draft general standards and safeguards. Ethical guidelines for such organizations should be clearly drafted as well as monitoring mechanisms.

The draft bill expresses Israel’s consideration of its responsibilities towards its citizens and towards foreigners too, due to the effect of its policy on foreign suppliers. It tries to ensure that cross-border transactions will be monitored, inasmuch as a unilateral action can ensure, while safeguarding most of the rights of foreign surrogates and equalizing the demands with those regarding national transactions. That said, the ability of the proposed bill to abolish exploitative transactions is dubious. The enforceability of the criminal offences will not necessarily reduce exploitative transactions, for example, in the case of mediators or physicians who are not Israeli. This also takes us back to the question of the extraterritorial authority a state has over its citizens when privately engaging in transactions which are legal where they are carried out.\(^\text{180}\) In the absence of justification for using the legal tool of extraterritorial offences, only domestically-related elements could be criminalized. On the assumption that the basic conditions of supply and demand remain unchanged, the concern arises that bargaining power will stay about the same, and future contracts will reflect it, to some extent. As I suggest next, any comprehensive regulation must relate to the wider aspects, and address the unequal opportunities and background inequality in standing in society that serve as incentives for women to enter into reproductive services transactions.

\(^\text{178}\) On safeguarding against the abuse of intermediaries in the Hague convention, see Baker, supra note 114, at 422-25.
\(^\text{179}\) Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, Directive 2004/23/EC (urging Member States to take steps to encourage a strong public and nonprofit sector involvement in the provision of tissue and cell application services and the related research and development). But see Cohen, How to Regulate Medical Tourism, supra note 46, at 15 (suggesting that the reviewing bodies should be third parties and not the government itself).
\(^\text{180}\) See supra, sec. II.1.
5. Wider requirements

Improving the terms of the transaction without changing a structure which excludes poor women from alternative occupations leaves intact inequalities and background injustice. Fair distribution of the benefits from the transaction would not necessarily be sufficient to maintain conditions for citizens’ equality, and could not compensate for the lack of children’s education, health insurance or housing and their contribution to pushing women into these markets. It would not change the ambitions and aspirations of the poor to earn money in order to be included and receive equal recognition.

While contract rules and safe medical care may be dealt with through regulation, the problem of poverty is unlikely to be cured by regulation alone. The fight for reduction of economic disparities is a wider problem, not specifically related to cross-border reproductive transactions. It is one of the main concerns of the global justice literature, and clearly wider than the scope of this paper. However, it could and should be one of the considerations regarding regulation according to the shared responsibility model. Miller mentions two preliminary conditions that states must ensure: first, some degree of freedom (hence a minimal threshold) is needed as a preliminary condition for participation in the market system. Second, states should accept terms of trade only when it benefits their citizens, and not as a result of a decision by a coalition of other states, with conflicting interests. In this part I will therefore sketch only briefly some recommendations regarding two contexts: the reduction of poverty, and the procedural justice in international institutions that govern the international order.

a. Capabilities

The unjust market is the result of the social, political, and legal situation in destination countries. There is a correlation between poverty, social vulnerability, and the accumulation of risks. Lack of social support (welfare or other) in destination states creates vulnerabilities that help to sustain a need for money, due to which the poor cannot refuse or renegotiate

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181 Onora O'Neill, *Justice, Gender and International Boundaries*, 20 British J. Pol. Sci. 439, 457 (1990) (arguing that by idealizing capacities and independence of parties involved in market transactions, liberalism overlooks power asymmetry and obscures why the weak may be unable to dissent to arrangements proposed by the strong); Pogge, *supra* note 124, at 30 (arguing that we should think not only about remedial measures, but also about how the injustice of the global order might be diminished through institutional reforms).

182 Miller, *supra* note 95, at 396-97.
transactions that might hurt them, even though theoretically these contracts are open to negotiation.\textsuperscript{183} Vulnerabilities are socially constructed. In a country like India, for example, which lacks social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society, salary, especially of poor unskilled women in lower positions, hardly covers basic needs. Housing, medical treatment, and education of the children become mega needs and women need to pursue private options to get them.\textsuperscript{184} As long as these conditions endure, poor people will remain oriented towards transactions that do not truly improve their position. Their lower bargaining position will make them accept almost any offer. Since the main motivator of the market is insufficient alternatives to earn money, it is clear that fighting poverty should be part of the solution.

Social exclusion and inequality cannot be rectified unless society changes its norms and expectations towards the poor. The demand for recognition is explicit. “Respecting another person is not just limited to leaving her alone; respecting another person involves attending to the conditions that are necessary for her thriving. And it also means seeing that she has equally available to her the basic conditions of meaningful self-direction.”\textsuperscript{185} Equal status is achieved when people see each other as a legitimate source of independent claims (with rights, liberties, and minimal resources such as education, but not necessarily equal income) of equal moral worth, each having bargaining power with no need for another’s permission to do so. The model should strive to conceptualize cultural recognition and social equality through empowerment, solidarity and support, regardless of low status or political powerlessness.\textsuperscript{186}

Comprehensive human development involves the economic, educational, social, cultural, and political development of the individual, family, and community in order to empower these populations and support the necessary conditions for achieving a life of human flourishing.\textsuperscript{187} Rawls calls these conditions “primary goods” that a rational person would want irrespective of what else she would want; they are fundamental to our feeling of

\textsuperscript{183} O’Neill, \textit{supra} note 181, at 456.
\textsuperscript{184} CENTER FOR SOCIAL RESEARCH, \textit{supra} note 8, at 32.
\textsuperscript{185} Callahan & Roberts, \textit{supra} note 13, at 1207.
\textsuperscript{186} WALZER, \textit{supra} note 14, at 118 (stating this requirement in order to reach complex equality).
\textsuperscript{187} NUSSBAUM, \textit{CREATING CAPABILITIES}, \textit{supra} note 73, at 21.
wellbeing, security, comfort and happiness. Amartya Sen and Martha Nussbaum define a set of “capabilities,” which are minimum requirements of justice needed to attain an individual’s central functioning and freedom of choice. Their approach focuses on the conditions that allow freedom of choice and the pursuit of a “flourishing life” or self-realization. I support Nussbaum and Sen’s approach because it is contextual, meaning; the person is seen as part of an entire environment which is taken into consideration. The duty stemming from capabilities is a heavier duty than the duty of the human rights approach. While human rights aim at setting a threshold that does not infringe the right, the obligation according to the capability approach aims at a threshold level that ensures capabilities, the condition that enables human flourishing in ways that are in compliance with people’s own desires and wishes for living a dignified life. Capabilities are a substantial tool to enable the distribution of opportunity that any decent political order must secure.

According to the capabilities approach, any regulation of the market must provide associates with conditions that nurture capabilities. Access to social goods that support capabilities should neither be part of the market nor depend on individual preferences for having them. Citizens should be able to participate as market agents free from the influence of poverty, hunger, illiteracy, or morbidity. I think that a structure in which the state provides safety nets of substantive needs to its poor is crucial, regardless to any interconnection, since at lower levels of vulnerability, the tradeoffs that suppliers would be willing to make would be different. Suppliers should not enter reproductive transactions

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188 RAWLS, supra note 1, at 54.
189 For the list of capabilities, see NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 33-34; NUSSBAUM, FRONTIERS OF JUSTICE supra note 137, at 76-78.
190 NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 23.
191 For an overview of the capabilities approach, see generally NUSSBAUM, CREATING CAPABILITIES, supra note 73; MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4–11 (2001); AMARTYA SEN, INEQUALITY REEXAMINED 39–53 (1992); AMARTYA SEN, THE IDEA OF JUSTICE 231-35 (2009). For differences between Nussbaum’s and Sen’s versions, see NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 19-20; NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, at 11-15. For capabilities across national boundaries, see NUSSBAUM, FRONTIERS OF JUSTICE supra note 137, at 273–315.
192 NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 33.
194 WALZER, supra note 14, at 180. Cf. id. at 56-57 (claiming regarding guest workers that in a constrained labor market (where unions and the welfare state protect the worker) the wages and working conditions of the undesirable jobs might improve radically, which might raise the costs of transaction and challenge the existing social hierarchy).
out of despair and may not be willing to enter exploitative transactions when the state provides them with safety nets. “Enough” capabilities regarding food and livelihood enables people to make a truly free choice between participating and refusing to participate in reproductive markets. Capable suppliers will have different alternatives in case they don’t want to sell reproductive services; they should be free to choose not to supply reproductive services if they care to do so. In these circumstances any choice could be respected, including the choice to transact their reproductive capacity, as long as the terms are fair, but such a decision should be taken from an empowered position.

This argument assigns responsibility to the governments of destination countries to improve capabilities, and holds them accountable for poverty. Letting destination states off the hook regarding the importance of background conditions in cases of exploitation would contribute to social acceptance of transactions based on inequality in background conditions both in poor and in affluent countries. It might also normalize more subtle exploitations of economic vulnerability. I think that in today’s reality, there are many places in which cross-border reproductive transactions are already normalized. States do not fight to stop them.\textsuperscript{195} National political structures are therefore assigned a duty to improve the social/political/economic conditions necessary in order to achieve a life of human flourishing.\textsuperscript{196} Autonomy requires a set of possible options to choose from, offered to women who cannot provide for their families without compromising their own health and wellbeing. If people must earn money, states should strive toward changing the social division of labor in order to change the bias of the structure itself.\textsuperscript{197} Society should consider “the right to a basic income” as a social good that should be equally available to all, as well as the interrelated right to social security. The least a state should do is secure the basic rights and capabilities of citizens who cannot earn an income in the labor market. They must provide the needed measures (regulative and other), invest resources, enact laws, and develop infrastructure, institutions, and policies to ensure minimal conditions.

\textsuperscript{195} See Miller, \textit{supra} note 95, at 392 (claiming that injustice could occur even when agents do not take any positive action that affects a second party, and should be addressed).

\textsuperscript{196} NUSSBAUM, \textit{CREATING CAPABILITIES}, \textit{supra} note 73, at 113 (arguing that each nation should provide support of the central capabilities of all citizens).

\textsuperscript{197} On the understanding on the role of the state in providing meaningful work, see Beate Roessler, \textit{Meaningful Work: Arguments from Autonomy}, 20 J. POL. PHIL. 71, 91-92 (2012). On the characteristics of desirable work, see \textit{id.} at 86.
Their accountability grows when they provide care to foreign consumers in a way that might extend existing inequalities in the state (especially if their citizens normally do not have access to these services).

Consumers’ countries might be more remotely connected to background conditions and the implementation of international norms in suppliers’ countries, which are extant regardless of cross-border reproductive transactions. They have no direct connection to the world’s poverty, gender or class inequality. Class inequality is not a harm caused by the participation of their citizens in cross-border reproductive transactions. There is no causal relationship between the two. Inequalities that we see today derive from external factors such as status hierarchies, organizational structures and power relationships. This argument enables consumers’ states to renounce their national ethical standards regarding foreign suppliers of reproductive services and roll the responsibility towards governments in destination countries, where the transactions occur and where the suppliers offer their services. Yet affluent countries are engaged and accountable.\(^\text{198}\) Dependency on transactions that stem from these inequalities leads to commercial connections which, although related only indirectly to inequality, should not release states from accountability.\(^\text{199}\) These factors will have to be addressed through the activities of consumers’ states in international institutions, on which I elaborate next.

\(^{198}\) For excessive poverty as the responsibility of the politically and economically influential states, see, e.g., NUSSBAUM, CREATING CAPABILITIES, supra note 73, at 42; NUSSBAUM, FRONTERS OF JUSTICE supra note 137, at 316; Thomas W. Pogge, Moral Universalism and Global Economic Justice, 1 POL. PHIL. & ECON. 29, 44 (2002). For the basis of such a duty, see Benvenisti, supra note 16, at 308 (basing the duties on trusteeship for promoting the rights of all human beings and their interest in sustainable utilization of global resources); NUSSBAUM, FRONTERS OF JUSTICE supra note 137, at 115 (basing responsibility on past colonialism); Thomas W. Pogge, Eradicating Systemic Poverty: Brief for a Global Resources Dividend, 2 J. HUM. DEV. 59, 73 (2001) (basing duty on the interests of affluent states to efficiently avoid externalities of poverty in advance rather than in retrospect. Pogge argues that cross-border externalities and risks will become a two-way street because no state will be able to effectively insulate itself. Poverty will cause military and terrorist attacks, illegal immigration, epidemics and the drug trade, pollution and climate change. I don’t see these externalities as relevant in the specific case of cross-border reproductive transactions.); Interim Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, To the United Nations General Assembly, UN Doc. A/58/427, para. 32. (Oct. 10, 2003) (by Paul Hunt), para. 32 (basing the responsibility to work actively toward equitable multilateral trading, investment, and financial systems conducive to the reduction and elimination of poverty on article 2 of the International Covenant on Economic, Social and Cultural Rights).

\(^{199}\) The fact that the destination country can alleviate the harms caused by cross-border reproductive care but fails to do so ought not to prevent consumers’ countries and international institutions from fulfilling their global justice commitment. Supra III.1.a, the accountability principle.
b. Striving to change the structure

The current global trade structure is unjust, even if transactions work to everybody’s advantage, because not all parties to the contract hold equal social power, and the norms regulating the cross-border market reflect this inequality. At the moment, negotiation to determine desirable international trade norms is in itself subject to inequalities and power imbalances between the states. Critics challenge the norms adopted by international institutions for serving the dominant groups in society, and denying equal economic beneficence to others.\textsuperscript{200} The negative impacts of international rules (distributive injustice and lack of recognition) on the lives of the subaltern classes are well known, yet institutions still avoid revising their policies and affluent states have not minimized the externalization caused by transnational transactions.\textsuperscript{201} At the same time, the scope of states’ moral duty in international norms is unclear without any concrete liability for the welfare of the marginalized. Archibugi argues that in light of the difficulty of constructing democracy at an international level on a state-like model, we often neglect the possibility of pushing for greater legitimacy of the decision-making process, even in those areas where it would be feasible to do so.\textsuperscript{202} The shared responsibility model aims to correct unjust structures that affirm inequalities by changing the framework at many levels, rather than focus only on individual behavior.\textsuperscript{203} States operating within international institutions are accountable for designing rules of conduct that sustain unjust power relations. The responsibility for rule-making cannot be dismissed.

\textsuperscript{200} Lee et al., supra note 141, at 417 (arguing that the priorities of countries with the greatest resources remain dominant).
\textsuperscript{201} Joshua Cohen & Charles Sabel, Extra Rempublicam Nulla Justitia?, 34 PHIL. & PUB. AFF. 147, 154 (2006) (arguing that in spite of the possibility of making different rules that would better address the needs of those worse off without large costs to others, people who are badly off are not getting an acceptable share, decent opportunities, or reasonable improvements).
\textsuperscript{203} For the need for restructuring international institutions, see NUSSBAUM, FRONTIERS OF JUSTICE supra note 137, at 319; A.J Julius, supra note 158, at 188 (agreeing that this is the site of justice and claiming that institutions are instruments that are meant to direct people’s actions to serve certain interests. We should not direct people’s actions to serve our own interests unless we can show that the results are something that these people have a reason to want); Marti Koskenniemi, What Should International-lawyers Learn from Karl Marx?, 17 LEIDEN J. INT’L L. 229, 236 (2004); O’Neill, supra note 181, at 458; Thomas W. Pogge, The Incoherence between Rawls’s Theories of Justice, 72 FORDHAM L. REV. 1739, 1751-52, 1756 (2003); Miriam Ronzoni, The Global Order: A Case of Background Injustice? A Practice-Dependent Account, 37 PHIL. & PUB. AFF. 229, 245 (2009); Nancy Fraser, Transnationalizing the Public Sphere, (March, 2005), http://republicart.net/disc/publicum/fraser01_en.htm (last visited Nov. 16, 2014).
Rules can structure procedures that enable new vocabularies for public claim-making. Associates should either develop new procedural tools (institutions and rules) or strengthen existing ones in order to face the new and complex reality and correct the power balance. States’ international responsibility for shaping global social arrangements should be compatible with their position in decision-making procedures and intergovernmental bargaining. This duty lays more burdens on affluent countries. In the current situation, these states are in a stronger position to influence the international order and are dominant decision-makers in international institutions. Consumers’ states have a neo-liberal interest that developing countries be a platform for trade under a neo-liberal regime. They are engaged by motivating destination countries to promote free global trade through reproductive markets, among others, and should bear responsibilities for negative impacts that stem from the neo-liberal order dictated by international institutions, which they dominate. They should therefore bear greater responsibility for improving the procedural international rules. Destination countries often suffer erosion in sovereignty due to external forces, be they other states or business enterprises, and are forced to collaborate within the framework of neo-liberal principles and surrender to international trade forces. Where poor states are unequally represented in the international decision-making process, where their sovereignty is dominated by private interests rather than democratic ones, they cannot be expected to bear the same responsibilities as states that are gaining more power due to the neo-liberal regime. A shared responsibility model thus answers the demands for justifying external duties incumbent upon richer states and other institutions.  

The development of mechanisms for institutional international considerations exceeds the scope of this paper, but I will briefly comment on issues in need of further development. First, global trade regulations should be sensitive to social needs, even at the expense of economic values. International institutions should redesign the global sphere in a way

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204 It can be attributed to the TWAIL perspective. See Opeoluwa Adetoro Badaru, Examining the Utility of Third World Approaches to International Law for International Human Rights Law, 10 INTEL COMMUNITY L. REV. 379, 383 (2008) (“the utility in TWAIL analysis is its ability to show how the activities in one part of the world can have detrimental effects in other parts of the world (the Third World especially), and hence, could equip scholars with justifications for extraterritorial obligations from richer states.”).

205 See Ronald Labonte, Globalization, Health, and the Free Trade Regime: Assessing the links, 3 GLOBAL DEVELOPMENT & TECH. 47, 66 (2004) (arguing that the WTO, as an institution, should be judged for how it contributes to the accomplishment of basic rights, human development, health and environmental sustainability goals, rather than simply on the degree to which it succeeds in promoting trade and investment.
that enables all associates to enjoy cross-border transactions fairly under safe standards. This does not mean that inequalities will cease to exist, but inequality will be tolerable only as long as it is extant among free citizens and to the advantage of all. It could change, for example, the priority that international regulation awards to trade interests over social considerations. If international rules acknowledge the needs of women in poor populations (potential suppliers) – to be able to provide for their families – it could have the potential to result in norms that increase women’s bargaining power.

Second, regulations should bear a democratic character and must be the outcome of public engagement and joint authorization, outlining how values are indeed chosen in the name of the general population, rather than merely serving those in power. Procedures should be restructured to ensure that those states whose capacities and opportunities are limited have options to choose from, good reason to accept the norms, and are not forced into arrangements. Different rules regarding procedural justice should allow due process and more transparency of decisions, protecting substantive rather than formal equality, without taking away the voice of the affluent countries. A possible legal tool to reach this goal could be through the framework of “international/global administrative law” within global governance. These theories relate to the multilayered norms in the international and national spheres, the diversity of national regimes that implement these norms, and the different groups that they affect. They could be helpful in capturing the complexity of international rulemaking.

Third, I recommend considering procedural and substantive engagement of concerned individuals as part of a more contextualized rulemaking process. Alternative mechanisms

liberalization. Changes should be made in WTO agreements when they conflict in any way with the accomplishment of these and other important norms and goals.).

POGGE, supra note 124, at 15 (arguing that the existence of an adversarial system, in which others and their representatives can vigorously pursue their interests, can justify prioritizing fellow members and group interests only if the institutional framework structuring the competition is minimally fair).

The central idea in this “involvement of will” theory is that it is impermissible to speak in someone’s name (and therefore in the name of all) unless that person (and therefore all) is (are) given equal consideration in making the regulations, which are represented as jointly authorized.

for the representation of all associates in international decision-making, not exclusively through the sovereignty of the state, could improve the interaction between society and the political institutions which make the rules, and ensure that they take into consideration the effect on others. 209 Walzer claims that political power is the ability to be included: to make decisions over periods of time, to change the rules. 210 Representation is of primary importance in order to incorporate such considerations, as it is the expression of recognition. 211 Improving representation expresses recognition to individual members within society, as full partners in social interaction.

Individual representation could be accomplished with the help of NGOs. 212 Nonprofit organizations often represent the interests of the underprivileged in society, who tend to have no structures of representation in public affairs. 213 It has been suggested that a locally rooted (bottom-up) model could create networks of stakeholders and join them together in an organization that efficiently conveys information through social networks and ensures decent conditions. 214 Such an organization could also represent suppliers’ interests. The collaboration of women with other impoverished populations, from different countries, in

209 Cohen, How to Regulate Medical Tourism, supra note 46, at 11(calling for representation of the affected population as part of the process of decision-making). E.g. Chimni, supra note 107, at 13 (suggesting representation of subaltern classes in negotiation teams by states); Cohen & Sabel, supra note 201, at 170 (suggesting an inclusion of the informal sector in the ILO decisions).
210 WALZER, supra note 14, at 58.
211 Nancy Fraser, Rethinking Recognition, NEW LEFT REV. 107, 113 (2000).
212 See B.S. Chimni, Marxism and International Law: A Contemporary Analysis, ECON. & POL. WKLY. 337, 344 (1999) (criticizing the absence of non-state bodies as well, such as interest groups and civic organizations, that would represent the impoverished classes). But see Sangeeta Kamat, The Privatization of Public Interest: Theorizing NGO Discourse in a Neo-liberal Era, 11 REV. INT'L POL. ECON. 155, 161 (2004) (arguing that the influence that advocacy NGOs have in international policy forums can be seen to undermine the sovereignty of state and international institutions).
213 Kamat, supra note 212, at 156 (reporting that given expanding market economies and shrinking states, NGOs are stepping in to respond to the needs and demands of the poor and marginalized sections of society). For a possible role for nongovernmental organizations, nationally and internationally, see Young, supra note 12, at 129. See, e.g., Chapman, supra note 126, at 107 (discussing human rights advocates that have tried to influence policies, practices, and operations of various international organizations, particularly international financial institutions and the WTO, by reminding them of the human right obligations of member states). For some groups that are currently working in destination countries to address injustices, see, e.g., Donchin, supra note 84, at 332 (noting the work of SAMA in India, to add enforcement measures to the presently voluntary guidelines for the regulation of ART clinics); Women and Medical Technologies, ISHA L’ISHA FEMINIST CENTER, http://www.isha.org.il/eng/docs/P176/ (last visited, June 28, 2013) (last visited, June 28, 2013) (a feminist organization in Israel, which has taken upon itself to begin a public discourse and engage on issues related to health, particularly on the interrelations between reproductive rights and technological developments and their social and economic implications for society in general and for women in particular. They serve as one of the leading voices of women’s rights in the country, especially representing women suppliers of reproductive services, egg donors and surrogates.).
214 Rittich, supra note 110, at 218-19.
similar positions, albeit not fighting the same fight, could create a coalition of actors with a common interest.\textsuperscript{215} Such connections have been proven to be effective, although, in order to truly serve the interest of all groups, coalitions should be aware of similarities as well as disparities between collaborating populations and between the fights chosen. It is also important to note that the use of suppliers for such purposes is not exploitative in itself.

The tools for implementation of this model are left for future research.

\section*{V. Conclusion}

After considering unilateral action by states (both consumers’ states and destination states), I have found it to be insufficient in order to achieve comprehensive ethical regulation. I have suggested a shared responsibility model as an alternative theoretical foundation for assigning duties. Under the shared responsibility model, attention is paid to whether and how social factors contribute to the incidence of injustice in order to distinguish different degrees of responsibility of all associates. This model not only suggests remedies to exploitative transaction, but aims to correct the structure of injustice that entrenches inequalities and poverty.

I have offered four parallel fields where I believe action is needed: joint action regarding legal parenthood and the nationality of the child; the professional field, to ensure universal norms of proper medical standards; the contractual field, to avoid violation of women’s and children’s rights, as well as a model of fair trade to better divide the benefits from transactions; and lastly, a general global commitment to the reduction of poverty and the improvement of procedural tools to promote procedural justice in institutions that sketch the global order.

\textsuperscript{215} Whittaker, \textit{supra} note 10, at 113 (suggesting that international umbrella organizations for patients, such as International Consumer Support for Infertility (iCSI), could present patients’ perspectives and influence legislation and guidelines on assisted reproduction services transnationally). On the logics of transnational collaboration, see Vera Mackie, \textit{The Language of Globalization, Transnationality and Feminism}, 3 INT’L FEMINIST J. POL. 180, 194 (2001). For examples of different coalitions and networks that have expressed concern about the impact of global trade on health services and democracy, and succeeded in preventing decisions regarding privatization, see Ellen R. Shaffer et al., \textit{Global Trade and Public Health}, 95 AM. J. PUB. HEALTH, 23, 32 (2005).
The shared responsibility model reflects different voices and challenges the languages used, the categorization, the structure of organizations and legal materials. Every relevant feature of cross-border reproductive services transactions is examined and responsibility assigned accordingly: the meaning of parenthood, the psychological implications of infertility, existing opportunities for infertile individuals, background conditions of suppliers, the role of agents, the implications of reproductive services for suppliers in the context of their life conditions, legal infrastructure (the reproductive health policies that regulate assisted reproduction, private trade law), etc. The division into specific areas of action emphasizes the common understandings between actors and minimizes disagreements. At the same time, under the suggested model, states remain entirely free to regulate or restrict cross-border reproductive transactions in whatever way they deem fit, as long as they respect minimum safeguards. Duties exist in spite of the familial-private character of the decision to be assisted by suppliers of reproductive services, whether we place the transaction in the private family sphere or the public market sphere, whether or not we recognize a basic global institutional structure, and whether the violations of suppliers’ rights qualify as severe human rights violations or are lower than that. The shared responsibility model deconstructs the selective accountability of strong actors and the power concentrated in their hands and does not dismiss the indirect associates engaged. The model makes it possible to assign greater responsibility to those who contribute more to the unjust situation, for example through direct causal connections, based on empirical investigations of actions and interactions within the practice and their effect on the unjust results. The obligation has to grow stronger due to the asymmetric power relations between the parties to the transaction.