SHIFTING SANDS IN THE INTERNATIONAL ECONOMIC SYSTEM: "ARBITRAGE" IN INTERNATIONAL ECONOMIC LAW AND INTERNATIONAL HUMAN RIGHTS

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ABSTRACT

International economic law is in the middle of rapid sea changes, arising from converging demands for deep reform on all fronts. These reforms range from current initiatives to recast the orthodox substantive guarantees of foreign market access, investment protection, prudential regulation and financial stability to states' choices between paths of unilateralism, bilateralism, regionalism, multilateralism, or some hybrid multi-speed variation between gradualism and compliance with economic commitments. They also include the formulation of different proposals to revise the dispute settlement mechanisms in world trade law, to rewrite the terms of investor-state dispute settlement, and to harden a definitive dispute settlement process for states' international financial obligations. Beyond these main threads of reform, however, international economic law is also increasingly challenged to meet frontier regulatory challenges, such as those arising from new disruptive technologies in the "sharing economy" and their implications for ensuring fair competition through cross-border anti-trust laws.

Reforming the terms of international economic law (writ large) creates heightened opportunities for arbitrage. In this context, firms, third states, and

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other non-state market actors can more easily take advantage of disparities between international economic rules throughout different jurisdictions undergoing their respective reform processes in treaty programs, regulatory design, and participation in international economic institutions. I argue that, beyond the escalating influence of international human rights in rewriting the terms of international economic law, international human rights—especially states' duties in economic, social, and cultural rights—exist as a foundational normative imperative for states, which can help address the underlying arbitrage problem in a more anticipatory (and not merely reactive) way. While the acts of arbitrage of firms, third states, and other non-state market actors (who take advantage of lingering loopholes in the process of reforming international economic law) may well be technically "legal" acts in relative non liquet situations, arbitrage may also result in a push to the "regulatory bottom" that can jeopardize the progressive realization of international economic, social, and cultural rights within states. States will thus have to embed international human rights assessments in every step and phase of the design of international economic law reforms to confront and mitigate the underlying arbitrage problem in the ongoing reform of international economic law.

I. INTRODUCTION: REGULATORY ARBITRAGE IN INTERNATIONAL LAW

> *"Global action is important to minimize regulatory arbitrage, promote a level playing field, and foster the widespread application of the principles of propriety, integrity, and transparency."*[1]

> *"The strong incentives for regulatory evasion and arbitrage, combined with the inherently disadvantageous position of regulators, also explains why regulation has to focus both on products and institutions and on the overall economic/financial system. Awareness of the strong incentives for regulatory evasion and arbitrage, together with awareness of the asymmetries in costs and benefits (the costs being borne by society, the benefits accruing to a few private parties), suggest that regulators should be both proactive and cautious."*[2]

> *"Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision . . . the most effective techniques are more pernicious, crafted by lawyers to meet the letter of the law while undermining its spirit, successful only until government discovers and closes the loophole."*[3]

> *". . . regulatory arbitrage depends on a rich ecosystem of diverse regimes and types of law, which are not organized into any clear, coherent, hierarchical whole."*[4]

Regulatory arbitrage is a phenomenon often associated with conflict of laws or private international law, where firms compare the relative costs of doing business based on different regulatory rules across national jurisdictions, such as rules on tax, corporate compliance, and

1. The G-20 Toronto Summit Declaration, June 26-27, 2010, ¶ 24, https://www.oecd.org/g20/summits/toronto/g20-declaration.pdf (last visited Aug. 1, 2017).

2. Joseph Stiglitz, *Regulation and Failure*, *in* 11 DAVID MOSS AND JOHN CISTERNINO (EDS.), NEW PERSPECTIVES ON REGULATION 21 (Tobin Project, 2009).

3. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 299 (2010-2011).

4. Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 63 CORNELL INT'L L.J. 72 (2014) [hereinafter Riles 2014].

banking.[5] Because regulatory arbitrage is a routine practice of firms choosing the most favorable national jurisdiction in which to do business, states inevitably engage in regulatory competition among themselves to attract private firms to site their business activities in their respective territories.[6] Jurisdictions that offer the fewest possible compliance burdens on private firms presumably generate the lowest costs of doing business.[7] However, this is a short-sighted and reductionist view of law as nothing but transaction costs.[8] It problematically denies law any meaningful role in the creation and perpetuation of structures that sharpen economic inequalities, or in striving towards the achievement of economic justice.[9]

Regulatory arbitrage is a matter that should also concern public international lawyers—and perhaps all the more so with the continued proliferation of international economic treaties[10] that increasingly

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5. *See* Tulio Rosembuj, *International Tax Arbitrage*, 39 INTERTAX 158, 158-68 (April 2011); Benjamin M. Weadon, *International Regulatory Arbitrage Resulting from Dodd-Frank Initiatives Regulation*, 16 N.C. BANKING INST. 249, 249-72 (2012); Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. OF INT'L LAW 563, 563-637 (1998).

6. Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996), *reprinted in* JOEL P. TRACHTMAN, THE INTERNATIONAL ECONOMIC LAW REVOLUTION AND THE RIGHT TO REGULATE 26 (Cameron May ed., 2006).

7. Josiah Ober, *Access, Fairness, and Transaction Costs: Nikophon's Law on Silver Coinage (Athens, 375/4 B.C.E.), in* 51 DENNIS P. KEHOE, DAVID M. RATZAN, & URI YIFTACH (EDS.), LAW AND TRANSACTION COSTS IN THE ANCIENT ECONOMY 52 (U. Mich. Press 2015) ("The basic idea behind transaction costs economics is simple: if the costs of doing business are low, more business will be done, and, all other things being equal, this will benefit society as a whole – it will raise the society's stock of material goods by allowing society to reap more benefit from the socially cooperative activity of free exchange.").

8. ERIK P. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION 218 (Routledge 2014) ("Viewing legal compliance or non-compliance as a cost of doing business fundamentally alters the way in which law is seen. Conceiving of law as a transaction cost and lawyers as transaction cost engineers operates not only at a descriptive level but a normative one too. Law may be drained of its normative force, as well as of its effective influence on human behavior, when modeled as a mere drag coefficient on economic activity.").

9. *See* FRANK GARCIA, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES 273-342 (Cambridge Univ. Press 2013).

10. Tomer Broude, Marc L. Busch, and Amelia Porges, *Introduction: Some Observations on the Politics of International Economic Law, in* 1 TOMER BROUDE, MARC L. BUSCH, AND AMELIA PORGES (EDS.), THE POLITICS OF INTERNATIONAL ECONOMIC LAW 12 (Cambridge Univ. Press 2011) ("The proliferation of international economic treaties over the past quarter century, both in investment and trade, has become a hallmark of the field, bearing with it a host of political questions. Why are these treaties made? How do they interact, in terms of institutional politics and values, with other regimes and with the multilateral level of economic regulation? What are the political

form part of the regulatory fabric that firms consider in their business calculus.[11] States likewise deploy international economic treaties as a matter of strategic foreign policy to reap geopolitical and economic advantage.[12] With international economic treaties now critical to firms' regulatory arbitrage practices (especially, for example, with respect to firms' assessments of investment treaty, tax, and intellectual property protections that a state offers),[13] it is not at all surprising that non-governmental organizations[14] (including corporate lobbies) are becoming more active, if not significantly influential, in states' treaty-making processes.[15]

Public international lawyers should always be sensitive to the regulatory arbitrage practices that can arise from the writing, rewriting, and

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forces, interest groups, and processes that influence their legal content? How politicized is their operation and implementation? What is their impact on political relations?").

11. *See* Richard Harroch, *20 Key Due Diligence Activities in a Merger and Acquisition Transaction*, FORBES (Dec. 19, 2014), https://www.forbes.com/sites/allbusiness/2014/12/19/20-key-due-diligence-activities-in-a-merger-and-acquisition-transaction/#6abcb87c4bfc (among the twenty standard items in business due diligence for mergers and acquisitions, Forbes magazine lists many matters that involve international law, such as the "competitive landscape," "governmental regulations, filings, and compliance with laws," "environmental issues," "technology and intellectual property" labor contracts and non-competition agreements).

12. *See* KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 26 (Oxford Univ. Press 2017) ("State Department officials were quite conscious that they were projecting U.S. constitutional and legal principles into the world . . . the United States set out to create a new postwar order in which 'American institutions would provide the model' . . . . As the Department explained in 1952, 'our foreign economic policies attempt to translate what we have learned into international terms.'").

13. *See* Matthias Pannier, *Nationality of Corporations under Domestic Law: A Comparative Perspective, in* 11 FEDERICO ORTINO, LAHRA LIBERTI, AUDLEY SHEPARD, HUGO WARNER (EDS.), INVESTMENT TREATY LAW: CURRENT ISSUES II 14 (BIICL 2007) ("Investors can choose the BIT which is most favourable to them. This form of regulatory arbitrage is well known in company law and has been discussed especially in the US."); REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 186 (Cambridge Univ. Press 2007) ("Tax arbitrage can be defined as transactions that are designed to take advantage of differences between national tax systems to achieve double nontaxation."); Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. (forthcoming 2003), http://people.ischool.berkeley.edu/~pam/papers/IP%20arbitrage%20duke.pdf.

14. *See* Nadia Bernaz & Irene Pietropaoli, *The Role of Non-Government Organizations in the Business and Human Rights Treaty Negotiations*, J. HUM. RTS. PRAC. 1, 1-25 (2017); Peter Malanczuk, *Multinational Enterprises and Treaty-Making – A Contribution to the Discussion on Non-State Actors and the 'Subjects' of International Law, in* VERA GOWLAND-DEBBAS (ED.), MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS 63 (Springer 2013).

15. *See* Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 264-321 (2016) (arguing that business entities already play important roles in the production of treaties, and that international law should respond "in real time" to business roles in treaty production).

revision of international economic treaties (including non-treaty instruments that also contain operative cross-border economic rules, primarily through global standard-setting in international financial law,[16] international telecommunications and internet governance, and intellectual property, among others). This is due as much to the continuing need to address demands of *procedural fairness*[17] (e.g., protecting the "level playing field"[18] in the international economic system by ensuring that international economic rules articulate and reflect the best possible or achievable balance of interests of all market actors, state and non-state), as it is due to the higher claims of *substantive justice* (e.g., ensuring that the international economic treaty rules normatively provide for sustainable development and the widest possible justice that can be made available to all state and non-state constituencies of the

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16. *See generally* Alexandra Kern, *Global Financial Standard-Setting, the G10 Committees, and International Economic Law*, 34 BROOKLYN J. INT'L L. 861, 861-82 (2009); Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINNESOTA J. INT'L L. 480, 480-88 (2011); Biel Company, *A Public Law Approach to Internet Standard-Setting*, 7 GOETTINGEN J. INT'L L. 49, 49-94 (2016); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889,1889-1980 (2002).

17. *See* Andrew D. Mitchell, Elizabeth Sheargold, & Tania S.L. Voon, *Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment*, J. WORLD INV. & TRADE (forthcoming), https://papers.ssrn.com/sol3/papers.cfm (last visited Aug. 1, 2017).

18. JOHN E. ROEMER, EQUALITY OF OPPORTUNITY 1 (Harv. Univ. Press 2009) ("Two conceptions of equality of opportunity are prevalent today in Western democracies. The first says that society should do what it can to 'level the playing field' among individuals who compete for positions, or more generally, that it level the playing field among individuals during their periods of formation, so that all those with relevant potential will eventually be admissible to pools of candidates competing for positions. The second conception, which I call the nondiscrimination principle, states that, in the competition for positions in society, all individuals who possess the attributes relevant for the performance of the duties of the position in question be included in the pool of eligible candidates, and that an individual's possible occupancy of the position be judged only with respect to those relevant attributes."); ANDREW MASON, LEVELLING THE PLAYING FIELD: THE IDEA OF EQUAL OPPORTUNITY AND ITS PLACE IN EGALITARIAN THOUGHT 2, 3, 7 (Oxford Univ. Press 2006) ("[E]quality of opportunity requires advantaged social positions to be subject to open competition. . . this vision of what it is to level the playing field [is] the 'meritocratic ideal of equality of opportunity'. . . the underlying motivation of the ideal of equality of opportunity, properly understood, is to counteract the effects of people's different natural and social circumstances whilst permitting inequalities of condition that emerge as a result of their choices . . . equality of opportunity might be a complex ideal that consists of more than one principle, with different principles governing different aspects of people's circumstances or different kinds of good, some of which are committed to strict equality of some sort . . . whilst others merely require providing everyone with access to some of the goods they need in order to be able to lead a decent life. . . .").

international economic system).[19] Both of these claims of procedural fairness and substantive justice are well encompassed in Thomas Franck's famous definition of the concept of legitimacy in international law:

> Legitimacy is used here to mean that the quality of a rule *which derives from a perception on the part of those to which it is addressed that it has come into being in accordance with right process.* Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights.[20]

Public international lawyers are at the heart of writing and rewriting international economic rules, particularly when they advise governments and international organizations involved in the negotiation and renegotiation of international economic treaties.[21] As of this writing, various rulemaking and rule-reform initiatives are simultaneously underway in various regions and involve prominent states worldwide, arising mainly due to major geopolitical realignments since 2016:

1. The United States' new trade policies under the Trump Administration disfavoring multilateral trade agreements in favor of new bilateral agreements[22] and seeking exit, if not at least revision, of agreements deemed to be contrary to American interests, such as from the Trans-Pacific Partnership (TPP),[23] the North American Free Trade Agreement (NAFTA),[24] and the South Korea and United

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19. *See* Donald McRae, *International Economic Law and Public International Law: The Past and the Future*, 17 J. INT'L ECON. L. 627, 627-38 (Sept. 2014); Barbara Stark, *Jam Tomorrow: Distributive Justice and the Limits of International Economic Law*, 30 THIRD WORLD L.J. 3, 3-34 (2010).

20. Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

21. David Anderson, *The Role of the International Lawyer in the Negotiation of Treaties, in* DAVID ANDERSON (ED.), MODERN LAW OF THE SEA 325-40 (Brill 2007).

22. Geoffrey Gertz, *What will Trump's embrace of bilateralism mean for America's trade partners?* BROOKINGS (Feb. 8, 2017) https://www.brookings.edu/blog/future-development/2017/02/08/what-will-trumps-embrace-of-bilateralism-mean-for-americas-trade-partners/.

23. Press Release, Office of U.S. Trade Representative, The United States Officially Withdraws from the Trans-Pacific Partnership (Jan. 30, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf.

24. Press Release, Office of U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.

States Free Trade Agreement (KORUS FTA),[25] as well as the United States' seeming abandonment of the multilateral trade dispute settlement system under the World Trade Organization (WTO),[26] in favor of using domestic legislation to impose targeted trade sanctions against countries with whom the United States has pronounced trade deficits, most notably China;[27]

2. The United Kingdom's 2016 decision to leave the EU (Brexit) under Article 50 of the Treaty on the Functioning of the European Union (TFEU), triggering negotiations with the EU on withdrawal terms, a prospective U.K.-EU free trade agreement, and giving rise to the need for the United Kingdom to renegotiate around 759 of its treaties due to Brexit;[28]
3. China's growing leadership of world trade and investment initiatives seen in its One Belt, One Road (OBOR)[29] infrastructure investment projects in around sixty countries, its leadership in the creation and financing of the Asia Infrastructure Investment Bank,[30] and its spearheading of

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25. Press Release, Office of U.S. Trade Representative, USTR Calls a Special Session under the U.S. – Korea Trade Agreement (July 2017) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-calls-special-session-under-us.

26. *See* Gregory Shaffer, Manfred Elsig, & Mark Pollack, *Trump is Fighting an Open War on Trade. His Stealth War on Trade May be More Important.*, WASH. POST (Sept. 27, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/; Rosalind Mathieson, *U.S. Block of WTO Appeals Body Compromises System, Director Says*, BLOOMBERG (Nov. 8, 2017), https://www.bloomberg.com/news/articles/2017-11-08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says.

27. Press Release, Office of U.S. Trade Representative, USTR Announces Initiation of Section 301 Investigation of China (Aug. 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section.

28. *See* Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, FIN. TIMES (May 30, 2017), https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e.

29. *See* Zeng Lingliang, *Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny*, 15 CHINESE J. OF INT'L L. 517 (Sept. 2016); David Murphy, *One Belt One Road: International Development Finance with Chinese Characteristics*, *in* GLORIA DAVIES, JEREMY GOLDKORN, AND LUIGI TOMBA (EDS.), POLLUTION 245-53 (ANU Press 2016); Debin Du & Yahua Ma, *One Belt and One Road: The grand geo-strategy of China's rise*, 34 GEOGRAPHICAL RES. 1005, 1005-14 (2015).

30. *See* Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255 (Nov. 2016); Gerard J. Sanders, *The Asian Infrastructure Investment Bank and the Belt and Road Initiative: Complementarities and Contrasts*, 16 CHINESE J. INT'L LAW 367, 367-71 (June 2017).

the efforts for a sixteen-nation free trade area under the Regional Comprehensive Economic Partnership (RCEP),[31] comprising about 40% of the world's economy;

4. Japan-led initiatives in world trade, such as reaching new agreements like the EU-Japan Economic Partnership Agreement,[32] reviving the Trans-Pacific Partnership (this time recast as the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership") a year after the United States' withdrawal,[33] and launching Japan's "High-Quality Infrastructure Partnership Initiative" for developing countries[34] to counter China's massive OBOR program; and
5. The continuing expansion of new trade and investment agreements facilitated by regional organizations such as the Association of Southeast Asian Nations (ASEAN),[35] Asia-Pacific Economic Cooperation (APEC),[36] East Asia Summit (EAS),[37] Mercado Comun del Sur (MERCOSUR),[38]

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31. *See Give play of China's Important Role and Accelerate RCEP Negotiations*, MINISTRY OF COMMERCE (Sept. 1, 2014), http://english.mofcom.gov.cn/article/newsrelease/significantnews/201409/20140900720384.shtml; Laura Zhou and Liu Zhen, *China-led regional trade pact tries to make ground as restyled TPP pushes on without US: Nations aligned to Regional Comprehensive Economic Partnership continue to wrestle with the details after 20 rounds of talks*, SOUTH CHINA MORNING POST (Nov. 14, 2017), http://www.scmp.com/news/china/diplomacy-defence/article/2119911/china-led-regional-trade-pact-tries-make-ground.

32. *See Negotiation and Related Documents of the EU-Japan Comprehensive Economic Partnership Agreement*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/ (last visited Oct. 1, 2017).

33. *See Principles Agreed Upon for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GOV'T OF CAN., http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx (last visited Nov. 10, 2017).

34. Masaaki Kameda, *Abe announces $110 billion in aid for 'high-quality' infrastructure in Asia*, JAPAN TIMES (May 22, 2015), https://www.japantimes.co.jp/news/2015/05/22/business/abe-announces-110-billion-in-aid-for-high-quality-infrastructure-in-asia/#.WgxpPkzMzhM; Press Release, U.S. Trade and Dev. Agency, USTDA Partners with Japan's Ministry of Economy, Trade and Industry to Support Quality Infrastructure (Nov. 6, 2017), https://www.ustda.gov/news/press-releases/2017/ustda-partners-japan's-ministry-economy-trade-and-industry-support-quality.

35. *See Status of ASEAN's trade agreements with Dialogue Partners*, ASEAN, http://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/ (last visited Oct. 1, 2017).

36. *See Free trade agreements and regional trade agreements facilitated by APEC*, APEC, https://www.apec.org/Groups/Other-Groups/FTA_RTA (last visited Oct. 1, 2017).

37. *See* ASIAN ECONOMIC INTEGRATION 2017, ASIAN DEV. BANK (2017), https://aric.adb.org/pdf/aeir/AEIR2017_complete.pdf.

38. Claire Felter & Danielle Renwick, *Mercosur: South America's Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS (Sept. 13, 2017), https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc.

Economic Community of West African States (ECOWAS),[39] and the African Continental Free Trade Area (ACFTA).[40]

In an unprecedented era of rapid, parallel, and simultaneous changes to international economic rules, such as those that have crystallized following the geopolitical changes since 2016, it should be expected that firms will practice even more regulatory arbitrage. States will be even more hard-pressed to act in regulatory competition with each other[41]:

> From a public policy perspective, underlaps in rules may create gaps in regulation which eviscerate the regulation. Overlaps in rules may unjustifiably hinder international commerce . . . domestic rules may confer competitive advantages or disadvantages on firms that are subject to them, and these advantages may be a basis for firms to engage in regulatory arbitrage (private policy) and for states to engage in regulatory competition (public policy). Regulatory arbitrage accentuates the rewards of regulatory competition.[42]

The potential problems of unchecked regulatory arbitrage practices present themselves even more starkly in today's global environment suffused by international economic rules in flux—whether from the United States' recent corpus of unilateralist actions to terminate or rewrite key treaties in the international economic system;[43] the United Kingdom's continuing efforts to rewrite hundreds of treaties post-

39. *See ECOWAS Treaty and Related Instruments*, ECOWAS, http://www.ecowas.int/ecowas-law/treaties/ (last visited Oct. 1, 2017).

40. *See* AFRICAN CONTINENTAL FREE TRADE AREA: POLICY AND NEGOTIATION OPTIONS FOR TRADE IN GOODS, U.N. CONFERENCE ON TRADE & DEV. [UNCTAD] (2016), http://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf.

41. *See* BRUCE G. CARRUTHERS & NAOMI R. LAMOREAUX, REGULATORY RACES: THE EFFECTS OF JURISDICTIONAL COMPETITION ON REGULATORY STANDARDS, https://www.aeaweb.org/articles?id=10.1257/jel.54.1.52 (last accessed Oct. 1, 2017); Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction*, 3 J. INT'L ECON. LAW 331, 331-48 (June 2000).

42. Trachtman, *supra* note 6, at 26.

43. *See The President's 2017 Trade Policy Agenda*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf (last visited Aug. 1, 2017); VOXEU.ORG, ECONOMICS AND POLICY IN THE AGE OF TRUMP (Chad P. Brown ed., 2017), http://giovanniperi.ucdavis.edu/uploads/5/6/8/2/56826033/ageoftrump_june2017.pdf.

Brexit and the EU's responses to Brexit;[44] or the realignment of new trade and investment alliances in different configurations by China, Japan, Australia, Korea, and India,[45] as well as "Global South" regions.[46] In the increasingly "data-driven international economic law,"[47] market players that have better access to and facility for navigating such data stand to exert greater control and impact on the changing landscape of international economic rules. Not only is the level playing field tipped in favor of market players who can afford to shop across borders for the "weakest regulator" in a time of changing international economic rules,[48] but with enough preponderance and dominance, these market players can ultimately incentivize and nudge states to shift the international economic rules towards the "regulatory race to the bottom."[49] As Chris Brummer observed,

> [R]egulatory arbitrage and competition create seemingly unprecedented quandaries for international economic diplomacy. On the one hand, globalization forces officials and supervisors to regulate. Supervisors have to remain on top of

44. Paul McClean, *After Brexit: the UK will need to renegotiate at least 759 treaties*, FIN. TIMES (May 30, 2017), https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e.

45. Sheng Bin, *China's Trade Development Strategy and Trade Policy Reforms: Overview and Prospects*, IISD (Apr. 2015), http://www.iisd.org/sites/default/files/publications/china-trade-strategy-policy-reform.pdf; Giovanni Ki Lieto, *RCEP the grand blueprint of Xi Jinping's world trade game*, ASIA TIMES (Sept. 28, 2017), http://www.atimes.com/rcep-grand-blueprint-xi-jinpings-world-trade-game/.

46. *See* CARLOS CLOSA & LORENZO CASINI, COMPARATIVE REGIONAL INTEGRATION: GOVERNANCE AND LEGAL MODELS 247-462 (Cambridge Univ. Press 2016).

47. *See* Wolfgang Alschner, Joost Pauwelyn, & Sergio Puig, *The Data-Driven Future of International Economic Law*, 20 J. OF INT'L ECON. L. 217, 217-31 (June 2017).

48. ALEXANDER DAVIDSON, HOW THE GLOBAL FINANCIAL MARKETS REALLY WORK 5 (Kogan Publishers 2009) ("firms are seeking opportunities for regulatory arbitrage, gravitating to the jurisdiction with the weakest regulation").

49. *See* Carruthers, *supra* note 41, at 1 ("Businesses often greet attempts to pass new regulatory legislation with dire forecasts of the large number of enterprises that will leave the jurisdiction if the rules are imposed. . . . They are attempts to influence the course of political action and prevent the regulations from being adopted. If the attempts are unsuccessful, business enterprises may or may not actually 'exit,' but whether they will is something that policy makers need to be able to predict. Businesses will exit in response to new regulations only if they have somewhere else to go—that is, if there is another jurisdiction that does not impose similarly undesirable rules. In a global economy where capital is highly mobile, policy makers face pressures to be mindful of what their counterparts in other jurisdictions are doing. If they believe that businesses will relocate in response to differences in the regulatory burden, in order to forestall exit they may decide not to impose stricter rules, however socially valuable. Alternatively, they may deliberately weaken their rules in order to encourage businesses to move to their jurisdictions.").

> fast-moving financial institutions and market participants in order to stave off fraud and bank runs, among a litany of other nasty problems. On the other hand, their hands are often tied if they want to act unilaterally. Mobility generates opportunities for governments to exploit one another's decisions, good and bad. This can be helpful insofar as it forces regulators to think twice about their rules and by extension, the costs of inefficient policies. If their rules are too onerous, people might conduct their financial affairs elsewhere. But it also creates incentives to placate powerful financial interests even in the face of systemic risk. The prospect of financial institutions running for the proverbial exit doors to foreign shores can scare officials into adopting weak standards.[50]

Part II of this Article will identify four pathologies that can occur when firms practice regulatory arbitrage at a time of changing international economic treaty rules, and concomitantly, when states do not build in control mechanisms to adapt to and address such regulatory arbitrage practices. First, unchecked regulatory arbitrage practices can lead to *norm irrelevance*, when states adopt higher regulatory standards in new international economic treaties without acting on pre-existing international economic treaties that impose much lower regulatory burdens. While the states that adopt higher or stricter regulatory standards catering to public interests may convey the supposed "progressiveness" or "innovation" of these new generations of treaties,[51] their neglect of masses of pre-existing treaties that still adopt lower regulatory standards erodes the innovative regulatory potentials of new agreements. This is nowhere more evident than in the proliferation of "new generations" and so-called "models" of investment treaties that supposedly incorporate more public policy innovations and deference to host states' regulatory prerogatives and discretionary spaces, while the same states still maintain their "older" generations of investment treaties.[52]

50. CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 91 (Cambridge Univ. Press 2014).

51. *See* Trans-Pacific Partnership Ministerial Statement ¶ 4 (Nov. 11, 2017), https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/news/Pages/trans-pacific-partnership-ministerial-statement.aspx ("Ministers agree that the CPTPP maintains the high standards, overall balance and integrity of the TPP while ensuring the commercial and other interests of all participants and preserving our inherent right to regulate, including the flexibility of the parties to set legislative and regulatory priorities.").

52. *See Monitoring and Implementing AEC Investment Policy in ASEAN's Regional Treaties*, U.S. AGENCY FOR INT'L DEV. (Mar. 2016), https://nathaninc.com/wp-content/uploads/2018/05/

Ultimately, in framing their claims against host states, investors will still opt to use older bilateral investment treaties (BITs) that contain the highest possible investment protections, the least restrictions on the investors' ability to access the dispute settlement mechanism, and the lowest evidentiary or treaty standard burdens on investors against host states.[53]

Second, regulatory arbitrage practices amid changing international economic treaty rules can create precarious *reform gridlocks*, which can happen when firms gravitate in substantial numbers and entrench themselves with enough lobbying power or market influence into the jurisdictions with the weakest regulations.[54] This can be done in ways that are enough to deter, dissuade, or, at the very least, paralyze other states from ordinarily initiating the revision or reform of international economic treaty rules in the first place. This is crisply illustrated in states' current inability to reach international consensus on the cross-border regulation of the "sharing economy"[55] (e.g., firms with "disruptive models" such as Uber, Lyft, and Airbnb, among others, that provide on-demand services) and particularly market-dominant technology firms (e.g., firms such as Google, Apple, and Facebook, among others)[56] on various issues such as the scope of intellectual property protection, antitrust, and international competition law. These are arenas where the United States and the EU continue to differ on their public values and enforcement priorities.[57]

Third, unchecked regulatory arbitrage practices occurring during times of changing international economic treaty rules could also lead

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Monitoring-and-Implementing-AEC-Investment-Policy-in-ASEAN-ACTI-15D-003-2018.pdf (I did an extensive analysis of this phenomenon in regard to ASEAN's regional investment treaties and the remaining bilateral investment treaty programs of the ten ASEAN Member States).

53. *See* JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW § 2.3 (Oxford Univ. Press 2016).

54. MATS FORSGREN, THEORIES OF THE MULTINATIONAL FIRM: A MULTIDIMENSIONAL CREATURE IN THE GLOBAL ECONOMY 1-11 (3d ed. 2017).

55. *See* Erica de la Harpe, *Regulating the sharing economy*, WORLD FIN. (Dec. 7, 2016), https://www.worldfinance.com/strategy/regulating-the-sharing-economy.

56. *See* Mark Scott & Nicholas Hirsch, *Europe's Next Competition Clash: Online Data*, POLITICO (Aug. 25, 2017), http://www.politico.eu/article/europe-competition-google-amazon-facebook-data-privacy-antitrust-vestager/; *Challenges of International Economic Cooperation in Competition Law Enforcement*, ORG. FOR ECON. COOPERATION & DEV. (OECD) (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

57. *See The 'Sharing' Economy: Issues Facing Platforms, Participants, and Regulators*, U.S. FED. TRADE COMM'N (Nov. 2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy; *Collaborative Economy Analytical Papers*, EUR. COMM'N, http://ec.europa.eu/growth/single-market/services/collaborative-economy_en.

to states being mired in *rule inertia*, which happens when states have sufficiently signaled their preferred changes to international economic rules, giving enough lead time for firms to adapt to the expected changes, while the same states themselves overlook and fail to put in place their own transitional mechanisms to adequately prepare for the downside impacts of international economic treaty rule changes. Trade adjustment best exemplifies this phenomenon.[58] During years of trade agreement negotiations for increasing foreign market access, firms and powerful commercial associations are in a better position than the state's own domestic constituencies to anticipate, adapt, and take advantage of the impacts of the trade agreements on processes of production, terms of competition, and patterns of consumption.[59] Local communities, on the other hand, which often do not have a seat at the negotiating table but depend on the state's treaty negotiators to reflect their interests, are often the least capable of adjusting to the labor, environmental, and social dislocations eventually caused by the opening up of markets to foreign goods and the ensuing displacement or dissolution of inefficient or uncompetitive local companies.[60] When states negotiate changes to international economic treaty rules without considering trade adjustment policies in the form of labor retooling and retraining, education reform, and improvements to social security and health care, they fail to deliver on the actual development objectives of their trade agreements because of a misaligned focus on raw economic growth.[61]

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58. *See Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, WTO, IMF, & WORLD BANK (Apr. 2017), https://www.imf.org/~/media/Files/.../PP/041017joint-wto-wb-imf-trade-paper.ashx.

59. *See generally* POL ANTRAS & C. FRITZ FOLEY, REGIONAL TRADE INTEGRATION AND MULTINATIONAL FIRM STRATEGIES (Apr. 2009), http://www.people.hbs.edu/ffoley/ftas.pdf.

60. *See* Diane A. Desierto, *Trade Adjustment IS a Matter of Domestic Policy and International Law: Embedding ESC Rights in Trade Law*, EJIL:TALK! (Apr. 22, 2017), https://www.ejiltalk.org/trade-adjustment-is-a-matter-of-domestic-policy-and-international-law-embedding-esc-rights-in-trade-law/.

61. *See* G.A. Res. 41/128, annex, Declaration on the Right to Development, art. 1-2 (Dec. 4, 1986) [hereinafter G.A. Res. 41/128]

> Article 1
> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.
>
> Article 2
> 1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

Finally, unchecked regulatory arbitrage practices that take place while states are in the process of changing their international economic treaty rules can be most problematic when they end up incentivizing *corruption and morally hazardous activities*. The "Panama Papers"[62] and "Paradise Papers"[63] data leakage scandals exposed multinational firms' practice of offshoring mailbox entities in tax havens,[64] which occurs widely in the absence of cohesive and harmonized international tax treaties, especially on enforcement of tax evasion investigations and prosecution.[65] Firms can also resort to morally hazardous and corrupt conduct in situations where they can take advantage of the absence of a uniform treaty[66] that standardizes government procurement policies

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2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

62. Luke Harding, *What Are the Panama Papers? A Guide to History's Biggest Data Leak*, GUARDIAN (Apr. 5, 2016), https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers.

63. Bryce Covert, *Paradise Papers Show How Misguided the G.O.P. is on Taxes*, N.Y. TIMES (Nov. 12, 2017), https://www.nytimes.com/2017/11/12/opinion/paradise-papers-republicans-taxes.html.

64. Marika Toumi, *Anti-Avoidance and Harmful Tax Competition: From Unilateral to Multilateral Strategies?*, *in* THE INTERNATIONAL TAXATION SYSTEM 83, 86 (Andrew Lymr & John Hasseldine eds., 2002) ("The huge amounts at stake, that countries can attract with tax incentives or detract if their regime is deemed unfavourable, constitute an unavoidable pressure on tax systems that are pushed into a race to the bottom to prevent capital flight. Besides harmful tax competition, money laundering is another damaging effect linked to tax havens and offshore centres. Their secrecy and deregulated environment have provided facilities where the gains from criminal activities can easily be channeled and then recycled into transactions that are more legitimate. The activities that are served by this convenient screen include drug trafficking, arms and diamond trafficking, and public corruption.").

65. *See* Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT'L L. 447 (2013).

66. WORLD BANK, COMPARISON OF THE INTERNATIONAL INSTRUMENTS ON PUBLIC PROCUREMENT 1 (Mar. 2013), http://siteresources.worldbank.org/PROCUREMENT/Resources/84265-1354233251381/Background_paper-International_instruments.pdf ("In particular, the value of procurement as a basic administrative function enabling public agencies to use allocated public funds to perform their mandate is not emphasized in these instruments. In this respect, despite harmonization at the level of 'principles', there are no universally accepted international standards of public procurement. Countries apply in their respective procurement systems the standards that meet the principles in accordance with the respective Agreements to which they have explicitly consented to be bound. Because these Agreements have different objectives, the adoption and incorporation of the principles into existing institutional and legal frameworks

and procedures for states' cross-border or flagship infrastructure projects.[67] The perils of unchecked regulatory arbitrage were demonstrated in the global economic and financial crises since 2008, arising from a lack of coherence in the ongoing reform of the global financial architecture and international regulation of risk.[68]

Part III will contend that states would be in a better position to avoid or mitigate the pathological consequences arising from the unchecked regulatory arbitrage practices of firms while states are changing international economic treaty rules *if states already embedded international human rights tools at the outset of negotiating the changes to international economic treaty rules*. By internalizing their international human rights law obligations as part of the domestic regulatory fabric and informing the content of the cross-border firm's due diligence obligations (especially on the right to development and economic, social, and cultural rights), states would be better placed to detect, avoid, or otherwise deal with *norm irrelevance*, *reform gridlocks*, *rule inertia*, and *corruption and morally hazardous activities*. When international human rights law serves as the foundation of states' economic decisions—including those expressed in international economic treaty rules—there would be less occasion for these pathologies to arise, precisely because the state has the continuing duty to assess the consistency of its own policies and procedures with the state's international human rights obligations.[69]

States can avoid *norm irrelevance* because their duties to respect, protect, and facilitate international human rights law necessitate a regular "human rights audit," requiring continuing review of their international

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requires thoughtful policy consideration and legal analysis to avoid systemic internal consistencies and inefficiencies.").

67. *See* OECD, *Collusion and Corruption in Public Procurement*, OECD Doc. DAF/COMP/GF (2010)6 (2010), https://www.oecd.org/competition/cartels/46235884.pdf.

68. *See* Joel F. Houston et al., *Regulatory Arbitrage and International Bank Flows*, 67 J. FIN. 1845 (2012) (finding that banks transferred funds to markets with fewer regulations, with destructive "race to the bottom" in global banking regulations); Malcolm D. Knight, *Reforming the Global Architecture of Financial Regulation* (Ctr. for Int'l Governance Innovation, Paper No. 42, Sept. 2014), http://eprints.lse.ac.uk/61213/1/SP-6%20CIGI.pdf.

69. *See, e.g.*, Alfred-Maurice de Zayas (Independent Expert on the Promotion of a Democratic and Equitable International Order), Report on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶ 62(a)-(p) U.N. Doc. A/HRC/30/44 (July 14, 2015) (containing recommendations for States to ensure harmonization of their trade and investment agreements with their fundamental human rights obligations); U.N. Conference on Trade and Development, *2015 World Investment Report: Reforming International Investment Governance*, at 126-27, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf; Comm. on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/241 (Aug. 10, 2017).

economic treaties to ensure consistency with the state's international human rights obligations towards its own citizens and communities as well as treaty counterparts and third parties.[70] There would also be fewer occasions of *reform gridlocks*, if states embraced the participatory and inclusive processes expected of international economic decision-making under the transparency, accountability, and democratic participation norms of international human rights law.[71] States would likewise minimize instances of *rule inertia* when they negotiate changes to their international economic agreements, because the impacts of these international economic agreements would be assessed and anticipated under appropriately and feasibly designed human rights risk assessments.[72] Finally, states' consistent internalization of their international human rights obligations would ultimately strengthen the mandates of these states to ensure regulatory consistency in competitive business environments in a manner that rejects the distortions of firms' illegal corrupt practices and morally hazardous activities, such as tax evasion through abusive tax offshoring practices.[73] While there are disputed limits on the scope of direct applicability of international human rights treaties to transnational firms (especially on home states' control over their firms' extraterritorial activities),[74] these limits could be circumvented if states were to themselves domestically incorporate international human rights law into their regulatory fabric. However, international human rights tools for impact assessment, due diligence, and monitoring compliance are hardly standardized and still appear rudimentary in some aspects,

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70. *See* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, MAINSTREAM HUMAN RIGHTS INTO TRADE AGREEMENTS AND WTO PRACTICE – UN EXPERT URGES IN A NEW REPORT (Sept 13, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx.

71. *See, e.g.*, Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321 (2000); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927 (2004); Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE L. & DEV. 19 (2012).

72. *See* Olivier De Schutter (Special Rapporteur on the Right to Food), *Guiding Principles on Human Rights Impact Assessments in Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/ADD.5, addendum (Dec. 19, 2011).

73. *See* INT'L BAR ASS'N, TAX ABUSES, POVERTY AND HUMAN RIGHTS (Oct. 2013), https://www.ibanet.org/Article/NewDetail.aspx; Anthony Ogus, *Corruption and Regulatory Structures*, 26 LAW & POL'Y 329 (2004).

74. *See, e.g.*, Jernej Letnar Cernic, *Corporate Human Rights Obligations at the International Level*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 130 (2008); Eric De Brabandere, *Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 66 (2010).

while offering room for evolution in others. This Article will propose some elements for designing the possible qualitative and quantitative contours of a "comprehensive human rights audit" that international economic law treaty negotiators could consider as part of a set of best practices for states to comply with their obligations under international human rights law at a time of rapidly changing international economic rules.

The concluding Part IV will observe the competing ideologies of "neoliberalism"[75] and "neo-mercantilism"[76] and pronounced national or parochial interests that dominate much of current discourse to change the international economic system. It will examine how both these ideologies reflect different visions for the future of international economic law. Regardless of the dominant ideology that emerges from the attempt to change international economic law, however, it should be clear that international human rights law is well beyond the terms for negotiation in international economic bargaining. States must take this fundamental body of obligations owed to individuals, groups, and communities, as the core normative direction for how they intend to shape the future content of international economic law. When states make international human rights tools an intrinsic and inherent part of international economic regulatory design, states create a powerful additional legal layer of checks against harms likely to arise from firms' regulatory arbitrage practices when international economic law is in flux. International human rights law should thus not only be contemplated in the rewriting of the rules, processes, and institutions of international economic law, but also to avoid and mitigate the harms that unchecked regulatory arbitrage causes on the wider public of the state's constituencies and local communities. States can better achieve procedural fairness and substantive legitimacy in the international economic system if they do not neglect oversight of the system's underlying regulatory arbitrage practices in times of rule change.

Given the ambiguities latent in achieving full compliance with all civil, political, economic, social, cultural, and environmental rights within the ambit of international human rights law itself, however, this is not an easy task. Government policymaking often navigates between

75. *See* Adam Harmes, *Neoliberalism and Multilevel Governance*, 40 REV. INT'L POL. ECON. 725 (2006); GIANDOMENICA BECCHIO & GIOVANNI LEGHISSA, THE ORIGINS OF NEOLIBERALISM: INSIGHTS FROM ECONOMICS AND PHILOSOPHY 1 (2017) ("Neoliberalism has been defined as a political doctrine that basically adopts a free market in a deregulated political framework.").

76. *See* Paolo Guerrieri & Pier Carlo Padoan, *Neomercantilism and International Economic Stability*, 40 INT'L ORG. 29, 30 (1986) ("The most pervasive definition of neomercantilism is the pursuit of a current account surplus: namely, a persistent excess of exports over imports.").

many priorities for citizens, and some human rights objectives may be prioritized more than others. Notwithstanding the differences in intensities among state capacities and political will to give effect to international human rights law, states nevertheless cannot neglect to be aware of the arbitrage situations that inevitably occur when states are engaged in changing international economic rules. Treaty-making and treaty revision must also be adapted to anticipate arbitrage.

II. Pathological Consequences from Unchecked Regulatory Arbitrage in International Economic Law

As long as there are differences in economic rules between sovereign jurisdictions and differences in the regulatory treatment prescribed by international economic treaties, it is inevitable that firms will practice regulatory arbitrage.[77] It also cannot be said that sufficient regulatory uniformity or standardization exists from the phalanx of trade, investment, finance, intellectual property, tax, competition, and other treaties that underpin international economic law.[78] The cross-border harmonization and standardization that had been fostered under multilateralism in World Trade Organization (WTO) agreements and corresponding institutions[79] is now steadily diminishing in the face of growing preferences for regional and bilateral trade agreements. The election of U.S. President Donald Trump in 2016 gave rise to an American policy disfavoring multilateral trade agreements in favor of renegotiated bilateral and regional treaties.[80] The United Kingdom's 2016 Brexit vote from the EU triggered not just negotiations for the United Kingdom's withdrawal under Article 50 of the Treaty on the Functioning of the European Union, but also related initiatives to forge

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77. *See, e.g.*, Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities*, 38 VA. J. INT'L L. 563 (1998); Gregory May, *Getting Realistic About International Tax Arbitrage*, TAX MAG. 37 (Mar. 2007); Samuelson, *supra* note 13, at 223-40; Janet Dine, *Jurisdictional Arbitrage by Multinational Companies: A National Law Solution*, 3 J. HUM. RTS. & ENV'T 44 (2012).

78. Amelia Porges, *The Future of International Economic Law in Practice*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 237-44 (Colin Picker et al. eds., 2008); Joel P. Trachtman, *International Economic Law Research: A Taxonomy*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 43-52 (Colin Picker et al. eds., 2008).

79. Petros C. Mavroidis, *WTO and PTAs: A Preference for Multilateralism (or, The Dog that Tried to Stop the Bus)*, 44 J. WORLD TRADE 1145 (2010).

80. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (Mar. 2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf.

an EU-U.K. trade agreement as well as renegotiate around 739 of the United Kingdom's treaties.[81] Renegotiations between the United States, Canada, and Mexico on the North American Free Trade Agreement (NAFTA) commenced in 2017 and will continue to 2018 (and possibly beyond).[82] The United States' withdrawal from the TPP recently led the remaining eleven states to the TPP,[83] under Japanese leadership, to resurrect the treaty under agreed common principles, renaming it the "Comprehensive and Progressive Agreement on Trans-Pacific Partnership" (CPTPP) at the 2017 summit of the Asia-Pacific Economic Cooperation (APEC).[84] The China-led sixteen-member Regional Comprehensive Economic Partnership (RCEP),[85] on the other hand, announced that it would conclude negotiations by 2018.[86]

The United States is also renegotiating its bilateral free trade agreement with South Korea (KORUS FTA),[87] while insisting on bilateral

81. *See* McClean, *supra* note 23; Horst Eidenmüller, *Negotiating and Mediating Brexit*, 44 PEPP. L. REV. 39 (2016).

82. *See* Press Release, Office of U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf; Press Release, Office of U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation (Nov. 2017), https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf.

83. Press Release, Office of U.S. Trade Representative, Letter from the Office of the United States Trade Representative to the New Zealand Ministry of Foreign Affairs & Trade (Jan. 30, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf.

84. *See* NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, JOINT MINISTERIAL STATEMENT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, (Nov. 10, 2017), https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/2017.11.10-Ministerial-Statement-FINAL.pdf; NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, ANNEX I – OUTLINE OF THE TPP 11 AGREEMENT: COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/Annex-I_Outline-of-Agreement.pdf (last visited Nov. 15, 2017).

85. *See Regional Comprehensive Economic Partnership Background on Negotiations*, ASEAN.ORG, http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership (last visited Oct. 1, 2017).

86. Yukako Ono & Ryohei Yasoshima, *RCEP Trade Agreement Delayed Till 2018*, NIKKEI ASIAN REV. (Nov. 12, 2017), https://asia.nikkei.com/Politics-Economy/International-Relations/RCEP-trade-agreement-delayed-till-2018; *see also* Kentaro Iwamoto, *Conclusion to RCEP Talks 'Finally in Sight,' Singapore PM Says*, NIKKEI ASIAN REV. (Aug. 29, 2018), https://asia.nikkei.com/Politics/International-Relations/Conclusion-to-RCEP-talks-finally-in-sight-Singapore-PM-says.

87. Carlos Barria, *In Shift, South Korea and US to Push Forward on Trade Talks*, CNBC.COM (Oct. 4, 2017), https://www.cnbc.com/2017/10/04/south-korea-and-us-to-push-forward-on-korus-trade-talks.html.

trade agreements with designated "Indo-Pacific"[88] strategic partners such as Japan,[89] the Philippines,[90] India,[91] and Vietnam.[92] The United States has also articulated a preference for a strong U.S.-U.K. trade relationship,[93] abandoning any plans for a Transatlantic Trade and Investment Partnership (TTIP) with the EU[94] and preferring a diminished role for the United States in the North Atlantic Treaty Organization (NATO).[95] In further instances, the Trump Administration has signaled its rejection of the WTO dispute settlement mechanism and its willingness to purposely delay the procedure for selection of the judges of the WTO Appellate Body as political leverage,[96] as well as to deny further capital increases for the World Bank—which the United States perceives as having unduly favored its rival China with numerous development loans.[97]

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88. Press Release, Donald J. Trump, U.S. President, Speech by President Trump at APEC CEO Summit, Da Nang, Viet Nam (Nov. 10, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/.

89. *Japan Dismisses the Idea of a Two-Way Trade Pact with the US, No Matter What Trump Wants*, CNBC.COM (Nov. 6, 2017), https://www.cnbc.com/2017/11/06/japan-dismisses-the-idea-of-a-two-way-trade-pact-with-the-us-no-matter-what-trump-wants.html.

90. Regine Cabato, *U.S. Open to Free Trade Agreement with PH*, CNN PHIL. (Nov. 16, 2017), http://cnnphilippines.com/news/2017/11/16/United-States-open-Philippines-free-trade-agreement.html.

91. *See* Joshua P. Meltzer & Harsha Vardhana Singh, *Growing the U.S. – India Economic Relationship: The Only Way Forward*, BROOKINGS: UP FRONT (June 22, 2017), https://www.brookings.edu/blog/up-front/2017/06/22/growing-the-u-s-india-economic-relationship-the-only-way-forward/.

92. *See* Press Release, U.S. Office of the Press Sec'y, Joint Statement between the United States of America and the Socialist Republic of Viet Nam (Nov. 12, 2017), https://www.whitehouse.gov/the-press-office/2017/11/12/joint-statement-between-united-states-america-and-socialist-republic.

93. *Trump: UK-US Trade Deal Could Be 'Big and Exciting'*, BBC NEWS (July 25, 2017), http://www.bbc.com/news/uk-politics-40716317.

94. Alastair Macdonald & Steve Holland, *Trump Talks Trade with EU, Varied Differences Remain*, REUTERS (May 25, 2017), https://www.reuters.com/article/us-usa-trump-eu/trump-talks-trade-with-eu-varied-differences-remain-idUSKBN18L1NX.

95. Robin Emmott & Steve Holland, *Trump Directly Scolds NATO Allies, Says They Owe 'Massive' Sums*, REUTERS (May 25, 2017), https://www.reuters.com/article/us-usa-trump-europe/trump-directly-scolds-nato-allies-says-they-owe-massive-sums-idUSKBN18K34D.

96. Damian Paletta & Anna Swanson, *Trump Suggests Ignoring World Trade Organization in Major Policy Shift*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/. *See also* Shaffer, Elsig, & Pollack, *supra* note 26.

97. Bethany Allen-Ebrahimian, *Trump Takes Aim at World Bank Over China Loans*, FOREIGN POL'Y (Oct. 13, 2017), http://foreignpolicy.com/2017/10/13/trump-takes-aim-at-world-bank-over-china-loans/; *The World Bank's Dealings with Trump*, FIN. TIMES (May 31, 2017), https://www.ft.com/content/5c9f7f16-45f4-11e7-8d27-59b4dd6296b8.

These parallel developments appear to reaffirm the growing force of political and legal "discontents" with multilateralism,[98] especially in the international economic system. And yet, other recent multilateral projects,[99] such as the December 2015 Paris Agreement on Climate Change,[100] also augur the restructuring of global, national, regional, and local economies, the means and methods of production and supply chains, as well as cross-border capital flows, fiscal expenditures, and consumption patterns in the short and long term.[101] China's overt defense of multilateralism and global economic cooperation under President Xi Jinping,[102] rallying states to the cause of global economic cooperation under Chinese leadership in banner projects such as the One Belt, One Road (OBOR) and the Asian Infrastructure Investment Bank,[103] stands in marked contrast to the United States' seeming abandonment of its leadership of the postwar multilateral system under its

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98. *See* Jose E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000).

99. *See* Suzanne Maloney, *After Dumping the Iran Deal, Trump Has No Strategy for Iran*, BROOKINGS: ORDER FROM CHAOS (May 9, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/09/after-dumping-the-nuclear-deal-trump-has-no-strategy-for-iran/; STEPHEN P. MULLIGAN, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT (Feb. 9, 2017), https://fas.org/sgp/crs/row/R44761.pdf.

100. *See* Paris Agreement, Dec. 12, 2015, 55 I.L.M. 743.

101. *See, e.g.*, Ralph Bodle et al., *The Paris Agreement: Analysis, Assessment, and Outlook*, 2016 CARBON & CLIMATE L. REV. 5 (2016); Liz Gallagher, *Political Economy of the Paris Climate Agreement*, ACT 2015, https://www.e3g.org/docs/ACT_2015_FINAL_Political_Framing%281%29.pdf (last visited Oct. 1, 2017); Yong-Xiang Zhang et al., *The Withdrawal of the U.S. from the Paris Agreement and Its Impact on Global Climate Change Governance*, ADVANCES CLIMATE CHANGE RES. 213 (2017); *EU Reaches Deal to Overhaul the World's Largest Emissions Market*, BUS. TIMES (Nov. 9, 2017), http://www.businesstimes.com.sg/government-economy/eu-reaches-deal-to-overhaul-worlds-largest-emissions-market; *The Consequences of Leaving the Paris Agreement*, COUNCIL ON FOREIGN RELATIONS (June 1, 2017), https://www.cfr.org/backgrounder/consequences-leaving-paris-agreement.

102. *See Full Text of Chinese President Xi's Address at APEC CEO Summit*, XINHUA (Nov. 11, 2017), http://news.xinhuanet.com/english/2017-11/11/c_136743492.htm ("[W]e should continue to foster an open economy that benefits all. Openness brings progress, while self-seclusion leaves one behind. We the Asia-Pacific economies know this too well from our own development experience . . . . We should make economic globalization more open, inclusive and balanced so that it benefits different countries and people of different social groups. We should proactively adapt to the evolving international division of labor and actively reshape the global value chain so as to upgrade our economies and build up new strengths. We should support the multilateral trading regime and practice open regionalism to make developing members benefit more from international trade and investment.").

103. *See Full Text of President Xi's Speech at the Opening of Belt and Road Forum*, XINHUA (May 14, 2017), http://news.xinhuanet.com/english/2017-05/14/c_136282982.htm; *Full Text of Chinese President Xi's Address at AIIB Inauguration Ceremony*, XINHUA (Jan. 16, 2016), http://news.xinhuanet.com/english/china/2016-01/16/c_135015661.htm.

"America First" foreign policy.[104]

Beyond the reform and revision of the scope and content of international economic treaties due to geopolitical changes, other drivers of change in cross-border economic rules also arise from rapid technological developments creating new frontiers for regulatory jurisdictions, such as: (1) the emergence of the supposedly disruptive business model of the cross-border "sharing" economy;[105] (2) the explosion of the digital "on-demand" economy through electronic commerce in goods and services;[106] (3) increased cross-border investment and operations activities of global energy, telecommunications, and utilities firms;[107] (4) automation and algorithmic decision-making in the means and methods of production;[108] (5) increasing artificial intelligence prospects for supply chains;[109] and (6) the monetization and commercialization of the

104. *See* Press Release, Donald J. Trump, U.S. President, Remarks to the 72nd Session of the U.N. General Assembly (Sept. 19, 2017), https://www.whitehouse.gov/the-press-office/2017/09/19/remarks-president-trump-72nd-session-united-nations-general-assembly.

105. *See* Jack M. Beerman, *Regulation of the Sharing Economy: Uber and Beyond*, ADMIN. & REG. L. NEWS 17 (2016); Diana Cao, *Regulation Through Deregulation: Sharing Economy Companies Gain Legitimacy by Circumventing Traditional Frameworks*, 68 HASTINGS L.J. 1085 (2017); Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. (ANN. REV.) 1067 (2015); Erez Aloni, *Pluralizing the Sharing Economy*, 91 WASH. L. REV. 1397 (2016).

106. *See* Gregory E. Maggs, *Regulating Electronic Commerce*, 50 AM. J. OF COMP. L. (SUPPLEMENT) 665 (2002); Jay P. Kesan & Andres A. Gallo, *Optimizing Regulation of Electronic Commerce*, 72 U. CIN. L. REV. 1497 (2004); NAT'L BD. OF TRADE, E-COMMERCE – NEW BARRIERS, NEW OPPORTUNITIES: A SURVEY OF E-COMMERCE BARRIERS IN COUNTRIES OUTSIDE THE EU (2012), https://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/ecom_national_board_e.pdf; *Dismantling the Barriers to Global Electronic Commerce*, OECD.ORG http://www.oecd.org/sti/ieconomy/dismantlingthebarrierstoglobalelectroniccommerce.htm (last visited Oct. 16, 1997); WORLD ECON. FORUM, THE GLOBAL INFORMATION TECHNOLOGY REPORT 2016: INNOVATING IN THE DIGITAL ECONOMY (2016), http://www3.weforum.org/docs/GITR2016/WEF_GITR_Full_Report.pdf.

107. *See* UNITED NATIONS ECON. & SOCIAL COMM'N FOR ASIA & PACIFIC, PUBLIC-PRIVATE PARTNERSHIPS FOR CROSS-BORDER INFRASTRUCTURE DEVELOPMENT (2016), https://www.unescap.org/sites/default/files/S4_PPP-for-Cross-Border-Infrastructure-Development_0.pdf; MIT ENERGY INITIATIVE, UTILITY OF THE FUTURE: AN MIT ENERGY INITIATIVE RESPONSE TO AN INDUSTRY IN TRANSITION (2016), https://energy.mit.edu/wp-content/uploads/2016/12/Utility-of-the-Future-Full-Report.pdf; UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY 155-218 (2017) http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

108. *See* Wolfgang Lehmacher, *From Flying Shuttles to Rolling Robots, Automated Supply Chains are Almost Here*, WORLD ECON. FORUM (Aug. 24, 2016), https://www.weforum.org/agenda/2016/08/from-flying-shuttles-to-rolling-robots-the-automated-supply-chain-is-almost-here/.

109. *See* Karen Butner, *Cognitive and AI Will Revolutionize Supply Chain Operations*, IBM SERVS. BLOG (June 12, 2017), https://www.ibm.com/blogs/insights-on-business/gbs-strategy/cognitive-ai-revolutionize-supply-chain/.

human genome and other biotechnological developments,[110] among others. With private firms and states adapting to global and legal regulatory changes comes a corresponding transformative impact on cross-border lawyers and the global legal profession:[111]

> [T]here is an emerging global legal community more diverse, customer-focused, socially committed, inter-generational, multidisciplinary, and innovative than the parochial, homogeneous, lawyer-centric one that it is supplanting. Law—like so many other industries—is undergoing a transformation that self-regulation cannot stanch. Change has been fueled by the confluence of the global financial crisis and its reboot of the buy-sell dynamic; the impact of technology on how we live and work; and globalization. The legal guild is morphing into a digitized marketplace where lawyers are no longer the sole providers of legal services and customers drive the bus. . . . [112]

Global and legal regulatory changes may thus be seen as inherent and inevitable phenomena of the international economic system. Notwithstanding that change is fast becoming a fixture in modern international economic law, public (and private) international lawyers should, nonetheless, still be concerned with determining the "fairness" of the international system as new rules are being rewritten.[113] As Aaron James powerfully argued, the fairness of the international economic system is now a staple polemic of modern international life:

> A philosophical account of fairness in the global economy should answer three central questions. First, the question of *applicability*: in what sense, if at all, does fairness apply in the global economy? Second, the question of *significance*: what might fairness require, in principle and in practice, and how

110. *See* Katrina Megget, *Money from Genes: CRISPR Goes Commercial*, SCI. AM. (Jan. 22, 2016), https://www.scientificamerican.com/article/money-from-genes-crispr-goes-commercial/.

111. *See* John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 INT'L J. LEGAL PROF. 169 (1996); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

112. Mark A. Cohen, *Law's Big Challenges Cross Borders and Common Resources Can Help Solve Them*, FORBES (Nov. 6, 2017), https://www.forbes.com/sites/markcohen1/2017/11/06/laws-big-challenges-cross-borders-and-common-resources-can-help-solve-them/#44a307ab3e56.

113. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 3-24 (1998). *See also* John Linarelli, *Principles of Fairness for International Economic Treaties: Constructivism and Contractualism*, 37 STUD. TRANSNAT'L LEGAL POL'Y 124 (2005).

> significant is it for economic and social institutions? Third, the question of *justification:* how, from a moral point of view, is an appropriate conception of fairness to be justified? . . .
>
> As for applicability, fairness in the global economy is fairness in a social practice. The global economy is constituted, in a fundamental sense, by an international social practice in which societies mutually rely on common markets. This shared practice raises a general issue of "structural equity," that is, equity in how different countries and their respective classes are treated within the common market reliance relationship.
>
> As for potential significance, structural equity places significant egalitarian demands upon nonmarket institutions. In a world of "free trade," nonmarket institutions must, in fairness, regulate how the global economy distributes its benefits and burdens across societies and their respective social classes. Fairness requires strong social insurance schemes, international capital controls, policy flexibility for developing countries, development assistance, and more. The cost of such measures is to be shared by all trading countries, as the "fair price" of free trade.
>
> As for justification, the demands of structural equity arise as emergent responsibilities, in virtue of the global economy's organizing social practice, quite apart from concerns with the general welfare, efficiency, basic freedoms, human rights or other forms of justice. Fairness demands arise, in their own right, as though from a "social compact" for an economy of global size, akin to a promise made but as yet unfulfilled . . . .[114]

In light of the increasing social responsibility and fairness demands in their profession, international lawyers have to be more alert to the significant impacts of private firms' regulatory arbitrage practices in the international economic system—all the more so at a time of intense and simultaneous legal changes from the writing of new global economic rules. The following subsections will focus on four recurring phenomena of unchecked regulatory arbitrage practices and their dangerous negative externalities if these phenomena remain unchecked and unaddressed: (1) norm irrelevance, (2) reform gridlocks, (3) rule inertia, and (4) corruption and morally hazardous activities. These

114. AARON JAMES, FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR A GLOBAL ECONOMY 3 (2012).

phenomena will illustrate how deftly firms can take advantage of the gap between the "myth systems and operational codes" in any legal system,[115] and especially so in international economic law during a time of such rapid change. This Article will make no claim that these phenomena exhaust all of the externalities that can arise from unchecked regulatory arbitrage practices, but rather use these four phenomena to draw a probabilistic or heuristic argument[116] that changing the international economic system and its institutions also requires constant awareness of and adaptation to the negative consequences that unchecked regulatory practices can create.[117] This does not mean, however, that one should deny the standard benefits of innovation[118] that can arise from regulatory arbitrage—it is *unchecked* and *unmonitored* regulatory arbitrage practices that negatively impact the international economic system to which I invite the attention of public and private international lawyers. It is also, at its core, a question of *who* bears the costs of arbitrage—the states which create the situations of arbitrage because

115. *See* W. Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229, 232, 234-35, 241 (1977) ("[R]eserve the word 'law' for those processes of decision which are both authoritative and controlling. The fact that people operating within social systems do not speak with such precision is one of the reasons why we have discrepancies between myth system and operational code. The point here is that much formal law, which community members continue to view as law and which they are not willing to dismiss as 'survival' . . . will not only *not* be effectively enforced, but its violation will be accepted by those charged with operating it as the way things are done. . . . It is only when the decision process holds itself as being public and popularly based that accounting for decisions by public procedures becomes a characteristic feature. With this development, tensions increase between the myth system of the group and the operational code of those charged with or directly concerned with decisions. . . . What is characteristic of the operational code is that it is shared by members of the control apparatus, that its deviations from the myth system are selectively tolerated and depend on the contingency, the identities of agents and objects, the purposes of the act and the probable effects on the larger organization. There is no attempt to revise the myth. On the contrary, efforts are made to maintain the integrity of the myth and to suppress the existence of the operational code.").

116. *See* Glenn Shafer, *The Construction of Probability Arguments*, 66 B.U. L. REV. 799 (1986); Leeanne Sharp, *Cognitive Heuristics and Law: An Interdisciplinary Approach to Better Judicial Decision-Making*, 20 BULL. AUSTL. SOC'Y LEGAL PHIL. 71, 74 (1995) ("Cognitive heuristics are judgmental rules of thumb used to simplify complex and uncertain mental tasks to simpler ones.").

117. *See, e.g.*, Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227-35 (1997).

118. *See* GERDING, *supra* note 8, at 120 ("The calculus of whether to engage in regulatory arbitrage is not all that different from the calculus of legal compliance . . . aggressive regulatory arbitrage transactions may skirt the edge of legality. On the benefit side of the equation, regulatory arbitrage may allow market participants to enjoy increased profits by avoiding regulatory restrictions and taxes. Conversely, investors that refrain from regulatory arbitrage while their competitors partake may be disadvantaged."); Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93 (2008).

they are rewriting international economic rules, and/or the market actors who thrive in taking advantage of lower costs associated with rule changes. The costs of arbitrage in the international economic system have to be shared among many stakeholders to ensure the popular legitimacy of new international economic rules and avoid giving the impression of favoring certain market actors over others. As Joel Trachtman rightfully observed over a decade ago, "[r]egulatory arbitrage is acceptable only when firms are required to bear the regulatory costs properly allocable to their activities and states are required to bear the social costs associated with their regulation or lack thereof."[119]

It was less than a decade ago when Gregory Shaffer presciently noted that the shift towards a multi-polar world in light of economic transformations in China, India, Brazil, and other developing and transitional countries would heavily impact the trajectory of reform for global economic governance.[120] And it was quite recently that David Collins articulated the "grand unified theory of international economic law" through the heuristic "chaos theory" in the physical sciences, where its "inescapable unpredictability engenders flexibility and adaptability."[121] What is often missing or glossed over, however, from the abundance of legal scholarship that assesses, describes, or critiques thematic changes in international economic law[122] is the analysis of operational practices during the nebulous interregnum, or gray area, *pending* these global economic rule changes. How can public interests be fully protected in real time, when treaty negotiators stake out positions for states but there is scant "public transparency"[123]? This is a crucial question given the obvious information asymmetries between those parties who have a seat at the treaty negotiations, those parties who can effectively lobby

119. Trachtman, *supra* note 6, at 277.

120. Gregory C. Shaffer, *Introduction: International Economic Law in a Time of Change*, 20 MINN. J. INT'L L. i, i-vi (2011).

121. David Collins, *Towards a Grand Unified Theory of International Economic Law*, 12 MANCHESTER J. INT'L ECON. L. 140, 140 (2015).

122. *See, e.g.*, Beth A. Simmons & Andrew B. Breidenbach, *The Empirical Turn in International Economic Law*, 20 MINN. J. INT'L L. 198 (2011); William J. Davey, *The Future of International Economic Law, in* THE FUTURE OF INTERNATIONAL ECONOMIC LAW 1–4 (William J. Davey & John Jackson eds., 2008); Thomas Oppermann, *Introduction: Ideas and Initiatives on Legal Reform of the International Economic Order, in* REFORMING THE INTERNATIONAL ECONOMIC ORDER 11–18 (Thomas Opperman & Ernst-Ulrich Petersmann eds., 1987); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17 (1996); Trachtman, *supra* note 6, at 33–62; Sonia E. Rolland, *Making International Economic Law Work: Integrating Disciplines and Broadening Policy Choices*, 48 GEO. J. INT'L L. 371 (2017).

123. *See* Michelle Limenta, *Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*, 10 N.Z. Y.B. INT'L L. 73 (2012).

for their interests to be represented at treaty negotiations, and those of the wider majority of the public who do not wield effective influence to have their specific interests represented at the negotiations.[124] Simply put, if treaty negotiators are supposed to act on behalf of their principal (the state), how will the state's ultimate principals (e.g., all the constituencies comprising the "public") ensure that their agents (e.g., treaty negotiators) are fully representing *all* of their interests?[125]

These questions do not have easy answers within the realm of international law. The international laws of diplomatic protection and state responsibility assume the *existence* of a relationship between the agent (e.g., the state) representing the interests of the principal and the principal (e.g., individuals, groups, and communities that form the constituencies of the state),[126] but they do not address breakdowns in that agent-principal relationship (as when the agent fails to properly represent the principal).[127] Rather, it is international human rights law that directs how states should treat their populations, but there is always a significant margin of deference to state sovereignty as to how states decide to best represent the manifold interests of their respective populations during treaty negotiations.[128]

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124. *See* DANIEL F. SPULBER, REGULATION AND MARKETS 64 (MIT Press 1989) ("There may be a role for government in the production or subsidization of information in markets if the incentives for revelation of information are imperfect . . . The need for regulation in markets with asymmetric information may thus depend on the trade-off between the costs of information production and the costs of inefficient transactions."); Richard D. Kearney, *International Legislation: The Negotiation Process*, 9 CAL. W. INT'L L.J. 504 (1979); Sonia E. Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT'L ECON. L. 65 (2010).

125. *See* BARRY BOZEMAN, PUBLIC VALUES AND PUBLIC INTEREST: COUNTERBALANCING ECONOMIC INDIVIDUALISM 58 (Geo. Univ. Press 2007).

126. *See* Int'l Law Comm'n, Draft Articles on Diplomatic Protection included in Rep. on the Work of Its Fifty-Eighth Session, UN Doc. A/61/10, art. 1 (2006) ("[D]iplomatic protection consists of the invocation by a State, through diplomatic action or means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."); Int'l Law Comm'n, Draft Articles on Responsibility of States for Intentionally Wrongful Acts included in Rep. on the Work of Its Fifty-Third Session, UN Doc. A/56/10, arts. 4-11 (2001) (on rules of attribution to the state, which presuppose the state is indeed acting on behalf of its population).

127. Tom Ginsburg, *The Interaction between Domestic and International Law, in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW 204, 211 (Eugene Kontorovich & Francesco Parisi eds., 2016) ("Agency costs arise whenever an official hired to undertake a particular task fails to exert full effort to achieve it, or instead acts on her own behalf.").

128. BASAK ÇALI, THE AUTHORITY OF INTERNATIONAL LAW: OBEDIENCE, RESPECT, AND REBUTTAL 106 (Oxford Univ. Press 2015) ("Democratic state sovereignty theorists find discomfort in the fact that treaties are negotiated between democratic states who, presumably, come to the negotiating

Contrast this with domestic public law theory, where legislators and rule-makers are frequently cautioned to be conscious of the political, economic, and social impacts that occur in tandem with the process of legal changes, such as those that arise from administrative or legislative rule-making.[129] For example, regulatory capture can arise during administrative rule changes, when the government agency making the administrative rules (ostensibly for the public interest) instead advances the particular special interests of groups that the agency is regulating.[130] Legislative gridlocks stalling the passing of new laws can also result in the dangerous inability of legislatures or parliaments to make "substantive policy decisions."[131] However, in the more porous horizontal[132] form that describes international law-making—where there is a greater remove between the individuals and groups that are (presumably) equal "subjects of international law"[133] and the states that ultimately negotiate and conclude international economic treaties—it

table in full knowledge and responsibility of the peoples they represent, and non-democratic states, who may simply be representing the interest of one man or a small elite group. It could, therefore, be argued that treaty negotiation does not represent responsible participation by all states in the international system. Whilst this view has merit, it in effect criticizes the diversity of regime types in the international system, rather than the procedures of international law that allow for voluntary participation in international legal systems. Whilst it is true that executive political authorities from democratic states are likely to be more responsive delegates to their citizens, this is in effect all the more reason to support a presumption of deference to texts produced by responsible executives.").

129. *See, e.g.*, George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193 (1987); Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97 (2014); Toby J. Heytens, *The Framework (s) of Legal Change*, 97 CORNELL L. REV. 595 (2012); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757 (2015); Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913 (2005).

130. *See* Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS UNIV. L. REV. 221 (2012); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency*, 101 GEO. L.J. 1337 (2013).

131. *See* Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217 (2013).

132. *See* Pierre D'Argent, *Sources and the Legality and Validity of International Law: What Makes Law 'International'?, in* THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 541, 545 (Jean D'Aspremont & Samantha Besson eds., 2017) ("[T]he emergence of shared interests in the form of *erga omnes* obligations (be they *inter partes* or not) does not change anything as far as the decentralized nature of international law is concerned. Rather, it confirms the horizontal structure of the international legal order by entrusting every single subject bound by the said rules with the interest to require compliance with them for the benefit of all because of the shared higher values protected under the erga omnes (partes) obligations.").

133. *See* M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984); ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 45 (Jonathan Huston trans., Cambridge Univ. Press 2016) ("[T]he international legal

is difficult for individuals, groups, and local communities to be able to exercise vigilance over international treaty-making processes.[134] One reason is that they do not possess similar pipelines for communication and constituency vetting that they ordinarily would have with their respective members of parliament or congressional representatives. Much as individuals can assert claims to basic human rights of participation and access to information,[135] we are not yet in a world where individuals, groups, and local communities have direct windows for the monitoring of (and formal channels for participation built into) all international treaty-making processes.[136]

It is this Article's view that private firms that successfully practice regulatory arbitrage are more attuned to take advantage of the actual "operational codes" in the international economic system, however much international lawyers would like to preserve and enhance a "myth system" of a well-functioning international economic law.[137] In this sense, one could say that international regulatory arbitrage practices

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personality of the individual does not depend on individualized international enforcement possibilities.").

134. PETERS, *supra* note 133, at 50 ("Although individuals have rights and duties in contemporary international law, they do not have full capacity to create hard international law. As a general rule, they cannot conclude international treaties, and in the current scheme, their conduct does not constitute relevant practice that might lead to the creation of customary international law.").

135. *See* political and public participation rights of individuals provided for in International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 8, Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(c), Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women arts. 7 & 8, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child art. 15, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities arts. 4 (3), 29, 33(3), Dec. 13, 2006, 2515 U.N.T.S. 3; International Convention on the Protection of All Migrant Workers and Members of their Families arts. 41, 42, Dec. 18, 1990, 2220 U.N.T.S. 3; G.A. Res. 41/128; G.A. Res. 41/128 *supra* note 61, at art. 1(1), 2, 8(2).

136. *See* Anna Spain, *International Dispute Resolution in an Era of Globalization, in* INTERNATIONAL LAW IN THE AGE OF GLOBALIZATION 41, 48 (Andrew Byrnes et al. eds., Martinus Nijhoff 2013) ("In the new era of globalization, every individual seeks to have a voice. Although States have been the dominant actors within international law, individuals today are demanding increased participation. States have the international legal capacity to enter into treaties but non-State actors are playing an increasingly powerful role in shaping the treaty-making process.").

137. Reisman, *supra* note 115, at 23 ("A disengaged observer might call the norm system of the official picture the 'myth system' of the group. Parts of it provide the appropriate code of conduct for most group members, and for some most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the 'operational code.'").

deftly capitalize on and take advantage of the real "operational codes" in international economic law—where there is *absence, inadequacy*, or *inapplicability* of cross-border regulations, treaties, or other international instruments to sufficiently and competently deal with transnational business behavior.[138] It may be the case that firms' practices of regulatory arbitrage are routinely "legal" practices under any domestic law, as would be the case when they take strategic advantage of "legal loopholes,"[139] as well as "legal uncertainties,"[140] short of definitively committing any facially illegal conduct.[141] However, one also has to remember that the line between legal and illegal regulatory arbitrage practices treads precariously on the legal polemics of asserted claims and invoked defenses. A firm may well say that there are no applicable rules for its market conduct and presume that "what is not prohibited is permitted," while the regulator may, in turn, take the contrary position and argue that a firm should act in good faith and not in abuse of law by disregarding the wider public interest consequences arising from market conduct.[142]

Notwithstanding the question of when firms' regulatory arbitrage practices shade from legal to illegal conduct,[143] however, there are unmistakably serious dimensions of justice and fairness that have to be considered[144] when regulatory arbitrage occurs in the process of changing global economic rules. In the first place, the treaty negotiation process is itself structurally skewed against transparency and fair disclosure of possible treaty terms, which makes accountability for

138. *See* Weadon *supra* note 5, at 249-72; Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J.L. & TECH. 227 (2004); Nicholas J. DeNovio & Timothy P. George, *International Arbitrage: Where Are We Now*, 6 J. TAX'N GLOBAL TRANSACTIONS 25 (2006).

139. *See* Daniel T. Ostas, *Corporate Counsel, Legal Loopholes, and the Ethics of Interpretation*, 18 TEX. WESLEYAN L. REV. 703 (2012); Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1 (2010).

140. *See* Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983).

141. *See* Partnoy, *supra* note 117.

142. *See* Riles, *supra* note 4, at 74; MAUREEN O'HARA, SOMETHING FOR NOTHING: ARBITRAGE AND ETHICS ON WALL STREET 101–26 (W.W. Norton & Co. 2016).

143. *See* NIGEL FEETHAM, A GUIDE TO INSURANCE: COMBINING GOVERNANCE, COMPLIANCE, AND REGULATION 135 (Spiramus Press Ltd. 2012) ("Arbitrage creates opportunities through a gap in the tax, regulatory or financial laws. The key to the arbitrage is bridging the documentation gap. Regulators often shy away from the use of the term 'regulatory arbitrage.' There is no single definition of regulatory arbitrage nor is there a single form of regulatory arbitrage. It is usually used to describe the avoidance of a particular regulation in carrying out a financial transaction or activity, achieving a reduction in regulatory cost or the elimination of perceived regulatory inefficiency or an unnecessary regulatory burden.").

144. *See* Linarelli, *supra* note 113, at 124-40; Ilan Benshalom, *Rethinking International Distributive Justice: Fairness as Insurance*, 31 BOSTON UNIV. INT'L L.J. 267 (2013).

local populations often a matter for their evaluation long after the treaty has already been concluded by their government negotiators with the counterpart state(s).[145] The treaty negotiation process does not contain the full spectrum of democratic checks and balances for all affected constituencies of these treaties, unlike (at least in theory, if not in fact) statutory legislative processes and administrative rule-making procedures.[146] And indeed, while international law-making has certainly "democratized" beyond the traditional purview of states,[147] there remain significant imbalances of power, influence, and interest between the kinds of non-state actors who can meaningfully influence the economic treaty-making or treaty negotiation process. Multinational corporations that operate in cross-border regulatory contexts,[148] for example, are better able to assess and take advantage of comparative gaps between regulatory jurisdictions, in contrast to individual households or local communities trying to evaluate the short- and long-term impacts of a trade agreement on their future prospects for local economic development, employment, and social security. Even international non-governmental organizations (INGOs) may possess more information than a local community about the interstitial workings of treaty negotiations, as well as inside information on the operations of institutions of global

145. *See* Stephan Schill, *Five Times Transparency in International Investment Law*, 15 J. WORLD INV. & TRADE 363 (2014); Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT'L L. 579 (2006); Megan A. Kinsey, *Transparency in Government Procurement: An International Consensus*, 34 PUB. CONTRACT L.J. 155-74 (Fall 2004); Robert T. Kurdle, *Tax Havens and the Transparency Wave of International Tax Legalization*, 37 UNIV. PA. J. INT'L L. 1153-82 (2016).

146. Walter Kälin, *Implementing Treaties in Domestic Law: from 'Pacta Sunt Servanda' to 'Anything Goes'?*, VERA GOWLAND-DEBBAS (ED.), MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS 111, 118 (Springer 2013) ("Multilateral treaty-making is often regarded by national legislators as 'undemocratic' in the sense that only a few players determine the contents of treaties and that participating countries must often accept far-reaching, politically-motivated compromises that do not always reflect their interests or needs."). Even the institutions of global governance, and their corresponding decision-making processes, are not themselves immune from the usual critiques of democratic deficit and the lack of full participation by the beneficiaries of rules and decisions produced under global governance. *See* Eyal Benvenisti, *The Law of Global Governance*, 368 RECUEIL DE COURS/COLLECTED COURSES OF HAGUE ACAD. OF INT'L LAW 161-88 (2013).

147. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of their Application, in* RÜDIGER WOLFRUM AND VOLKER RÖBEN (EDS.), DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15-30 (Springer 2005).

148. Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. 3, 3-60 (2007).

governance that administer these global economic treaties.[149] Ultimately, too much regulatory arbitrage can also distort the balance of fair competition in the global economy.[150] These problematic situations make these quandaries of fairness and justice from *unchecked* and *unmonitored* regulatory arbitrage practices of firms even more pressing and urgent for state decision-makers to consider when they seek to change the current architecture of international economic law.[151]

It is thus naïve to assume that international economic rule changes do not also create, benefit, and entrench certain "victors" within the elites of the international economic system,[152] as much as they can perpetuate and displace inherited inequalities for more groups, individuals, communities, and non-state constituencies whose interests against regulatory arbitrage often remain silent and unvoiced.[153] Exposing the pathologies that can arise from *unchecked* regulatory arbitrage by firms—in the specific cases when states are in the process of negotiating or rewriting their international economic treaties, standards, or other rules of international economic governance—is critical. It is ultimately

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149. *See* Yale H. Ferguson, *NGOs' Role in Constructing Global Governance*, 18 GLOB. GOVERNANCE 283, 283-86 (2012); Barbara K. Woodward, *The Role of International NGOs: An Introduction*, 19 WILLAMETTE J. INT'L L. & DISP. RESOL. 203, 203-31 (2011).

150. *See* Peter R. Fisher, *The Need to Reduce Regulatory Arbitrage*, 28 BROOK. J. INT'L L. 455, 457 (2002) ("We have too much, rather than too little, regulatory arbitrage. Rules that expand competition are in the public interest. Rules that limit competition – either directly or by bestowing unique privileges on a narrow set of firms – are not in the public interest because they limit the forces that help us efficiently convert savings into investment.").

151. *See* Celine Tan, *Navigating new landscapes: socio-legal mapping of plurality and power in international economic law*, *in* AMANDA PERRY-KESSARIS (ED.), SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT 19, 21 (2013) ("The tentacular reach of international economic law into the domestic realm of nation states is both *expansive* and *intimate*-*expansive* in that international economic rules . . . now extend to a broad range of economic and non-economic activities within the territorial jurisdiction of states; *intimate* in that they seek to reorganize fundamental aspects of the domestic, social economic, and political constitution.")

152. *See* James Crawford, *Chance, Order, and Change: The Course of International Law*, 365 RECUEIL DE COURS/COLLECTED COURSES HAGUE ACAD. OF INT'L L. 46-47 (2013) ("There is a legal element to every international dispute; it may or may not be decisive, but it cannot be ignored. Yet the processes by which norms and the values they reflect are accepted and institutionalized at the international level are often far from clear, and this has led to uncertainty and to false or untenable claims about the normativity of just about any proposition. Accounts of such processes – the formation of rules of customary international law, to take a prominent example – are often vapid, circular, and take little account of the real factors, including the factors of political and economic power, which generate norms and maintain them once accepted . . . We may dismiss the charge that international law is purely epiphenomenal, but we do need to factor in the roles played by power and reciprocity into our account of international law . . . .").

153. *See* Richard B. Freeman, *Globalization and Inequality*, OXFORD HANDBOOK OF ECON. INEQUALITY 575, 577 (2009).

a measure which seeks to recalibrate our lens and deepen our awareness of the public interests of those largely unrepresented, but often hardest hit, in the writing and revision of international economic law. While there may be more than four pathologies than those identified and discussed here, I have deliberately focused this analysis on the most glaring pathological consequences that exacerbate the problems of lack of meaningful participation and representation of local communities in the process of renegotiation and rewriting of international economic treaty regimes. Beyond the seemingly neutral claims of legal pluralism in managing regulatory arbitrage, however, this Article takes a different view from current scholarship[154] and argues that international human rights law *does* contain normative parameters that should help inform how states manage regulatory arbitrage. Precisely because regulatory arbitrage in a time of changing international economic rules generates serious human rights consequences, states' fundamental continuing duties to ensure respect for human rights and protection and/or facilitation of human rights, as well as to provide a remedy to their populations for the human rights violations of third parties (such as transnational business entities),[155] all sharply come into play when a state has to devise its own policy toolkit to address and manage regulatory arbitrage. Part III of this Article will demonstrate that no matter how rudimentary, diverse, or unstandardized their methodologies may be at present,[156] various tools of international human rights law can help avoid and mitigate, if not remedy, the four pathologies, as states deliberate and introduce more rule changes to the international economic system.

A. *Norm Irrelevance*

Much of the writing and rewriting of international economic treaties in recent years has taken place rapidly in the field of international investment law. This is a field where much scholarly literature and many expert resources have been dedicated to seeking the ideal

154. Riles 2014, *supra* note 4.

155. *See* U.N. Office of the High Comm'r for Human Rights, Guiding Principles on Business and Human Rights: Implementing the U.N.'s "Protect, Respect, and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

156. *See* Hilary Charlesworth, *A regulatory perspective on the international human rights system*, REG. THEORY: FOUND. & APPLICATIONS 357, 359-60 (2017); Gauthier de Beco, *Human Rights Impact Assessments*, 27 NETH. Q. HUM. RTS. 139-66 (2009); Ann Janette Rosga & Margaret L. Satterthwaie, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. OF INT'L L. 253-315 (2009); Helen Watchirs, *Review of Methodologies Measuring Human Rights Implementation*, 30 J. L. MED. & ETHICS 716-33 (2002).

balance between investment protection guarantees and preservation of host states' regulatory and policy spaces.[157] However, even as states strive to reach the "gold standard" in investment treaty design with self-described "progressive" investment treaties,[158] scant attention has, in reality, been paid to the practical problems posed by almost four thousand pre-existing bilateral and regional investment treaties today. Since termination of pre-existing treaties is a matter of both international law (e.g., treaty provisions for exit as well as exit mechanisms provided for under the Vienna Convention on the Law of Treaties) and domestic law (e.g., some legislative measure may be required to ensure that treaty exit or withdrawal is given effect),[159] very few states have spent their political resources and diplomatic capital to overhaul or exit from their pre-existing regional or bilateral investment treaty programs.[160] As of this writing, only a few states have completely terminated or unilaterally withdrawn from some, if not all, of their investment treaties.[161] These include Ecuador (denouncing twelve BITs in 2017),[162] and before that, there were limited withdrawals from certain investment treaties by countries such as Venezuela, South Africa, Indonesia, Italy, and Russia:

The conditions are ripe for regulatory arbitrage in the parallel and simultaneous existence of older generations of BITs that provide for

157. *See* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1–88 (Fall 2014); Wolfgang Alschner, *The Impact of Investment Treaty Arbitration on Investment Treaty Design: Myths versus Reality*, 42 YALE J. INT'L L. 1-66 (Winter 2017); Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 J. WORLD INV. & TRADE 357-408 (June 2007); Suzanne Spears, *The Quest for Policy Space in a New Generation of Investment Agreements*, 13 J. INT'L ECON. L. 1037-76 (2010); U.N. Conference on Trade and Development, *Towards A New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, IIA Issues Note No. 5 (July 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf; Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 INT'L LAW. 529-84 (2017).

158. *See* U.N. Conference on Trade and Development, *Reform of the IIA Regime: Four Paths of Action and a Way Forward*, IIA Issues Note No. 3 (June 2014), http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf.

159. *See* Bruno Simma, *Termination and Suspension of Treaties*, 21 GER. Y.B. INT'L L. 74-96 (1978).

160. *See* Andrea Carska-Sheppard, *Issues Relevant to the Termination of Bilateral Investment Treaties*, 26 J. INT'L ARB. 755-72 (December 2009); James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. WORLD INV. & TRADE 928-50 (2012).

161. *Is the Sun Setting on BITs?*, ASHURST (Dec. 18, 2017), https://www.ashurst.com/en/news-and-insights/legal-updates/is-the-sun-setting-on-bits/.

162. *Ecuador Terminates 12 BITs – A Growing Trend of Reconsideration of Traditional Investment Treaties?*, DLA PIPER LLP (May 15, 2017), https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/.

UNILATERAL WITHDRAWALS FROM INVESTMENT TREATIES[163]

Country	Total BITs	*Unilateral withdrawal from...*	
		ICSID	**Treaty (Partner Country)**
Bolivia	16	Yes	No
Venezuela	28	Yes	Yes (Netherlands)
Ecuador	18	Yes	Yes (Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic, Uruguay, Finland)
South Africa	39	No	Yes (Belgium and Luxembourg, Spain, Germany, Switzerland, Netherlands)
Indonesia	55	No	Yes (China, Laos, Malaysia, Netherlands, Italy, France, Slovakia, Bulgaria, Egypt)
Italy	88	No	Yes, Energy Charter Treaty
Russia	74	No	Yes, Energy Charter Treaty

Note: Data as of January 2016. UNCTAD.

more liberal or generously-worded standards of investment protection (especially the malleable "fair and equitable treatment standard")[164] and easier access for investors to invoke compulsory investor-state dispute settlement procedures, alongside the new generations of investment treaties seeking to preserve more policy space for host states. Investors will tend to invoke pre-existing older generations of investment treaties in order to gain access to compulsory investor-state

163. Table attributed to Clint Peinhardt and Rachel L. Wellhausen, Withdrawing from Investment Treaties but Protecting Investment (Apr. 20, 2016) (unpublished paper), http://www.rwellhausen.com/uploads/6/9/0/0/6900193/peinhardt_wellhausen_bitwithdrawal.pdf.

164. *See* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7 (2014); U.N. Conference on Trade & Dev., UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment: A Sequel, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012), http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

arbitration mechanisms or to use more favorable investment treaty provisions therein, such as openly-worded most favored nation treatment standards[165] or fair and equitable treatment standards.[166] As of this writing, there are no publicly known arbitration awards that are based on the newer "calibrated" or "progressive" models of investment treaties that allow host states to avail of many treaty-based defenses. (Those defenses include restrictions on the scope and coverage of investment, reservations, exceptions, and explicit provisions that protect regulatory spaces in labor and environmental laws, among others). This choice of more favorable treaties by investors is a practice known as *treaty shopping*, which is analogously comparable to regulatory arbitrage, because the investors or firms bringing claims against host states can do so by taking advantage of the lower regulatory burdens imposed under older investment treaties.[167] Conversely, investors might also prefer to bring their claims under newer models of investment treaties, if they estimate a lower overall regulatory burden from these new treaties, because the new treaties do not directly internalize the host state's *current and future* commitments to uphold international environmental, social, or labor standards. In that situation, what becomes normatively irrelevant is the host state's evolving international regulatory baseline on environmental, social, or labor standards, because the new investment treaty fails to either reproduce them or to ensure continued alignment between investment protection guarantees and the expectations of compliance with the host state's environmental, social, and labor regulatory environment.[168]

Regional investment treaties, especially those that purport to approximate the elusive "gold standard" in investment treaty-making, well illustrate these paradoxes. Chapter 8 (Investment) of the EU-Canada Trade Agreement (CETA), for example, is hailed for many innovations that are supposedly designed to reinforce states' rights to regulate,[169]

165. *See* Alejandro Faya Rodriguez, *The Most Favoured Nation Clause in International Investment Agreements: A Tool for Treaty Shopping*, 25 J. INT'L ARB. 89 (2008).

166. *See* Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 MAX PLANCK Y.B. INT'L L. 609-80 (2006).

167. *See* Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225-306 (2015).

168. *See* Alison Giest, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 CHI. J. INT'L L. 321, 333-38 (2017) (on different modes of introducing 'public interest' regulation through an investment treaty).

169. *See* Jonathan Ketcheson, *Investment Arbitration: Learning from Experience, in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, INCREASINGLY DIVERSIFIED 97, 119-20 (Steffen Hindelang & Markus Krajewski eds., Oxford Univ. Press 2016); EUROPEAN COMM'N,

such as the establishment of a multilateral investment court system,[170] the explicit recognition of the right to regulate,[171] and the clarification and narrowing of the interpretively-malleable fair and equitable treatment standard of investment protection.[172] More importantly, Article 30.8 of CETA, in relation to Annex 30-A of CETA, explicitly provides

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INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT 1 (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf ("CETA represents a significant break with the past, at two different levels: 1. It includes an explicit reference to the right of governments to regulate in the public interest and clearer and more precise investment protection standards, i.e. the rules, as set out in CETA, removing the ambiguities that made these standards open to abuses or excessive interpretations: and 2. It creates an independent investment court system, consisting of a permanent tribunal and an appeal tribunal competent to review decisions of the tribunal, where dispute settlement proceedings will be conducted in a transparent and impartial manner.") [hereinafter CETA].

170. CETA, *supra* note 169, at Chapter 8 (Investment), art. 8.29 ("The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.").

171. *Id.* art 8.9:

> 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.
> 3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy: (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section.
> 4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.

172. *Id.* art. 8.10:

> 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
> 2. A party breaches the obligation of fair and equitable treatment referenced in Paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further

for the termination of pre-existing Canada BITs with certain member states of the EU (Croatia, Czech Republic, Hungary, Latvia, Malta, Poland, Romania, and the Slovak Republic).[173] In this narrow sense, there are dim prospects of either Canadian or European investors undertaking treaty shopping for their claims, when one examines CETA vis-à-vis Canada's phased out BITs with these member states of the EU. To illustrate, Annex A of the Canada-Czech Republic BIT explicitly rejects the existence of any indirect expropriation for "non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment."[174] CETA Article 8.9(2) should also produce this same result, since "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section"—which certainly includes the provision on expropriation under CETA Article 8.12.

However, there may also be regulatory arbitrage when one considers different reference points, such as those between the newer investment treaty and regulatory burdens from pre-existing environmental treaties that may not have been carried into the newer investment treaty. Critics argue that CETA does not genuinely introduce a "gold standard" on the right to regulate,[175] because it is not harmonized with the high regulatory thresholds for environmental protection and the precautionary principle enshrined in the EU.[176] Assuming these criticisms are correct, the situation would potentially be ripe for regulatory arbitrage for private firms that would be more than willing to invoke CETA in their investment disputes, while possibly enabling evasion of higher regulatory burdens for environmental protection under the precautionary

elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

173. *Id.* Annex 30-A.

174. Bilateral Investment Treaty, Can.-Czech, annex A, May 6, 2009, ¶ c, U.N.T.S. I-53345.

175. *See* CORP. EUROPE OBSERVATORY, THE GREAT CETA SWINDLE 3-6 (Nov. 2016) https://corporateeurope.org/sites/default/files/attachments/great-ceta-swindle.pdf.

176. *See* Angeline Couvreur, *New Generation Regional Trade Agreements and the Precautionary Principle: Focus on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union*, 15 ASPER REV. INT'L TRADE & BUS. L. 165, 287 (2015) ("[N]ew generation trade agreements such as CETA contain the potential to enhance shared understanding of the precautionary principle and a reduction of the regulatory barriers its application can create. Nonetheless, such developments greatly depend on the degree of involvement of the parties within the cooperational mechanisms . . . .").

principle.[177] It remains debatable whether CETA Articles 8.9(1) and 8.9(2) could be read to avoid this outcome of regulatory disparity, since any modification of laws for environmental protection in a manner that interferes with an investor's profit expectations would only "not amount to a breach of an obligation" under CETA's investment chapter.[178] CETA Article 1.5 provides, at best, that the "Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are a party," without explicitly providing for the harmonization of environmental, social, and labor regulatory burdens already assumed by Canada and member states of the EU in their respective treaty programs.[179] Although this situation is hypothetical, it provides a clear example of *possibly imminent* norm irrelevance, where firms may indeed be quite willing to bring future claims under the new supposed "gold standard" investment treaty (and not under the old BITs which are explicitly phased out), because there may be, on balance, lower regulatory burdens in other areas of the agreement, such as in environmental protection. This situation may be even more likely, if there is lingering ambiguity as to whether higher environmental standards and commitments under the precautionary principle and the Paris Agreement on Climate Change have been incorporated in the new investment treaty CETA.[180] Admittedly, with the recent entry into force of CETA in 2017,[181] it remains to be seen if firms will practice regulatory arbitrage using CETA in order to escape higher environmental regulatory burdens in other international environmental agreements such as the Paris Agreement.

A more straightforward case of *existing* norm irrelevance arises from the parallel existence of the regional investment treaties of the ten-member Association of Southeast Asian Nations (ASEAN) (with China, South Korea, India, Japan, Australia, and New Zealand, and the ASEAN Comprehensive Investment Agreement (ACIA) applicable to all ten ASEAN Member States) and the respective bilateral and regional

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177. *See Comprehensive Economic and Trade Agreement (CETA) and the Environment: A Gold Standard for the Planet or for Big Business?*, TRANSP. & ENV'T & CLIENTEARTH (Nov. 2016), https://www.transportenvironment.org/sites/te/files/publications/2016_11_CETA_Gold_Standard_FINAL.pdf.

178. CETA, *supra* note 169, § D, art. 8.9.2

179. *Id.* art. 1.5.

180. *See* Stuart Trew, *Yes, CETA is a Gold Standard Deal – for North America's Corporations*, GUARDIAN (Feb. 13, 2017), https://www.theguardian.com/commentisfree/2017/feb/13/ceta-north-america-canada-european-union-trade-eu-ttip.

181. Press Release, European Comm'n, EU-Canada Trade Agreement Enters into Force (Sept. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm.

investment treaty programs of the ASEAN Member States (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam). The problem of norm irrelevance of the ASEAN regional investment treaties in the face of the individual Southeast Asian BIT programs can be illustrated through the continuing difference in the narrow formulation of the fair and equitable treatment (FET) clause under the ASEAN regional investment treaties, as opposed to broader variants in several Southeast Asian BITs.[182] For example, Article 11(2)(a) of the ACIA obligates ASEAN Member States to observe FET towards foreign investors by merely requiring "each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process."[183] Many Southeast Asian BITs, however, do not narrowly circumscribe FET in this manner.[184] The 1994 Malaysia-Albania BIT states that "the Contracting Party shall receive treatment which is fair and equitable,"[185] without explaining or interpreting the qualitative contours of this treatment. The 1999 Argentina-Philippines BIT states that each Contracting Party "shall at all times ensure fair and equitable treatment of the

182. I have previously reported on this question, among others, in detail as a Legal Expert for the ASEAN Coordinating Committee on Investment. Full report: DIANE A DESIERTO, USAID, MONITORING AND IMPLEMENTING AEC INVESTMENT POLICY IN ASEAN'S REGIONAL TREATIES (Mar. 2016), https://www.nathaninc.com/wp-content/uploads/2016/03/Investment-Policy-and-ASEANs-Regional-Treaties.pdf.

183. ASEAN Comprehensive Investment Agreement, art. 11(2)(a), Feb. 26, 2009, ASEAN Legal Instruments No. 30 (entered into force Feb. 24, 2012), http://agreement.asean.org/media/download/20140119035519.pdf [hereinafter ACIA]. *See also* Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, art. 7(2)(a), Nov. 12, 2014, http://www.asean.org/wp-content/uploads/2016/04/ASEAN-India-Investment-Agreement-ASEAN-version.pdf [hereinafter ASEAN-India Investment Agreement]; Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, art. 6(2)(a), Feb. 27, 2009, 2672 U.N.T.S. 3 (entered into force Jan. 1, 2010), http://asean.org/storage/2012/05/AANZFTA-legal-text-PRINTED-Signed.pdf [hereinafter ASEAN-Aus-NZ FTA Investment Chapter]; Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, art. 5(2)(a), June 2, 2009 (entered into force Sept. 1, 2009), http://www.asean.org/storage/images/archive/22973.pdf [hereinafter ASEAN-Korea Investment Agreement]; Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, art. 7(2)(a), Aug. 15, 2009 (entered into force Jan. 1 2010), http://www.asean.org/wp-content/uploads/images/archive/22974.pdf [hereinafter ASEAN-China Investment Agreement].

184. *See* ACIA, *supra* note 183, at Annex A.

185. Agreement for the Promotion and Protection of Investments, Malay.-Alb., 1994, art. 3(1) http://investmentpolicyhub.unctad.org/Download/TreatyFile/22.

investments by investors of the Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof through unjustified or discriminatory measures."[186] Because of the more expansive formulations of FET in the Southeast Asian BITs, the ASEAN Member States remain bound to a stricter threshold of investment guarantees of "fair and equitable treatment," as opposed to the narrow scope of this treatment owed to investors under the ASEAN regional investment treaties. It will not be surprising, therefore, if foreign investors claiming compensation for injury caused by ASEAN Member States would prefer an interpretively more expansive version of FET in the Southeast Asian BITs, rather than invoke the ASEAN regional investment treaties.

Similar problems of norm irrelevance between the more progressive regional investment treaties and the older bilateral investment treaties of individual ASEAN Member States occur with respect to the most favored nation (MFN) clauses in these treaties. There are MFN clauses in several of the ASEAN regional investment treaties,[187] as well as in many of the Southeast Asian investment treaties and FTA investment chapters. The MFN clause in investment treaties is particularly controversial, because it serves as the substantive gateway for the incorporation of norms from other treaty sources with third party states.[188] These norms may not necessarily just be substantive standards of investment protection, but also procedural guarantees or benefits extended under the investor-state dispute settlement mechanism in an investment

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186. Agreement for the Promotion and Reciprocal Protection of Investment, Arg.-Phil., 1999, art. 3(1) http://investmentpolicyhub.unctad.org/Download/TreatyFile/112.

187. ACIA, *supra* note 183, art. 6 (although footnote 4 to Art. 6 does not apply the MFN clause to dispute settlement procedures, the same footnote does require that preferential treatment extended to other non-Parties to the ACIA in existing or future arrangements should also be granted to the Parties to the ACIA); ASEAN-Korea Investment Agreement, *supra* note 183, art. 4 (although paragraph 3 does not apply MFN to preferential treatment already accorded in "existing bilateral, regional, and/or international agreements or any forms of economic or regional cooperation with any non-Party"); ASEAN-China Investment Agreement, *supra* note 183, art. 5 (although paragraph 3 does not apply MFN to preferential treatment already accorded in "existing bilateral, regional, and/or international agreements or any forms of economic or regional cooperation with any non-Party"). The ASEAN-India Investment Agreement, ASEAN-Australia-New Zealand Investment Chapter, and the ASEAN-Japan Investment Chapter do not contain MFN clauses.

188. *See* U.N. Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Most Favoured Nation Treatment, U.N. Doc. UNCTAD/DIAE/IA/2010/1, U.N. Sales No. 10.II.D.19 (2010) http://unctad.org/en/Docs/diaeia20101_en.pdf. MFN clauses have also been argued to create a 'multilateralizing' effect on investment treaties. *See* Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496 (2009).

treaty. In *Emilio Agustin Maffezini v. Kingdom of Spain*,[189] the arbitral tribunal interpreted the MFN clause to extend to both substantive as well as procedural dispute settlement provisions of the applicable BIT.

Legal and regulatory uncertainty is magnified under the present situation, with the continued overlapping existence of intra-ASEAN BITs and individual Southeast Asian BITs with ASEAN's regional investment treaty partners (India, China, Australia, New Zealand, Japan, and South Korea), alongside the ASEAN regional investment treaties, as shown in Part I. This is best illustrated by the problem of intra-ASEAN BITs existing alongside the ACIA. Among its key objectives, the ACIA emphasizes the "provision of enhanced protection to investors of all Member States and their investments,"[190] the "improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States,"[191] and the "joint promotion of the region as an integrated investment area."[192] To accomplish these objectives, the ASEAN Member States are purposely obligated, among other things, to enhance ASEAN integration specifically by "harmonis[ing], where possible, investment policies and measures to achieve industrial complementation."[193] The ACIA does not provide for any sunset clauses or termination of pre-existing intra-ASEAN BITs, as in fact the ACIA expressly states that, "nothing in this Agreement shall derogate from the existing obligations of a Member State under any other agreements to which it is a party."[194] In the case of an investor-state dispute under the ACIA, intra-ASEAN BITs could very well apply, since the ACIA entitles the investor-state arbitral tribunal to "decide the issues in dispute in accordance with [the ACIA], *any other applicable agreements between the Member States*, and the applicable rules of international law."[195]

With the simultaneous applicability of the ACIA and intra-ASEAN BITs, several issues are likely to arise. First, given the differences in the quality of investment protection afforded between the ACIA and the older models of intra-ASEAN BITs, could ASEAN Member States be deemed to have "complied" with the ACIA's duties for all ASEAN Member States to harmonize their investment policies to promote the

189. *See* Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000).

190. ACIA, *supra* note 183, art. 1(b).

191. *Id.* art. 1(c).

192. *Id.* art. 1(d).

193. *Id.* art. 26(a).

194. *Id.* art. 44.

195. *Id.* art. 40(1) (emphasis added).

region as an integrated investment area? Continuing deviations from the qualitative standards and obligations defined in the ACIA through the individual BITs between ASEAN Member States could encourage the *de facto* inoperability of the ACIA's envisaged level, strategy, and quality of investment protection.

Second, the simultaneous applicability of the ACIA and the intra-ASEAN BITs muddles the governing law for investor-state disputes under the ACIA. Where there are proven disparities between the quality of investment protection afforded by an ASEAN Member State under its intra-ASEAN BIT and the quality of investment protection that the same ASEAN Member State is obligated to extend under the ACIA, it will likely be difficult for the ASEAN Member State to muster ACIA-based defenses to investor claims when foreign investors decide which investment treaty to invoke for purposes of initiating suit. One can expect that foreign investors will still frame their cause of action under the older intra-ASEAN BITs, which often do not contain innovations that protect host states' regulatory spaces. ASEAN Member States may still be burdened to find plausible defenses or calibration mechanisms against investor claims under the older generation of intra-ASEAN BITs.

Third, and most importantly, the continued applicability of the intra-ASEAN BITs alongside the ACIA could very likely trigger questions of the ASEAN Member States' compliance with their fundamental ASEAN Charter duties under Article 5(2) to "take all necessary measures . . . including the enactment of appropriate legislation, to implement obligations of membership."[196] By continuing to pursue investment regulatory governance bilaterally (within the framework and purposes of an intra-ASEAN BIT) despite the existence of the ACIA, it is doubtful whether an ASEAN Member State could indeed be said to have taken "all necessary measures" to implement its regional obligations. This is especially the case for those that were specifically crafted and designed in the ACIA based on the consensus of all ASEAN Member States.

Such legal uncertainties likewise permeate the other ASEAN regional investment treaties. Many of these treaties fail to provide harmonization and coordination mechanisms that would govern ASEAN Member States' duties under their individual BITs with the ASEAN regional investment treaty partners India, China, South Korea, Japan, Australia, and New Zealand, without jeopardizing or undermining regional investment objectives and protections. The ASEAN-India Investment

196. ASEAN Charter art. 5(2) (entered into force Dec. 15, 2008), http://agreement.asean.org/media/download/20160509062115.pdf.

Agreement appears silent on the effects of this regional agreement on India's individual BITs with ASEAN Member States,[197] while the ASEAN-China Investment Agreement explicitly recognizes the applicability of other international agreements that entitle investments to treatment that may be "more favourable" than provided for in the ASEAN-China Investment Agreement.[198] The ASEAN-China Investment Agreement, however, does not apply its favorable public policy features or calibration mechanisms of the investors' entitlement to "more favourable treatment" in China's older individual BITs with the ASEAN Member States. The ASEAN-China Investment Agreement does not contain any language purporting to supersede or control the interpretation of investment treaty standards in China's older individual BITs with ASEAN Member States to make the same consistent with the standards as formulated in the ASEAN-China Investment Agreement. Neither does the ASEAN-China Investment Agreement contain any provision creating a regional sunset clause for China's BITs with individual ASEAN Member States. It therefore perpetuates the same problems of likely treaty-shopping for foreign investors interested in invoking the highest degree of investment treaty protections with the lowest amount of available defenses, mitigation mechanisms, or exculpatory exceptions for host states.

The ASEAN-Korea Investment Agreement contains a similar recognition clause as the ASEAN-China Investment Agreement for other agreements entitling investors to more favorable treatment,[199] *sans* application of the host state's calibrating mechanisms made available under the regional agreement. Just like the ASEAN-China Investment Agreement, the ASEAN-Aus-NZ FTA Investment Chapter also explicitly permits "any other applicable agreements between the parties"[200] to apply as governing law to investor-state disputes, which could thus usher in Australia's existing older individual BITs with the ASEAN Member States. New Zealand does not have such BITs.

To summarize, treaty standards under the intra-ASEAN BITs and the individual BITs of ASEAN regional investment treaty external partners with the ASEAN Member States could infuse the content and operation of the ASEAN regional investment treaties in three ways. First, the operation of MFN clauses in these treaties opens the door for foreign

197. *See* ASEAN-India Investment Agreement, *supra* note 183.

198. ASEAN-China Investment Agreement, *supra* note 183, art. 18(1).

199. ASEAN-Korea Investment Agreement, *supra* note 183, arts. 23(1), 23(2).

200. ASEAN-Aus-NZ FTA Investment Chapter, *supra* note 183, Chapter 11 (Investment), art. 27(1).

investors to import treatment and protections beyond the four corners of the regional investment treaty. MFN clauses in ASEAN Member States' BITs, in turn, could also result in importing standards of protection and treatment entitlements from BITs with third states (e.g., states which are not parties to the ASEAN regional investment treaties), which might not have been contemplated at all when standards of protection and other treaty provisions were drafted in the ASEAN regional investment treaties. The vast uncertainty created by MFN clauses as to the actual scope of protection in the ASEAN regional investment treaties undermines the latter's usefulness to creating a predictable rules-based environment for regional investment in Southeast Asia, especially under the aegis of the ASEAN Economic Community and the Charter-based ASEAN institutions.

Second, the ASEAN regional investment treaties' definition of investment "in accordance with laws, regulations, and policies"[201] of ASEAN Member States and/or their regional external partners (India, China, Korea, Australia, and New Zealand) could also create another opening for the applicability of intra-ASEAN BITs and individual BITs with ASEAN regional investment treaty external partners. If these intra-ASEAN BITs and other individual BITs are deemed to be part of the "laws, regulations, and policies" of the ASEAN Member States, investors under the ASEAN regional investment treaties could be burdened with ensuring that their investment complies with such BITs at the time of admission and/or establishment of such investment. The uncertain scope of "laws, regulations, and policies" tacked on to the definition of investment in the ASEAN regional investment treaties introduces another layer of uncertainty to how foreign investors are expected to comply with the regulatory framework for the admission of their investments and proper coverage under the ASEAN regional investment treaties. With no centralized exchanges or information made available to date between the ASEAN Member States in regard to their BITs, the foreign investor is thus left to assume the risk that its investment may be deemed in the future to have failed to comply with the "laws, regulations, and policies" of ASEAN Member States, including in the form of intra-ASEAN BITs and individual BITs with ASEAN regional investment treaty partners.

201. ASEAN-China Investment Agreement, *supra* note 183, art. 1(1)(d); ASEAN-India Investment Agreement, *supra* note 183, at art. 1(1)(b); ASEAN-Aus-NZ FTA Investment Chapter, *supra* note 183, Chapter 11, art. 2(a); ASEAN-Korea Investment Agreement, *supra* note 183, art. 1(c).

Third, intra-ASEAN BITs and other individual BITs with ASEAN regional investment treaty external partners might also apply as part of the governing law of investor-state disputes under the ASEAN regional investment treaties, specifically for the ASEAN-China Investment Agreement and the ASEAN-Aus-NZ FTA Investment Chapter. This expansion of the applicable law could affect an arbitral tribunal's future interpretation of standards of investment protection, host state defenses and exceptions, the scope of covered investment, transparency requirements, and any other obligations of host states and home states of investment under the ASEAN regional investment treaties.

As evidenced by the aforementioned case studies of norm irrelevance, whether in the context of possibly imminent norm irrelevance of pre-existing and future international environmental commitments of Canada and member states of the EU as a result of CETA, or of actual ongoing norm irrelevance with the parallel existence of ASEAN regional investment treaties vis-à-vis older generations of Southeast Asian investment treaties, investors or firms are expected to practice regulatory arbitrage in bringing forth their claims under the latter, older bilateral treaties, rather than the former, newer regional treaties. While CETA is yet untested in investor-state jurisprudence, the current thin evidence from the record of investment claims brought against Southeast Asian states shows that investors are indeed bringing their claims under the older BITs,[202] and no claims have been brought under the newer regional investment treaties where host states have more legal defenses over policy space.

B. *Reform Gridlocks*

Cross-border economic regulatory reform may be difficult for states to coordinate, where transnational firms that heavily depend on regulatory arbitrage practices can feasibly mount significant technical resources, political opposition, or even litigation-based delay against government attempts to impose new regulations or close

202. *See, e.g.*, Lao Holdings N.V. v. Lao Peoples' Democratic Republic, ICSID Case No. ARB (AF)/12/6 Decision on the Merits (June 10, 2015) (brought under the Laos-Netherlands BIT); Churchill Mining PLC v. Republic of Indonesia, ICSID Case No. ARB/12/14 & 12/40, Award (Dec. 6, 2016) (brought under Indonesia-UK BIT); Yaung Chi Oo Trading Pte Ltd. v. Union of Myanmar, ASEAN Case No. ARB/01/1, Award (Mar. 31, 2003) (brought under 1987 ASEAN Agreement on Investment, where the Tribunal declined jurisdiction); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) (brought under Germany-Philippines BIT); Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 10, 2007) (brought under UK-Malaysia BIT).

regulatory loopholes.[203] This is best illustrated by trans-Atlantic differences over how to regulate the disruptive business models created by the "sharing economy":

> Sharing economy businesses do typically maintain certain characteristics. Most commonly, these businesses use an Internet-based application, often called a web platform, which permits individuals to share or sell things where previously the transaction costs would have prohibited such commerce . . . [A] regulatory response to the sharing economy requires recognition that the types of transactions occurring differ substantially in how they affect the real world and thus require a differentiated regulatory response . . .
>
> [T]he established market, even if it bristles at regulation, typically works within the rules or seeks to change the rules to an approach under which they can prosper while sharing economy companies nimbly dodge such regulation. They respond this way for several reasons. The established market typically has a regulator that can cease the established market's operations through traditional command-and-control regulation, such as a local government's abatement processes under building codes, food codes, and so on. The sharing economy, on the other hand, is elusive to such regulators, which can make it difficult to use traditional command-and-control processes to regulate the sharing economy uses.[204]

Jurisdictions differ over how to regulate sharing economy services such as Uber and Airbnb, which generate public interest concerns ranging from public safety (traditionally addressed by licensing requirements for carriers and other public commute operators) and compliance with building codes and other safety regulations (traditionally imposed on lessor-lessee relationships) to collateral consequences of operations (such as crowding out impacts on the established markets

203. *See, e.g.*, David Dayen, *To Avoid Regulations, Uber Describes Itself as Either, Neither, and Nor*, INTERCEPT, (May 26, 2016), https://theintercept.com/2016/05/26/to-avoid-regulations-uber-describes-itself-as-either-neither-and-nor/; Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html; Rick Schmitt, *The Sharing Economy: Can the Law Keep Pace with Innovation?*, 96 STANFORD LAWYER (May 31, 2017), https://law.stanford.edu/stanford-lawyer/articles/the-sharing-economy-can-the-law-keep-pace-with-innovation/.

204. Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 151, 161-62 (2016).

and users of the established markets, including growing homelessness due to skyrocketing rental prices with the presence of Airbnb operators and the closure of licensed taxi operators).[205] Because sharing economy services do not fit the mold of traditional business models for which licensing and other regulatory oversight and compliance requirements have been set, it is also easier for sharing economy companies such as Airbnb and Uber to have "first-mover advantage" and set up operations in jurisdictions that do not yet have such adapted regulations (and correspondingly, transaction costs) to their businesses.[206] Thus, even as the City of London denied Uber an operating license in 2017,[207] other cities and countries that do not yet have regulations in place have nonetheless permitted Uber to operate pending the issuance of administrative or regulatory rules.[208] Sharing economy and other technology firms also spend tremendous resources on lobbying efforts around the world to ensure that any forthcoming regulatory reforms would not jeopardize their disruptive business models.[209] This is a classic case of how multinational firms optimally take advantage of differences in regulatory treatment between jurisdictions around the world, otherwise known as cross-border regulatory arbitrage practices.

Most significantly, despite the cross-border nature of sharing economy services and their global platforms,[210] states have been glacial in

205. *See, e.g.*, Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015); Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2017); Erin Mitchell, *Uber's Loophole in the Regulatory System*, 6 HLRE 75 (2015); Hannah A Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber*, 101 IOWA L. REV. 405 (2015); Brianna J. Santolli, *Winning the Battle, Losing the War: European Cities Fight Airbnb*, 49 GEO. WASH. INT'L L. REV. 673 (2017); Dayne Lee, *How Airbnb Short Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229 (2016); Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber*, 19 STAN. TECH. L. REV. 293 (2016).

206. *See* Inara Scott & Elizabeth Brown, *Redefining and Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553 (2017).

207. Sarah Butler & Gwyn Topham, *Uber stripped of London Licence Due to Lack of Corporate Responsibility*, GUARDIAN (Sept. 22, 2017), https://www.theguardian.com/technology/2017/sep/22/uber-licence-transport-for-london-tfl.

208. Karen Hao, *Map: All the Places Where Uber is Partially Banned or Fully Banned*, QUARTZ (Sept. 23, 2017), https://qz.com/1084981/map-all-the-places-where-uber-is-partially-or-fully-banned/.

209. *See* Seth Fiegerman, *Tech Giants Spend Record Amounts on Lobbying under Trump*, CNN (July 21, 2017), http://money.cnn.com/2017/07/21/technology/business/tech-lobbying-trump/index.html; Foo Yun Chee & Julia Fioretti, *Brussels Calling: Tech Firms Add Lobby Strength as EU Gets Tough*, REUTERS (Sept. 7, 2016), https://www.reuters.com/article/us-eu-apple-lobbying/brussels-calling-tech-firms-add-lobby-strength-as-eu-gets-tough-idUSKCN11D2MH.

210. *See* Valentina Marano, Stephen B. Tallman & Hildy Teegen, *The Sharing Economy and the Challenges of Internationalization*, 1 ACAD. MGMT. PROCEEDINGS 10442 (2017).

achieving any degree of coordinated international regulation over these services (including on matters of international taxation).[211] For the most part, regulation over "sharing economy" and global platforms services has tended to be through domestic legislation or administrative rulings, rather than through international treaties or cross-border co-operative "soft" instruments between states. Such regulation is all the more so with respect to international enforcement of antitrust or competition laws, which is currently more a matter for horizontal coordinated enforcement between national jurisdictions, rather than vertical harmonization of standards through international competition treaties.[212]

In 2017, the European Parliament called for clear guidelines to ensure consumer protection, workers' rights, consistent tax obligations, and fair competition towards sharing economy or collaborative economy services.[213] The social welfare proponents' stance taken by the European Parliament stands in contrast to the more innovation-driven position taken by the U.S. Federal Trade Commission (FTC). In a 2016 report, the FTC emphasized the need for achieving balance to enable innovation in the sharing economy such that "regulators should avoid imposing unnecessary regulatory burdens that could prevent or impede their success. On the other hand, appropriately tailored measures may help protect consumers, promote public safety, and meet other legitimate public goals."[214] In various actions taken to impose fines and/or other compliance sanctions against technology and sharing economy firms, EU Competition Commissioner Margarethe Vestager has repeatedly emphasized the continuing need to regulate the operations of technology companies, including sharing economy services.[215]

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211. *Sharing Economy Shows Up Outdated Tax Rules*, FIN. TIMES (Jan. 3, 2017), https://www.ft.com/content/56567f7a-d1cc-11e6-9341-7393bb2e1b51.

212. Roscar du Toit, *Regulation of Competition in a Global Economy*, 24 S. AFR. Y.B. INT'L L. 35, 51-52 (1999); John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 W. & MARY L. REV. 549, 591-92 (2003).

213. *Sharing Economy: Parliament Calls for Clear Guidelines*, EUROPARL.EU (June 15, 2017), http://www.europarl.europa.eu/news/en/press-room/20170609IPR77014/sharing-economy-parliament-calls-for-clear-eu-guidelines.

214. FED. TRADE COMM'N, THE 'SHARING' ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS, AND REGULATORS 64 (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf.

215. Katie Collins, *EU Commissioner: We Shouldn't Serve Tech, Tech Should Serve Us*, C/NET (Nov. 7, 2017), https://www.cnet.com/news/apple-paradise-papers-taxes-eu-competition-margrethe-vestager/.

States have also not been able to coordinate the regulation of international data flows—particularly on the question of who owns or manages the data content voluntarily given by individuals through digital platforms in either the sharing economy or other internet-based marketing platforms through the draft Trade in Services Agreement (TISA).[216] The United States, home to global champions in the technology sector such as sharing economy services Uber and Airbnb and internet platforms Amazon and Facebook (and their powerful lobbying interests pushing for liberalized data flows),[217] favors increased cross-border data flows liberally regulated under the TISA.[218] The EU, on the other hand, has been more cautious over how data flows will be protected under TISA, given its own standards on data protection under the EU General Data Protection Regulation (GDPR) which took effect on May 25, 2018.[219] U.S. technology companies reportedly favor maximizing international data flows by including data content as part of the matters to be liberally regulated under the draft TISA.[220] To this extent, the market interests and global dominance of entrenched U.S. technology companies could be seen to pose real gridlocks against reaching any international consensus on coordinated public interest reforms to protect international data flows.[221]

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216. *See* Alan Beattie, *EU Trade Data Flows are Becoming the New GMOs*, FIN. TIMES (Dec. 4, 2017), https://www.ft.com/content/9da22968-d8ee-11e7-a039-c64b1c09b482; U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), DATA PROTECTION REGULATIONS AND INTERNATIONAL DATA FLOWS: IMPLICATIONS FOR TRADE AND DEVELOPMENT (2016), http://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf. Kriangsak Kittichaisaree & Christopher Kuner, *The Growing Importance of Data Protection in International Law*, EJIL:TALK! (Oct. 14, 2015), https://www.ejiltalk.org/the-growing-importance-of-data-protection-in-public-international-law/.

217. *See* Olivia Solon & Sabrina Siddiqui, *Forget Wall Street – Silicon Valley is the New Political Power in Washington*, GUARDIAN (Sept. 3, 2017), https://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington; Brian Fung & Hamza Shaban, *Want to Understand How Dominant Tech Companies Have Become? Look at the Number of Issues They Lobby on*, WASH. POST (Aug. 31, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/08/31/want-to-understand-how-dominant-tech-companies-have-become-look-at-the-number-of-issues-they-lobby-on/.

218. *Trade in Services Agreement: Supporting U.S. Jobs through Services Exports*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/TiSA (last visited Oct. 1, 2017).

219. *See* Annegret Bendiek & Evita Schmieg, *European Union Data Protection and External Trade*, 11 SWP Comments (Feb. 2016), https://www.swp-berlin.org/fileadmin/contents/products/comments/2016C11_bdk_scm.pdf.

220. *See* Jeremy Malcolm, *TISA and Tech's Double Standards on Secret Government Internet Deals*, ELEC. FRONTIER FOUND. (EFF) (Aug. 27, 2015), https://www.eff.org/deeplinks/2015/08/tisa-and-techs-double-standards-secret-government-internet-deals.

221. *See* Yun Chee & Fioretti, *supra* note 209.

Accepting the sharing economy's theory that its business models are simply those of web-based platforms would also afford sharing economy services actual legal relief due to the lack of cross-border regulation on internet governance.[222] There is no international treaty thus far that comprehensively regulates the internet, although various platforms for international cooperation exist under the auspices of the WTO, the Organisation for Economic Cooperation and Development (OECD), and the Internet Governance Forum at the U.N.[223] Significantly, in 2017, the International Standards Organization (ISO)—a non-governmental, international standard-setting federation comprised of the membership of 162 national standards-setting bodies—released its 2017 Guiding Principles and Framework for the Sharing Economy.[224] If adopted by 162 ISO member-countries worldwide, the ISO Guiding Principles could potentially help to define a common regulatory baseline that would diminish the social costs of sharing economy firms' unchecked regulatory arbitrage practices. The economic strength and "first mover" entrenchment of the sharing economy firms in various jurisdictions around the world, however, make gridlocks inevitable in reforming cross-border competition, tax, and compliance regulations to manage the social costs of the sharing economy's disruptive business model. At its worst, it could result in a regulatory race to the bottom[225] with technology firms being able to take advantage of the absence of any treaty or cross-border regulatory harmonization.

C. *Rule Inertia*

When states renegotiate their international economic treaties, particularly international trade and investment treaties, private firms and

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222. *See* David P. Fidler, *Internet Governance and International Law: The Controversy Concerning Revision of the International Telecommunication Regulations*, 17 ASIL INSIGHTS 6 (Feb. 7, 2013), https://www.asil.org/insights/volume/17/issue/6/internet-governance-and-international-law-controversy-concerning-revision.

223. *See* Volker Roben, *International Internet Governance*, 42 GER. Y.B. INT'L L. 400 (1999); Robert Uerpmann-Wittzack, *Principles of International Internet Law*, 11 GER. L.J. 1245 (2010); Antonio Segura-Serrano, *Internet Regulation and the Role of International Law*, 10 MAX PLANCK Y.B. INT'L L. 191 (2006); Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L.J. 393 (2013).

224. Elizabeth Gasiorowski-Denis, *New ISO solution to support the sharing economy model*, ISO (Oct. 12, 2017), https://www.iso.org/news/ref2225.html.

225. *See* Peter Coy, *How to Tame Google, Facebook, Amazon, Apple*, BLOOMBERG (Nov. 29, 2017), https://www.bloomberg.com/news/features/2017-11-29/how-to-tame-google-facebook-amazon-and-apple.

chambers of commerce are powerful and influential voices.[226] With more information and influence over forthcoming rule changes, private firms are in a better position to adapt their production processes and capital flows, as well as manage any risks to their profit margins and cross-border operations, that could be reasonably anticipated from the increased market access and investment promotion and protection policies contained under new (or renegotiated) trade and investment treaties.[227] As states harden their trade and investment positions in anticipation of treaty changes, multinational firms can still continue regulatory arbitrage practices by operating in jurisdictions that contain fewer restrictions than those jurisdictions where firms anticipate increased regulations forthcoming as a result of new or renegotiated economic treaties. Multinational firms can also strategically reduce their market exposures in countries which, in their assessment, will be negatively impacted by increased regulatory burdens from new or renegotiated trade and investment rules.

The same strategic adaptation, however, cannot be said of local communities represented by states negotiating these economic treaties. These communities often assess the impacts of new or renegotiated trade and economic treaties on their own—and usually as a result of impacts felt much too long after these treaties have been concluded (e.g., job losses due to increased competition from altered terms of market access, or displacements from land and other natural resources due to investor activities, among others). Because states neglect to introduce counterpart trade adjustment policies, strategies, and other rules to ensure that local communities are protected from multinational companies' regulatory arbitrage practices in a time of anticipated economic treaty changes, the result is a pathological rule inertia with serious social consequences for local populations displaced by trade and investment activities. The International Monetary Fund (IMF), the World Bank (WB), and the WTO acknowledged this inertia by states in their April 2017 Joint Report, "*Making Trade an Engine of Growth for All:*

226. *See* Sungjoon Cho, *The Demise of Development in the Doha Round of Negotiations*, 45 TEX. INT'L L.J. 573 (2010); John G. Ruggie, *Multinationals as a Global Institution: Power, Authority, and Relative Autonomy*, REG. & GOVERNANCE 1 (2017).

227. *See Regulatory Reform and Innovation*, OECD, https://www.oecd.org/sti/inno/2102514.pdf (last visited Oct. 1, 2017); ADAPTING BUSINESS STRATEGY TO THE REGULATORY OUTLOOK, KPMG (2012), https://home.kpmg.com/content/dam/kpmg/pdf/2012/02/adapting-business-strategy-regulatory-outlook.pdf.

The Case for Trade and for Policies to Facilitate Adjustment."[228]

The Joint Report demonstrates how these three multilateral institutions perceive themselves at a time of critical rethinking of the international economic order and resurgent economic nationalism in states such as the United States and Britain.[229] IMF Managing Director Christine Lagarde, WB President Jim Yong Kim, and WTO Director-General Roberto Azevedo met in Berlin for the launch of the Joint Report, speaking in defense of the positive impacts of trade and noting that

> [W]e must recognize the concerns of people about trade and the impact that it can have in their lives . . . we need to ensure the benefits of trade are shared more widely. We should also recognize at the same time that 80 percent of the jobs that are lost today in the advanced economies are not due to imports. They are lost because of new technologies, innovation, and higher productivity.[230]

While the Joint Report resounds a strong defense of trade's value for achieving economic growth, the Joint Report falls short of the mark in attempting to fully address global concerns about the displacing impacts of trade on workers, local communities, individuals, and groups.

It is clear from the report that the IMF, WB, and WTO perceive that criticisms against trade arise when states' poor domestic policies on trade adjustment, labor mobility, and social protection, combined with the rising challenges from automation, are unable to mitigate negative impacts of trade on workers and local communities.[231] The Joint Report goes on to affirm that these negative impacts "highlight the need for appropriate adjustment policies, rather than for closing markets."[232] What stands out significantly from this Joint Report is its

228. *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, IMF, WORLD BANK, & WTO (April 2017), https://www.wto.org/english/news_e/news17_e/wto_imf_report_07042017.pdf [hereinafter Joint Report].

229. Diane A. Desierto, *Economic Nationalism in a New Age for International Economic Law: Recalling Warnings of Ludwig von Mises and the Austrian School*, EJIL:TALK! (Jan. 30, 2017), https://www.ejiltalk.org/economic-nationalism-in-a-new-age-for-international-economic-law-recalling-warnings-of-ludwig-von-mises-and-the-austrian-school/.

230. *See* Larry Elliott, *Free trade warning – IMF, WTO and World Bank say it must be defended*, GUARDIAN (April 10, 2017), https://www.theguardian.com/world/2017/apr/10/free-trade-must-be-defended-imf-wto-and-world-bank-warn.

231. IMF, WORLD BANK & WTO, *supra* note 228, ¶¶ 36-42.

232. *Id.* ¶ 42.

typology of policy alternatives that the IMF, WB, and WTO suggest that states consider building in more social and economic rights-harmonious policies when devising their trade adjustment programs, such as labor market policies (including active labor market programs and passive labor market and social protection policies), complementary policies (housing, credit, place-based, and education policies), and trade-specific programs (job retraining with a commitment to observing environmental standards).[233]

The Joint Report did not comment on the status of implementation of the WTO Decision on Trade and Environment,[234] the WTO's consensus on core labor standards through the International Labor Organization,[235] or the urgent implementation concerns raised by developing countries in meeting commitments under the Doha 4th Ministerial Conference.[236] It did not even discuss the threshold question of the WTO's role in trade adjustment. The WTO has yet to decide whether WTO provisions "currently create an environment that is pro-adjustment, anti-adjustment, or adjustment-neutral."[237] Separate from the litany of empirical evidence summarized in the Joint Report to affirm the conventional wisdom that trade openness generally is growth-creating, however, the Joint Report lends the impression that it is ultimately up to states to craft domestic policies as best they can to cushion the impact of collateral damage from trade—job losses, firms going out of business, and obsolescence in goods and services—that results from diminishing market competitiveness. There is no "one-size-fits-all" basket of policies, and all that the Joint Report proposes is a synthesis of trade adjustment measures culled from numerous economic and empirical studies. In this sense, the Joint Report still appears fairly unresponsive to global currents from populations around the world dissatisfied with the distributional consequences of the world trade system.

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233. *Id.* ¶ 67.

234. *WTO Decision on Trade and Environment*, WTO, https://www.wto.org/english/docs_e/legal_e/56-dtenv.pdf (last visited Oct. 1, 2017).

235. *WTO Consensus on Core Labour Standards through the ILO*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited Oct. 1, 2017).

236. *WTO, Implementation-related issues and concerns, Decision of 14 November 2001*, WTO, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm (last visited Oct. 1, 2017).

237. Chad P. Bown & Rachel McCulloch, *Trade Adjustments in the WTO System: Are More Safeguards the Answer?*, OXFORD REV. ECON. POL'Y (forthcoming May 2007), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.516.313&rep=rep1&type=pdf.

But is trade adjustment truly just a matter of the state's reserved domain of sovereignty? What the Joint Report fails to consider is that trade adjustment is not merely a matter of discretionary government policy, but should also be conceptualized as a matter of crucial implementation of international human rights law. For example, in formulating labor-market policies through active and passive labor market programs, much reflection should be taken by states of their duties and obligations in ensuring the right to work and the enjoyment of just and favorable conditions of work.[238] Housing policies, as part of complementary trade adjustment policies, also have to be seen from the prism of the state's baseline obligations and progressive realization of the right to an adequate standard of living, including housing,[239] while education policies have to be informed by state commitments on the right to compulsory primary education,[240] as well as rights to secondary, higher, and fundamental education.[241] Instead, while acknowledging the importance of "trade and trade related policies not just in promoting growth and prosperity but helping to share that prosperity more widely"[242] and the "role of supporting domestic policies and prompt attention to those individuals and communities at risk of being left behind,"[243] the Joint Report was ultimately silent on how trade adjustment policies are to be designed in a manner that deliberately builds in state commitments to ICESCR rights protection and progressive realization.

Admittedly, states' rule inertia when it comes to trade adjustment policies cannot be said to be directly caused by private firms' regulatory arbitrage practices during the process of changing international economic treaty rules. What regulatory arbitrage practices can do is exacerbate the gulf between how market players such as transnational enterprises, vis-à-vis individuals, groups, and local communities, can readily adapt to an environment of changing international economic rules. Especially where transnational enterprises or multinational firms have advance information over individuals, groups, and local communities on states' forthcoming international economic rule changes (for example, because chambers of commerce are privileged to have wider access to, and influence in, trade negotiations), it can be argued that

238. International Covenant on Economic, Social, and Cultural Rights [ICESCR], arts. 6, 7 & 8, Dec. 16, 1966, 993 U.N.T.S. 3.

239. *Id.* art. 11.

240. *Id.* art. 14.

241. *Id.* art. 13.

242. IMF, WORLD BANK & WTO, *supra* note 228, ¶ 81.

243. *Id.* ¶ 79.

states fail, in this respect, to ensure individuals and local communities their rights to non-discrimination, equality before the law, and individuals' meaningful right to self-determination over their economic, social, and cultural development.[244]

Thus, while multinational companies have the resources and institutional wherewithal to participate, anticipate, and adapt to forthcoming regulatory changes from renegotiated or revised international economic treaties, local communities and populations are largely left in the dark about the terms of these treaties and their short- and long-term social, environmental, labor, educational, and health impacts. Using regulatory arbitrage practices (e.g., shifting production or supply chains to other jurisdictions with fewer regulatory burdens), multinational companies can ultimately insulate themselves from the risks of rule changes when states write or renegotiate their international economic treaties. Local communities and populations do not enjoy these kinds of privileges of information, political access, resources, and capacities for adaptation to economic rule changes.

D. *Corruption and Moral Hazards*

Regulatory arbitrage practices can perilously slip into illegal practices, especially when multinational firms take advantage of regulatory loopholes in other jurisdictions abroad to evade compliance rules in their home jurisdictions. One strategy to immunize corporate assets from possible claims arising from compliance regulations in a company's home jurisdiction would be to transfer assets to offshore companies in jurisdictions with much lower regulatory burdens: "[the] registration of companies in jurisdictions with lax fiscal and corporate governance regulations may reflect the pursuit of regulatory arbitrage."[245] One scholar observed that differences in regulatory treatment of largely homogeneous hedge funds ultimately incentivize excessive risk-taking or morally hazardous behavior by these crucial actors in the

244. ICESCR, *supra* note 238, at art. 1(1) (explaining the right of peoples to "freely pursue their economic, social, and cultural development"), art. 2(2) (explaining the duty of States to guarantee that Covenant rights will be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); art. 3 (explaining the duty of the State to ensure the "equal right of all men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant").

245. Dante Mendes Aldrighi, *Risks of Wrongdoing in Public Companies and Ways to Cope with them: The Case of Brazil, in* INT'L HANDBOOK ON THE ECON. OF CORRUPTION, VOLUME TWO, 231, 248 (Susan Rose-Ackerman & Tina Soreide eds., 2011).

international financial system.[246] Regulatory arbitrage is especially pernicious when it comes to issues of tax evasion, as seen from the recent "Panama Papers" leak which disclosed the roles of offshore tax havens that enabled private firms and high-net-worth individuals to avoid paying taxes legally in their home jurisdictions.[247] As the International Bar Association rightly observed, tax abuses by firms taking advantage of tax regulatory arbitrage across jurisdictions contribute to overall poverty and deepening violations of human rights:

> [T]ax abuses are one of the causes of global poverty because they deprive governments of the resources needed to combat poverty and fulfil human rights. As discussed above, tax abuses result in economic flows out of developing countries that exceed the inflows of development assistance; therefore, tax abuses in developed countries can have an effect on perpetuating extreme poverty in developing countries. Conversely, greater tax revenues have the potential to reduce poverty, provided that they are properly spent on programmes that contribute to infrastructure, development and human rights. Furthermore, concerns were raised about tax abuses contributing to rising levels of inequality between and within nations. As one stakeholder stated: "the global shadow economy is contributing to a growth in global inequality, which is also having a major impact on democracy. Poverty may be declining in some places, but inequality is growing. The democratic system cannot survive in a context of massive inequality."[248]

Differences in public procurement rules can also reduce the quality of the state's regulatory environment to the point that the private firm or operator finds more incentive to engage in morally hazardous behavior.[249] These differences in public procurement rules can still exist across national jurisdictions, even with the common principles

246. *See* Hossein Nabilou, *Regulatory Arbitrage and Hedge Fund Regulation: The Need for a Transnational Response*, 22 FORDHAM J. CORP. & FIN. L. 557 (2017).

247. *See* Juliette Garside, *A world of hidden wealth: why we are shining a light offshore*, GUARDIAN (April 3, 2016), https://www.theguardian.com/news/2016/apr/03/a-world-of-hidden-wealth-why-we-are-shining-a-light-offshore.

248. *Tax Abuses, Poverty, and Human Rights*, INT'L BAR ASSOC. 89 (October 2013), https://www.ibanet.org/Article/NewDetail.aspx.

249. *See, e.g.*, James Cox & R. Mark Isaac, *Moral Hazard and Adverse Selection in Procurement Contracting*, 17 GAMES & ECON. BEHAV. 147 (1996); Harsh Pathak, *Corruption and Compliance: Preventive Legislations and Policies in International Business Projects*, 3 JURID. TRIB. 136 (2013); Indira

embedded in the WTO Agreement on Procurement.[250] Article IV of the WTO Agreement on Procurement mandates that the procuring entity shall "conduct covered procurement in a transparent and impartial manner that . . . avoids conflicts of interest . . . and prevents corrupt practices."[251] However, the same treaty leaves considerable flexibility and discretion for each WTO member to define the scope of such corrupt practices.[252]

The OECD Common Principles and Standards on Propriety, Integrity, and Transparency recommends international cooperation and cross-border regulatory coordination to deal with the interlinked problems of regulatory arbitrage, corruption, and other morally hazardous behavior of firms:

> 1) A strong, fair and clean economy must be based on the values of propriety, integrity and transparency. These values should be promoted by public policies and be upheld by business. Effective monitoring of the implementation of these principles and standards should be undertaken on a regular basis.
>
> 2) Governments, companies and all business entities, irrespective of their legal form, around the world should recognise that these values are the keystone of a market economy which serves the needs and aspirations of citizens of every country and which deserves their respect and confidence.
>
> 3) Any "race to the bottom" in labour, social and environmental standards and regulatory arbitrage among jurisdictions should be prevented through international cooperation and convergence of domestic legal frameworks.
>
> 4) Tax evasion and avoidance are harmful to society as a whole and companies and all business entities, irrespective of their legal form, should fulfil their fiscal duties, including

Carr & Opi Outhwaite, *Surveying Corruption in International Business*, 5 MANCHESTER J. INT'L ECON. L. 3 (2008).

250. *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Agreement on Government Procurement, Apr. 15, 1994, 1867 U.N.T.S. 154, https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf [hereinafter GPA].

251. *Id.* art. IV:4.

252. For a discussion of specialized international instruments on anti-corruption, however, see Alejandro Posadas, *Combating Corruption under International Law*, 10 DUKE J. COMP. & INT'L L. 345 (2000).

by respecting the arm's length principle in transfer pricing practices.

5) Government/business interaction, including lobbying and "revolving door," should be conducted in accordance with principles which are balanced, transparent, fair to all parties, and enforceable.

6) Business practices and governance of companies and all business entities, irrespective of their legal form—whether traded or non-traded, private or State-owned—should ensure accountability and fairness in the relationship between management, the board, shareholders and other stakeholders. Financial structures and instruments should not be misused in order to hide the true beneficial owner and corporate vehicles, in their various forms, should not be used for illicit activities, including money laundering, bribery, shielding assets from creditors, illicit tax practices, self-dealing and diversion of assets, market fraud and circumvention of disclosure requirements.

7) Disclosure of timely and accurate information regarding the activities, structure, ownership, financial situation and performance of companies should be ensured.

8) Pay and compensation schemes should be sustainable and consistent with companies' and all business entities', irrespective of their legal form, long-term goals and prudent risk-taking.

9) Bribery, including bribery in international business transactions, should be established as a criminal offence and effectively prosecuted and punished.

10) Money laundering should be criminalised and the crime of money laundering should be applied to all serious offences, with a view to including the widest range of predicate offences.

11) Any form of protectionism should be banned.

12) Bank secrecy should not constitute an obstacle to the application of the abovementioned principles, including tax compliance worldwide.[253]

253. *OECD Principles for a Strong, Fair, and Clean Economy*, OECD, https://community.oecd.org/community/gcls/blog/2009/07/06/12-principles-for-a-strong-fair-and-clean-economy (last visited Oct. 1, 2017) (emphasis added).

While there are various international instruments prohibiting corruption (such as the U.N. Convention Against Corruption[254] or the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[255]), there is still no definitive consensus among states on how to ensure regulatory coordination in order to neutralize dangerous regulatory arbitrage practices of firms. This is particularly true for firms that participate in outright tax evasion and tax abuse, morally hazardous behavior and risk-taking in procurement and financial activities in the international system, or other forms of conduct where firms easily manipulate the absence of regulation or existing regulatory loopholes between jurisdictions towards the "race to the bottom." It should also be considered that states practice regulatory competition amongst themselves to attract international investors and multinational firms to operate in their jurisdictions. However, if that competition incentivizes poor regulatory quality or "regulatory races to the bottom," then states themselves also become complicit in perpetuating the pathological consequences of corruption and other moral hazards as a result of unchecked regulatory arbitrage practices. This is precisely why the U.N. Office of the High Commissioner for Human Rights declared that corruption negatively impacts the enjoyment of all human rights:

> The impact on the realization of human rights depends on the level of pervasiveness, the different forms and levels of corruption. Corruption can affect human rights as an obstacle to their realization in general and as a violation of human rights in specific cases. Corruption in the public and private spheres and its proceeds are not confined within national borders, nor is its impact on human rights.
>
> It typically diverts funds from state budgets that should be dedicated to the advancement of human rights. It therefore undermines a State's human rights obligation to maximize available resources for the progressive realization of rights recognized in article 2 of the International Covenant on Economic, Social and Cultural Rights.

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254. U.N. Convention against Corruption, Dec. 11, 2003, S. Treaty Doc. No. 109-6 (2005), 43 I.L.M. 37.

255. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, reprinted in 37 I.L.M. 1 (1998).

> Corruption undermines the fairness of institutions and processes and distorts policies and priorities. As a result, corruption damages the legitimacy of regimes leading to a loss of public support and trust for state and government institutions.
>
> Corruption impacts on the ability of the State to protect and fulfil its human rights obligations and to deliver relevant services, including a functioning judiciary, law enforcement, health, education, and social services.
>
> In countries where corruption pervades governments and legal systems, law enforcement, legal reform and the fair administration of justice are impeded by corrupt politicians, judges, lawyers, prosecutors, police officers, investigators and auditors.
>
> Corruption in the rule of law system weakens the very accountability structures which are responsible for protecting human rights and contributes to a culture of impunity. Since illegal actions are not punished, accountability may be diverted to innocents, redress may be frustrated and laws not consistently upheld.[256]

In summary, states should be alert to the presence of the four phenomena observed—(1) norm irrelevance, (2) reform gridlocks, (3) rule inertia, and (4) corruption and other moral hazards—when they seek to change global and cross-border economic rules, whether through international economic treaties, international administrative standard-setting practices, global governance practices or decision, or even from the margins of discretion they use when implementing international economic treaty obligations that inherently defer to states. Economic rule changes are always fertile grounds for regulatory arbitrage opportunities to flourish. Part III will transition to international human rights law to expand our public interest tools for anticipating, and avoiding, the pathological consequences of unchecked regulatory practices in a time of rule changes in the international economic system.

III. International Human Rights Law Tools Against Regulatory Arbitrage in International Economic Law

While international human rights law plays a crucial normative role allowing states to check multinational firms' regulatory arbitrage

256. U.N. Office of the High Commissioner for Human Rights, The Negative Impact of Corruption on the Enjoyment of Human Rights, http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf (last visited Oct. 1, 2017).

practices, when states are in the process of writing or renegotiating international economic treaties, standards, and other economic rules, it cannot resolve all issues arising from regulatory arbitrage. After all, regulatory arbitrage is a structural and institutional phenomenon that cuts across all fields of law and regulation. It cannot be dealt with alone by any single body of law, which is why so much of the scholarship on regulatory arbitrage emphasizes the role of cross-border regulatory coordination and legal harmonization among states.[257] However, regulatory coordination and legal harmonization strategies are largely matters for inter-state collaboration. They do not say much about how states should view their own regulatory duties in light of their concurrent duties to the communities and populations whose "public interests" they are supposed to advance in international economic treaty negotiations, standard-setting, and other cross-border economic rule-making. It is in this space of how states regard their own regulatory duties towards their populations that international human rights law—along with its evolving methodologies and tools for compliance and impact assessment—could provide additional checks and balances.[258]

A. *International Human Rights Law as a Tool for Public Participation*

Even in recent developments of exits from, and renegotiations of, international economic treaties by politicians, very little is ever explained to local communities and populations about the human costs to them of these rule changes. One has to wonder whether the

257. *See, e.g.*, Lena Rethel, *Bank regulation after the global financial crisis: the case of regulatory arbitrage, in* TRANSNATIONAL FINANCIAL REGULATION AFTER THE CRISIS 72, 78 (Tony Porter Ed., 2014); Daniel Heath, *International Coordination of Macroprudential and Monetary Policy*, 45 GEO. J. INT'L L. 1093 (2014); WORLD BANK, GLOBAL DEVELOPMENT FINANCE: CHARTING A GLOBAL RECOVERY 96 (2009); Federico Lupo-Pasini, *Global Systemic Risk and International Regulatory Coordination: Squaring Sovereignty and Financial Stability*, 30 AM. UNIV. INT'L L. REV. 665 (2015).

258. Many scholars have certainly contributed to the growing stock of knowledge on how to design market regulations and governmental regulations over business activities in ways that best protect human rights or promote human rights compliance. *See, e.g.*, Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013); Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225 (2012); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010); Saleh Al-Sharieh, *Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law*, 32 UTRECHT J. INT'L & EUR. L. 5 (2016); The U.N. Office of the High Commissioner for Human Rights has also focused more programs on the integration of human rights in economic development. U.N. Office of the High Comm'r for Human Rights, Integrating Human Rights in Development and in the Economic Sphere, http://www.ohchr.org/EN/AboutUs/Pages/developmentintheeconomicsphere.aspx (last visited Oct. 1, 2017).

states willingly inviting the policy, regulatory, and economic uncertainty into their domains are transparently discussing the human costs of these changes and enabling the widest possible consultations with, and participation of, communities, individual persons, and groups in the lasting economic decisions being taken on their behalf. Regardless of the form of the economic decision that treaty negotiators and politicians reach—whether a bilateral, trilateral, or multilateral trade agreement or any other political arrangement conceived to steer the state's course towards more economic development—states invoking the argument of sovereignty in the current debates about global economic treaty changes remain legally and politically bound to recognize the higher claims of the communities, groups, and individual persons that constitute the "sovereign will" states invoke in the first place.

Often, states immersed in the processes and politics of tectonic global economic treaty changes have muted the human costs and impacts of change in policy debates without giving an equal place for the independent participation of individuals, civil society groups, and local communities alongside lobbying efforts of chambers of commerce and market players. As the WB's 2017 World Development Report, *Governance and Law*, acknowledges:

> All countries, regardless of their level of economic and institutional development, are subject to elite bargains. Change is unlikely to occur unless powerful actors—elites—in the country agree to that change. When influential actors resist change, suboptimal policies and governance institutions that are detrimental to development tend to persist. Under certain circumstances, however, elites may voluntarily agree to limit their influence in their own self-interest. Citizens can also organize to bring about change, playing an important role in applying pressure to influence the outcome of favorable bargains in the policy bargaining process . . .
>
> Individual citizens may not have the power to influence the policy arena to generate more equitable development on their own. However, all citizens have access to multiple mechanisms of engagement that can help them overcome collective action problems—to coordinate and cooperate—by changing contestability, incentives, and preferences and beliefs. Modes of citizen engagement can include elections, political organization, social movements, and direct participation and deliberation. Because all of these expressions of collective action are

> imperfect, they complement, rather than substitute for, one another . . .
>
> Policies do not occur in a vacuum. Rather, they take place in complex political and social settings in which individuals and groups with unequal bargaining power interact within changing rules as they pursue conflicting interests.[259]

A "business as usual" ethos in the writing and rewriting of trade agreements privileges certain governing elites more preponderantly than citizens. Domestic politicians seeking key political support for trade agendas, for example, will inevitably focus more on the concerns of organized labor, chambers of commerce, and producers' associations, rather than isolated communities impacted by the loss of jobs from trade agreements. Somewhat uniquely, U.S. President Donald Trump's electoral campaign ran strongly on speaking against "unfair trade deals"[260] that supposedly do not protect the interests of the majority of Americans, but without firmly committing to showing how each local community benefits (or does not benefit) from new or revised trade rules.[261] The opacity of states on the projected impacts of the negotiation and rewriting of trade agreements on local communities ultimately undermines the right to development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."[262] As will be discussed subsequently, there are four overlooked aspects that should be considered as states deliberate changes to global economic rules: (1) transparency, consultations, and participation; (2) human rights impact assessments; (3) short- and long-term trade adjustment strategies through labor and education policies; and (4) interacting long-term economic, social, cultural, and environmental

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259. WORLD BANK, WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW 19, 23, 29 (2017), http://www.worldbank.org/en/publication/wdr2017.

260. Vicki Needham, *Trump says global trade will be fair and reciprocal*, THE HILL (Jan. 30, 2018), http://thehill.com/policy/finance/371539-trump-says-global-trade-will-be-fair-and-reciprocal.

261. Significantly, the United States Chamber of Commerce – and not the Office of the US Trade Representative – released an analysis of the State-By-State impact of the US government's tariffs in its trade wars against Europe, China, Canada, and other steel and aluminum producers. *See Interactive Map in United States Chamber of Commerce, Trade Works. Tariffs Don't.*, U.S. CHAMBER OF COMMERCE (July 2, 2018), https://www.uschamber.com/tariffs.

262. G.A. Res. 41/128, *supra* note 61, art. 2.

obligations that already constrain how states rewrite the new global terms of trade for future generations.

1. Transparency, Consultations, and Participation

The ongoing Brexit negotiations illustrate the significance of public consultations as states rewrite international trade rules. In December 2017, Member of Parliament Baroness Armstrong submitted a written question on whether the U.K. government would "provide funding for citizens' assemblies on Brexit to consider the public's views on the nature of the UK's future relationship with the EU," to which she received the general answer that "stakeholder engagement is a central element of [the] plan to build a national consensus around a negotiating position."[263] As of this writing, while some consultations have taken place with the business sector,[264] Brexit negotiations have thus far not created a formal channel for the participation of individuals, groups, or communities in the United Kingdom:

> All sides agree that public opinion should continue to influence the process, but there are two views on what that should mean. One view is that the public spoke in the referendum and the task now is simply to implement that decision. The other view is that opinion is more complex and changeable and that evolving public views should also be considered. One way public opinion might be heard is through a referendum on the final deal. The form this would take, the effects it might have, and how it might come about are complex issues. The most like version would pit the negotiated deal against remaining in the EU. Circumstances leading to such a vote are imaginable, but its outcome is impossible to predict. The prevailing public mood will, in any case, influence MPs' and ministers' day-to-day decisions. Direct public intervention could also come in the form of a general election.[265]

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263. Brexit: Public Consultation – HL 3923, (Dec. 6, 2017), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-12-06/HL3923/.

264. *See* HM GOV'T, THE FUTURE RELATIONSHIP BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION 31 (July 2018) (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724982/The_future_relationship_between_the_United_Kingdom_and_the_European_Union_WEB_VERSION.pdf.

265. Alan Renwick, *The Process of Brexit: What Comes Next?* 3 (UCL European Institute, Working Paper No. 3, 2017), https://www.ucl.ac.uk/constitution-unit/news/the-process-of-brexit.

In a letter dated February 28, 2017, the EU Ombudsman urged the EU Commission to ensure transparency and consultation with all stakeholders in the Brexit negotiations and to "assist in protecting EU citizens' rights."[266] In response, the Commission has adopted a tailor-made policy of "maximum level of transparency," opening all negotiation documents on the Article 50 negotiations with the United Kingdom.[267]

In contrast to the EU's efforts, the NAFTA renegotiations process has not built in formal channels for negotiation transparency,[268] public consultations with all stakeholders, and public participation. Although the United States Trade Representative set up a public comment period on its NAFTA renegotiation objectives, it was only an opportunity to comment on those broad and general objectives, but not necessarily the precise terms of renegotiation for every affected sector with NAFTA partners Canada and Mexico.[269] The perfunctory right to "comment" on broad objectives ultimately deprives Americans of their right to meaningful public participation in development decisions made by their states under Article 8 of the Declaration on the Right to Development.[270]

Without access to information on the terms of the ongoing negotiations, individuals, groups, and local communities that are denied stakeholder participation will not be able to weigh in on the ultimate terms of the NAFTA renegotiation, unlike business groups, chambers of commerce, producer groups, and other supply chain firms who have a greater wealth of resources to make their positions known to their respective governments conducting the NAFTA renegotiations. Similar controversies about lack of transparency and the dearth of open public

266. Letter Case No. SI/1/2017/KR, Letter from the Ombudsman to President Juncker concerning information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU (Feb. 28, 2017), https://www.ombudsman.europa.eu/cases/correspondence.faces/en/76528/html.bookmark.

267. *See* European Commission Documents Published on Transparency on Article 50 negotiations with the United Kingdom, EUR. COMM'N, https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en (last visited Oct. 1, 2017).

268. Jeremy Malcolm & Jyoti Panday, *Shrinking Transparency in the NAFTA and RCEP Negotiations*, ELECT. FRONTIER FOUND. (Sept. 14, 2017), https://www.eff.org/deeplinks/2017/09/shrinking-transparency-nafta-and-rcep-negotiations.

269. Press Release, U.S. Trade Representative, USTR Extends Public Comment Period on NAFTA Renegotiation Objectives (June 14, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/ustr-extends-public-comment-period.

270. G.A. Res. 41/128, *supra* note 61, art. 8 ("States should encourage popular participation in all spheres as an important factor in development and in the full realisation of human rights.").

consultations affected the negotiations of potential mega-regional agreements such as the TPP (now re-designated into the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership"),[271] the stalled Trans-Atlantic Trade and Investment Partnership (TTIP),[272] and the pending negotiations for the China-led Regional Comprehensive Economic Partnership (RCEP).[273]

2. Human Rights Impact Assessments

In December 2016, the U.K. Parliament released its report, "The human rights implications of Brexit," noting that the Government of the United Kingdom "has not been able to set out any clear vision as to how it expects Brexit will impact the UK's human rights framework."[274] In fact, the Government "seemed unacceptably reluctant" to discuss the issue of human rights after Brexit. The Minister of State responsible for human rights was either "unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU."[275] In contrast, the European Commission Directorate General for Trade has pre-existing "Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives,"[276] as well as settled practices on "sustainability impact assessments." It is important to note that the Commission has not yet released any such impact assessment report in relation to the ongoing Brexit negotiations and supposed negotiation thereafter for a new U.K.-EU trade treaty. The NAFTA renegotiations process does not provide for any such human rights impact assessments, especially since human rights have not figured much into public discussions of the NAFTA "2.0."

The right to development does not specifically mandate human rights impact assessments. But in the aftermath of global financial crises and upheavals in states' economic decision-making policies in the last

271. *See* Eric Bradner, *How Secretive is the Trans-Pacific Partnership?*, CNN (June 12, 2015), http://edition.cnn.com/2015/06/11/politics/trade-deal-secrecy-tpp/index.html.

272. *See* Sven Giegold, *The promised 'transparency' around TTIP has been a sham*, GUARDIAN (Aug. 31, 2015), https://www.theguardian.com/commentisfree/2015/aug/31/transparency-ttip-documents-big-business.

273. *See* Jeremy Malcolm & Jyoti Panday, *supra* note 268.

274. UK Parliament, The Human Rights Implications of Brexit, Conclusions and Recommendations, HL 88, HC 695, at 33, ¶¶ 1-2, https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf.

275. *Id.*

276. Directorate-General for Trade, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*, EUR. COMM'N, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf (last visited Oct. 1, 2017).

decade, a draft resolution submitted to the U.N. Human Rights Council, dated March 16, 2017, requested the Independent Expert (on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social, and cultural rights) to "develop guiding principles for human rights impact assessments for economic reform policies, in consultation with States, international financial institutions and other relevant stakeholders, and to organize expert consultations for the development of the guiding principles and a mapping of existing impact assessment tools."[277] Likewise, the Committee on Economic Social and Cultural Rights' General Comment No. 24 emphasizes the need to conduct human rights impact assessments before entering into trade and investment agreements: "The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development."[278]

Admittedly, however, there is no universal consensus on what human rights impact assessments (HRIAs) should look like.[279] Even in the particular case of trade and investment agreements, results from a 2010 U.N. expert seminar organized by the Office of the High Commissioner for Human Rights (OHCHR) pointed to the following challenges:

> There was considerable discussion of the challenges of *ex ante* assessments. Is it truly possible to do an *ex ante* assessment of a trade or investment agreement? HRIAs require a significant investment of resources, consultation of different stakeholders

277. U.N. Human Rights Council, Draft Resolution, *Mandate of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, A/HRC/34/L.3 (Mar. 16, 2017), http://www.un.org/ga/search/view_doc.asp.

278. U.N. Committee on Economic, Social, and Cultural Rights (CESCR), *General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, (Aug. 10, 2017), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx.

279. *See* Gillian MacNaughton, *Human Rights Impact Assessment: A Method for Healthy Policymaking*, 17 HEALTH & HUM. RTS. 63 (2015); Jessica Evans, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations*, 107 PROC. AM. SOC'Y INT'L L. 298 (2013); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007); James Harrison, *Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment*, 3 J. HUM. RTS. PRAC. 162 (2011).

> and time. The negotiating texts of a trade agreement can vary significantly from the start until the agreement is concluded.
>
> Another difficulty in assessing the impact of trade and investment agreements is that it is not always the agreements themselves, but rather the domestic policies put in place by governments, which create the winners and losers. This underscores the importance for HRIAs to identify dangers *ex ante*, in order to allow governments to take precautions, including safeguard clauses.
>
> Most participants felt that it was possible, and necessary, to conduct *ex ante* assessments even if they were not perfect. Under the WTO's Doha Agenda, for example, the World Bank, universities and NGOs carried out assessments of the *likely* outcome of the negotiations. These were not precise but helped to highlight possible impacts and alert government negotiators.
>
> *Ex ante* assessments of investment agreements pose their own unique challenges, because it is difficult to model the potential economic consequences of an investment agreement. Economists have been trying to show that investment liberalization promotes investment, but there is no convincing evidence to support the theory. How can the HRIA explore the implications of the loss of policy space resulting from the legal obligations of the treaty and its enforcement provisions?
>
> Investment experts and practitioners agreed that, when analyzing the actual or potential conflicts between international investment agreements and human rights treaties, it is important to examine current and past experiences of such agreements, for which there is a wealth of information. This would make the exercise easier and provide empirical evidence of a range of potential impacts.[280]

Of course, the needle of interdisciplinary research has moved considerably since these findings of the OHCHR in 2010. A February 2016 report submitted to the OHCHR that surveyed the evolution of HRIAs and different types of methodologies for conducting HRIAs based on authorship (non-governmental organization or community-led HRIAs,

280. U.N. Office of the High Commissioner for Human Rights, *Human Rights Impact Assessments for Trade and Investment Agreements*, Rep. of the Expert Seminar, Geneva, Switzerland, at 6-7 (June 23-24, 2010), http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf.

company-led HRIAs, and government-led impact assessments),[281] subsequently reported discernible common features in various HRIA methodologies:

> A review of the many guides and tools available shows that HRIAs mostly follow a similar methodology to other forms of impact assessment. Various terms are used but, in essence, the assessment process involves the following basic steps: (1) an initial screening to establish the need for an assessment; (2) a scoping process to prioritize the issues and establish a baseline; (3) evidence gathering, including consultation with the affected stakeholders; (4) an analysis stage in which the impacts are assessed; (5) developing recommendations, including possible mitigating measures; (6) designing appropriate monitoring, management and grievance mechanisms; and (7) reporting on the outcome of the assessment, ideally in a transparent and published form.[282]

The 2011 Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, prepared by U.N. Special Rapporteur on the right to food Olivier de Schutter,[283] which the U.N. Human Rights Council endorsed,[284] discuss the following methodology and key steps in preparing HRIAs specifically for assessing the human rights impacts of prospective or current trade and investment agreements:

> 5. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered: (a) Making explicit reference to the normative content of human rights obligations; (b) Incorporating human

281. RORY MUNGOVEN, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, WALKING THE TALK: EXPLORING METHODOLOGIES AND APPLICATIONS FOR HUMAN RIGHTS IMPACT ASSESSMENT BY THE UNITED NATIONS (2016) (expert report submitted to the OHCHR), https://hr.un.org/sites/hr.un.org/files/editors/u4492/Walking%20the%20talk%20-%20Exploring%20methodologies%20%26%20applications%20for%20Human%20Rights%20impact%20assessment%20by%20the%20UN%20-%202015%20Sabbatical%20-%20R.pdf.

282. *Id.* at 10.

283. Rep. of the Special Rapporteur on the Right to Food, *Guiding Principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5 (Dec. 19, 2011) (by Olivier De Schutter), http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf.

284. *Id.* at 1.

> rights indicators into the assessment; and (c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression. . . .
>
> 7. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter most: (a) Screening; (b) Scoping; (c) Evidence gathering; (d) Analysis: (e) Conclusions and recommendations; and (f) Evaluation mechanism.[285]

Beyond the recommended principles quoted previously, states will inevitably have differences in the manner in which they conduct HRIAs in relation to their current and future trade and investment agreements. For one, states have a variable universe of international human rights law, including environmental and social, commitments based on their respective treaties, and other voluntary commitments in the international system. Drawing that index of the state's "international human rights baseline" in the first place is an archaeological task, let alone conducting qualitative and quantitative tests for the consistency of current or future international economic agreements, regulations, standards, treaties, or other instruments with the state's "international human rights baseline."[286]

Methodologies and best practices for creating individualized or customized HRIAs remain an ongoing collaborative effort in international human rights law.[287] To the extent that they are designed well and

285. *Id.* at 9-11, 14.

286. The social sciences provide for various qualitative and quantitative tools for conducting research. *See, e.g.*, JOSHUA D. ATKINSON, JOURNEY INTO SOCIAL ACTIVISM: QUALITATIVE APPROACHES 65-98 (2017) (on qualitative methods); Ariel I. Ahram, *Concepts and Measurement in Multimethod Research*, 66 POL. RES. Q. 280 (2013); Robert Adcock & David Collier, *Measurement Validity: A Shared Standard for Qualitative and Quantitative Research*, 95 AM. POL. SCI. REV. 529 (2001); Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009).

287. *See, e.g.*, *New Guidelines on the Analysis of Human Rights Impacts in Impact Assessments*, EUR. COMM'N (July 2, 2015), http://trade.ec.europa.eu/doclib/press/index.cfm; Fabiane Baxewanos & Werner Raza, *Working Paper No. 37: Human Rights Impact Assessments as a New Tool for Development Policy?*, AUSTRIAN FOUND. FOR DEV. RES. (2013), https://www.econstor.eu/bitstream/10419/

carefully, HRIAs can helpfully inform states' policymaking tools when they seek to devise checks on the pathological consequences of regulatory arbitrage from changes forthcoming or contemplated in international economic rules. It is crucial, however, to bear in mind that there cannot be a one-size-fits-all method that would yield a perfect objective conclusion for the state on the consistency (or inconsistency) of the current or future international economic treaty, regulation, or standard with that state's international human rights baseline. For example, indicators may usefully give a static snapshot of human rights compliance, but they are hardly the most authoritative or singularly definitive method for fully comprehending how a state complies (or not) with its human rights commitments over time.[288] While the tools for measurement can (and inevitably will) evolve for international human rights law compliance, what is important is to try and approximate reasonable effectiveness. In doing so, states would use "counterfactual"[289] thinking in their policy toolbox by using as many plural tools and methods as possible in making their assessments of the consistency (or inconsistency) of their current or future international economic law rules.[290] Empiricists routinely check the feasibility and integrity of their own methods, models, and assumptions about reality, [291] even if there are inevitable limits to these exercises of verification.[292] States should be equally conscious of the same when they deploy HRIA tools in the realm of international economic law and policymaking.

3. Trade Adjustment Strategies through Labor and Education Policies

While it may seem premature to formulate trade adjustment strategies when negotiations on Brexit and the supposed new U.K.-EU treaty are in early stages, and while NAFTA renegotiations are nowhere

98807/1/734851294.pdf; *The Human Rights Compliance Assessment*, THE DANISH INST. FOR HUMAN RIGHTS, https://www.humanrights.dk/business/the-human-rights-compliance-assesment (last visited Oct. 1, 2017).

288. *See* UN Office of the High Comm'r for Human Rights, Human Rights Indicators: A Guide to Measurement and Implementation (2012), http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf.

289. *See* Joan Weiner, *Counterfactual Conundrum*, 13 NOÃS 499 (1979).

290. *See* David McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 EUR. J. INT'L L. 385 (2016).

291. *See, e.g.*, Daniel E. O'Leary, *Verification of Uncertain Knowledge-Based Systems: An Empirical Verification Bias*, 42 MGMT. SCI. 1663 (1996); S. Cannavo, *On the Verifiability of Universal Empirical Statements*, 26 ANALYSIS 21 (1965).

292. *See* MATS ALVESSON & DAN KARREMAN, QUALITATIVE RESEARCH AND THEORY DEVELOPMENT: MYSTERY AS METHOD 23-27 (2011).

near reaching agreement on discrete points, the uncertain duration of global economic treaty rule changes, whether from exiting trade agreements or concluding new ones, makes it imperative for states to exercise foresight. States focused on properly ensuring the right to development for their populations must effectively plan short- and long-term trade adjustment strategies. These include forecasting worker displacements, shifts in demands for skilled and unskilled labor, and corresponding needs for worker adaptability through continuing training and for education strategies that anticipate the diversification of needed skills and relevant expertise from those expected to join the job market after the new global economic treaty rules are concluded and enter into force.[293]

NAFTA took fourteen years to conclude in 1994 from the time U.S. President Ronald Reagan first articulated a proposal for such an agreement in 1980. Since then, the United States has repeatedly been called upon to anticipate labor market changes and corresponding educational needs arising from changing labor markets adapting to NAFTA, such as in the U.S. Government Accountability Office's 1997 Report on NAFTA Impacts and Implementation, a 2010 report filed with the National Bureau of Economic Research, and even a 2017 Congressional Research Service Report on NAFTA.[294] The United States implemented the Trade Adjustment Assistance Reform Act of 2002, but it focused on short-term transfers to ease transitions of job losses from trade diversion,[295] and not long-term strategies for labor retraining and education to anticipate future trade dislocations to be further exacerbated by increasing automation in global production processes.[296]

In 2016, the OECD G20 Employment Working Group issued its report, Enhancing Employability.[297] The report emphasized the need for continuing evaluation of the adaptability and fit of education

293. *See* MICHAEL J. TREBILCOCK, DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS 63-80 (2014) (on labor market and education policies as part of trade adjustment policies).

294. *See* M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42964, THE NORTH AMERICAN FREE TRADE AGREEMENT (May 2017), https://fas.org/sgp/crs/row/R42965.pdf.

295. *See* Katherine Baicker & M. Marit Rehavi, *Policy Watch: Trade Adjustment Assistance*, 18 J. ECON. PERSP. 239 (2004).

296. *See* Christian Bodewig, *Replacing work with work: New Opportunities for workers cut out by automation?*, BROOKINGS (Feb. 21, 2017), https://www.brookings.edu/blog/future-development/2017/02/21/replacing-work-with-work-new-opportunities-for-workers-cut-out-by-automation/; Ryan Migeed & Anna Gawel, *Trade, Automation, Cheap Wages Abroad Conspire to Alter U.S. Economic Landscape*, WASH. DIPLOMAT (Mar. 1, 2017), http://www.washdiplomat.com/index.php.

297. OECD, ILO & WBG WITH IMF, ENHANCING EMPLOYABILITY: REPORT PREPARED FOR THE G20 EMPLOYMENT WORKING GROUP (2016), https://www.oecd.org/g20/topics/employment-and-social-policy/Enhancing-Employability-G20-Report-2016.pdf.

policies and labor market strategies in the face of structural shifts from changes in global economic rules and challenges of obsolescence arising from technological innovation and automation—alongside the need for states to adopt policy coherence as they make economic decisions that stand to have lasting impacts on populations. In this era of expected global economic rule changes, it is troubling that states are not routinely holding counterpart discussions on devising long-term labor and education strategies to adapt to future competitiveness under the new economic rules.

4. Interacting Long-Term ESC Rights and Environmental Obligations

Finally, during the period of rewriting economic rules through negotiations on Brexit and the new U.K.-EU treaty, as well as the NAFTA renegotiations, it should also be emphasized that the states involved do not negotiate in a vacuum. There are dense international obligations taken on by all states involved which do not just refer to economic agreements, but more pertinently involve the rights owed under international human rights law to all individuals, groups, and local communities to be affected in the short-term by the uncertainty of the regulatory environment and in the long-term by the new rules arrived at by states' treaty negotiators.[298] As shown above, there are few direct opportunities for full participation by, and information exchange with, individuals, groups, and local communities in the NAFTA renegotiations process or the negotiations on Brexit and the new U.K.-EU treaty. For these reasons, it will be foreseeably harder for these constituencies of international human rights law and international environmental law to check their political representatives in real time during treaty negotiations. Effectively, it would be a *fait accompli* if populations had to wait years for a referendum to approve new draft treaty texts, to vote in elections to replace treaty negotiators or politicians, or to litigate before domestic or international courts or tribunals, before they could vindicate their economic, social, cultural, and environmental rights against infringing provisions of the new economic treaty rules. By then, the crystallization of these infringing provisions of new economic treaty rules would have created human rights impacts that may not always be possible to reverse (especially in the case of environmental damage).

The ends of trade and investment agreements are to realize the authentic meaning of development under the right to development,

298. *See* Chantal Thomas, *Trade-Related Labor and Environmental Agreements?*, 5 J. INT'L ECON. L. 391 (2002).

which is "the inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised."[299] This right is all the more crucial in these times when politicians are obscurely rewriting the rules for all of us and fueling global economic policy and treaty uncertainty without ensuring that individuals, citizens, groups, and communities actively take part in drawing up the terms of bargaining for the future global economic order.

To that end, it is important for states changing global economic rules to consider how international human rights law has also developed to more closely scrutinize the international business activities of multinational firms and enterprises. On August 10, 2017, the Committee on Economic, Social and Cultural Rights (hereinafter the Committee) released its General Comment No. 24 on state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities.[300] General Comment No. 24 is arguably the most impactful document yet released by the Committee, since it elaborates on the role of the ICESCR as a legal constraint on state regulation of business activities, especially in the area of investment treaty-making. As I have argued elsewhere in more detail,[301] the implementation of the ICESCR (and related human rights) in international economic law cannot be relegated to the back end of issues of treaty interpretation and treaty application in world trade law disputes or investor-state arbitrations, but rather, should operate as an inbuilt constraint for states when bargaining the terms of their international economic agreements in the first instance. When negotiating these international economic agreements, states must take into account: (1) the impact of treaty commitments on states' social protection baselines under the ICESCR ("minimum core obligations"); (2) how the new treaty will affect the future ability of the state to progressively realize ICESCR rights, given the state's continuing non-retrogression obligations under the ICESCR; (3) the model of development chosen by the state and how it will impact the state's legal and/or constitutional duties to its citizens to respect, protect, and facilitate ICESCR rights; and (4) whether the design of the dispute resolution mechanism in the international economic agreement preserves the

299. G.A. Res. 41/128, *supra* note 61, art. 1(1).

300. Comm. on Economic, Social and Cultural Rights, *supra* note 69.

301. DIANE DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND DEVELOPMENT (2015).

state's present and future capacity and authority to respect, protect, and facilitate ICESCR rights—including questions of whether there are sufficient exit and voice mechanisms for local communities impacted by trade and investment operations. In addition, states must consider whether there is meaningful, and not mere token, participation in monitoring and oversight by all impacted constituencies, as well as a sufficient broadening of the sources of information that either affect the investor's risk and return calculus with respect to the host state of investment, or that which would affect the exporting firm's regulatory expectations about the importing country.

Current trends in reforming international economic agreements thus far reveal strategies of "accommodation" for the ICESCR or other human rights obligations that depend more on dispute resolution for application and interpretation.[302] To that end, more agreements seek to include provisions maintaining compliance with labor and environmental agreements[303] without being altogether clear about the legal consequences (e.g., no breach, excused breach, or mitigated liability, among others) for a host state that purposely breaches an investment protection standard in order to maintain compliance with such labor and environmental agreements. The EU-Canada Trade Agreement/ CETA Investment Chapter Article 8.9 arguably does a better job at clarifying what these precise legal consequences are when a state commits otherwise investor-injurious acts pursuant to its right to regulate, but even this treaty is pending challenge at the European Court of Justice.[304] This challenge involves France's concerns over environmental and health impacts, as well as Belgium's objections over the supposed impact of CETA's investor-state arbitration process on states' rights to regulate.[305]

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302. *See* HEEJIN KIM, REGIME ACCOMMODATION IN INTERNATIONAL LAW: HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW AND POLICY 175-324 (2016) (describing the terms of accommodation for human rights in the dispute resolution practices of trade and investment regimes).

303. *See, e.g.*, U.S. Model Bilateral Investment Treaty, art. 12, 13 (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

304. *European Court of Justice to Decide Legality of CETA Multilateral Investment Court*, CTR FOR INT'L ENVTL. LAW (Sept. 6, 2017), http://www.ciel.org/news/european-court-justice-decide-legality-ceta-multilateral-investment-court/.

305. *See Belgium seeks EU court opinion on EU-Canada free trade deal*, EURACTIV (Sept. 6, https://www.euractiv.com/section/ceta/news/belgium-seeks-eu-court-opinion-on-eu-canada-free-trade-deal/; press release, Gov't of Fr., France will ensure CETA's compliance with European standards on health and environment (Sept. 22, 2017) (Fr.), https://www.gouvernement.fr/en/france-will-ensure-ceta-s-compliance-with-european-standards-on-health-and-the-environment.

It may be inherently futile to rely on such a strategy of ex post interpretation by international economic tribunals to implement international human rights law into international economic agreements. This cannot be better illustrated than in the apparent stasis of investor-state arbitration, which still dichotomizes treaty obligations (presumably binding only states) and contract obligations (supposedly the only mode of binding investors). While recent arbitral awards, such as Urbaser v. Argentina,[306] have significantly recognized broad sources of international human rights law from the Universal Declaration of Human Rights to customary norms as "relevant rules for treaty interpretation" under Article 31 (3)(c) of the Vienna Convention on the Law of Treaties (thus paving the way for investment treaties to be interpreted in light of human rights law), thus far arbitral tribunals remain reticent about the *direct* applicability of the ICESCR and other human rights obligations to states' investment contracts. As the Urbaser v. Argentina tribunal stressed:

> While it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. *In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law . . . .*[307]

This view—where international human rights law appears detached from having any direct applicability to investors—echoes similar reasoning from that of the 2010 Decision on Liability in Suez v. Argentina:

> Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its

306. Urbaser SA v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), ¶¶1195-1200.

307. *Id.* ¶ 1210 (emphasis added).

> obligations under the (bilateral investment treaties or BITs) and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. *Argentina is subject to both international obligations, i.e. human rights and treats obligation, and must respect both of them equally.* Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations . . . .[308]

The unique genius and foresight behind the Committee's General Comment No. 24 lies in how it achieves comprehensive internalization of the ICESCR, by embedding the ICESCR in every step of states' regulation of the conduct of business activities, trade, and investment and doing so in a manner more markedly direct than those sought through voluntary corporate social responsibility instruments (such as the U.N. Global Compact, Equator Principles, and U.N. Principles on Responsible Investment, among others).[309] General Comment No. 24 provides for modes of attribution of direct state responsibility for the action or inaction of business entities (whether state-owned or privately-owned enterprises). Moreover, it anticipates that there will be direct treaty conflicts between the ICESCR and international economic law, such that states should, accordingly as a matter of routine practice, conduct HRIAs long before concluding trade and investment treaties, and states should also require business entities to conduct extensive human rights due diligence in order to identify, prevent, and mitigate risks of ICESCR violations. Because the ICESCR is a long-standing treaty binding 169 states parties, with 71 signatory states pending ratification of the ICESCR[310] (and thus bound, pursuant to Article 18 of the Vienna Convention on the Law of Treaties, not to defeat the object and purpose

308. Suez v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability ¶ 262 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf (emphasis added).

309. *See* William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, (2001); Karin Buhmann, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions*, 6 TRANSNAT'L LEGAL THEORY 399 (2015).

310. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

of the ICESCR), the ICESCR constitutes binding international law to hold states accountable when they regulate business, trade, and investment activities in ways that are inconsistent with ensuring respect, protection, and facilitation of ICESCR rights. The Committee's General Comment No. 24 bears significance as an influential (if not authoritative) interpretation[311] of the ICESCR—one that gives states practical guidance on the implementation of the ICESCR in the context of regulating business, trade, and investment activities. In this sense, perhaps more successfully than the aspirations on business and human rights based on the U.N. OHCHR's Guiding Principles on Business and Human Rights,[312] General Comment No. 24 consolidates much of the previous works of the Committee on these matters into a single authoritative interpretive document. It is precisely this rich blueprint that states and non-state actors can now use to invoke legal constraints inbuilt and guaranteed by treaty under the ICESCR, as states design and plan for the regulation of business, trade, and investment activities.

General Comment No. 24 makes clear that the ICESCR applies to all business activities—transnational, state-owned or state-controlled, or privately-held—"regardless of whether domestic laws exist or are fully enforced in practice."[313] States continue to possess extraterritorial obligations to ensure respect, protection, and facilitation of ICESCR rights. States' fundamental duty of non-discrimination requires them to eliminate formal as well as substantive forms of discrimination by non-state entities, including groups disproportionately affected by the adverse impacts of business activities. The groups include women, children, indigenous peoples, disabled persons, and constituencies such as peasantry and rural workers impacted by the development, utilization, or exploitation of lands and natural resources.[314] Most importantly, the

311. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and their Legitimacy, in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 128 (Helen Keller & Geir Ulfstein eds., 2012) (albeit referring to the Human Rights Committee and its General Comments to the International Covenant on Civil and Political Rights); BEN SAUL, DAVID KINGSLEY & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 5 (2014) ("General Comments, which draw on the CESCR's experience in monitoring state reports, are not formally binding, but are highly influential in setting out the scope of rights and standards under the ICESCR, and provide an excellent starting point for examining its normative content . . . .").

312. *See* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

313. Comm. on Economic, Social and Cultural Rights, *supra* note 69, ¶ 5.

314. *Id.* ¶¶ 7-8.

Committee finds that states parties to the ICESCR may be held directly responsible for the action or inaction of business entities:

> (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts;
>
> (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or
>
> (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.[315]

The Committee explicitly points out that

> extraterritorial obligations arise when a State party *may influence* situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social, and cultural rights outside its territory.[316]

This can include duties on the part of states not to obstruct fellow states parties from complying with their ICESCR obligations, such as when negotiating trade and investment agreements or financial and tax treaties;[317] duties of states to take reasonable measures to prevent breaches caused by a private entity's conduct, especially in high-risk projects such as those in mining and the extractive industries;[318] or duties of states to directly require corporations to "deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries . . . or business partners, . . . respect Covenant rights."[319] The Committee also expressly places the obligation on states to ensure that any trade and investment treaties

315. *Id.* ¶ 11.

316. *Id.* ¶ 28 (emphasis added).

317. *Id.* ¶ 29.

318. *Id.* ¶ 32.

319. *Id.* ¶ 33.

subsequently entered into after the ICESCR must ensure the former's consistency with the latter:

> States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by *human rights impact assessments* that take into account both the positive and negative human rights impact of trade and investment treaties, including the contribution of such treaties to the realisation of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. *States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude . . . .*[320]

The Committee further extends the obligation to ensure respect for the ICESCR and protection of ICESCR rights to downstream operations of the business supply chain, including broader consultation with affected indigenous communities:

> The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise *human rights due diligence* in order to identify, prevent, and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements *to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners* . . . businesses should consult and cooperate in good faith with the indigenous peoples concerned

320. *Id.* ¶ 13 (emphasis added).

> through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities . . . .[321]

Corruption is anathema to the realization of ICESCR rights, because it "leads to the discriminatory access to public services in favour of those able to influence authorities, including by offering bribes or resorting to political pressure . . . ."[322] While privatization of traditionally public sectors such as water, electricity, education, or health care "is not per se prohibited,"[323] states should "retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs."[324] Intellectual property rights systems must also "recognise and protect the right of indigenous peoples to control the intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions."[325] States should also reject impunity for tax evaders who ultimately undermine state capacities to realize Covenant rights:

> States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights . . . .[326]

Finally, the Committee takes note of the unique (and nearly insurmountable) obstacles faced by individual victims of transnational corporate abuses in seeking to access effective remedies, whether from corporations successfully invoking the corporate veil defense or taking advantage of forum non conveniens doctrines. The Committee observes that states parties to the ICESCR are:

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321. *Id.* ¶¶ 16-17 (emphasis added).
322. *Id.* ¶ 20
323. *Id.* ¶ 21.
324. *Id.* ¶ 22.
325. *Id.* ¶ 24.
326. *Id.* ¶ 37.

> [R]equire[d] . . . to remove substantive, procedural, and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings . . . States parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence held by the defendant.[327]

Moreover, the Committee contemplates that corporate accountability for violations of ICESCR rights can span:

> [C]riminal liability of corporations and/or of the individuals responsible. . . . States parties should also consider the use of administrative sanctions to discourage conduct by business entities that lead, or may lead, to violations of the rights under the Covenant. For instance, in their public procurement regimes, States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant . . . .[328]

Remedies may also be judicial or non-judicial, in keeping with the particular nature of the harm caused to the individual or group victim of corporate conduct that violates ICESCR rights.[329]

In summary, as the foregoing subsections have shown, international human rights law has itself been steadily evolving with increasing empirical tools, conceptual methodologies, and evidence-based and contextual analyses. The following section will sketch principles for states to consider in devising a comprehensive human rights audit when they change global economic treaties, standards, regulations, and international instruments.

327. *Id.* ¶¶ 44-45.
328. *Id.* ¶¶ 49-50.
329. *Id.* ¶¶ 51-57.

B. *Considerations for a "Comprehensive Human Rights Audit" Against Regulatory Arbitrage During Changes to International Economic Law*

Part II of this Article has already discussed four pathologies (norm irrelevance, reform gridlocks, rule inertia, and corruption and moral hazard activities) in relation to private firms' regulatory arbitrage practices when states change international economic treaties and other global economic rules. Part III, in turn, has mapped the field of current and recent developments in international human rights law that can impact public participation tools, specifically at a time when states are revising, rewriting, terminating, or otherwise changing their international economic commitments in treaties and standard-setting practices issued by international organizations where states participate, or when states collaborate in devising cross-border regulations for coordinated domestic enforcement.

As previously discussed, there can be no singular set of criteria, universal methodology, conceptual analytical process, or empirical verification technique that applies when states have to undertake the rigorous process of determining the consistency of their contemplated (or actual) changes to global economic rules with their respective obligations under international human rights law. States have varying development ideologies, resource capacities, human capital, information infrastructure, and learning technologies. It might well be expected that the project of testing for consistency between international human rights law and international economic law would inevitably be interdisciplinary in nature, multi-temporal in scope, and could entail significant margins for discretion and imprecision, if not error. None of these challenges, however, detract from states' recognized fundamental obligation to test for the consistency of their international economic agreements made with other states[330] with their commitments to their respective populations under international human rights law. To that end, and considering the adaptive abilities of private firms to practice regulatory arbitrage while states are mired in treaty revisions and rule changes, this Article suggests the following twin considerations of time and scope for states to visualize crafting an appropriately comprehensive human rights audit that could usefully inform their international economic treaty negotiations.

1. Time: Pre- and Post-Audits

In negotiating new or revised international economic treaties, instruments, or other cross-border global economic rules, states have to pay

330. *See generally* Comm. on Economic, Social and Cultural Rights, *supra* note 69.

particular attention to the asymmetries of participation and access to information within their own jurisdictions. Private firms such as multinational corporations and other transnational enterprises have the resources to capitalize on their access to information and influence over the prospective content of the international treaty-making process. Thus, when states contemplate changes to their international economic obligations, a pre-audit should fairly identify *all* of the constituencies affected by the proposed new rules or changes to existing rules, as well as address current deficiencies in access to information over contemplated policy changes. For example, in the revision and rewriting of international economic agreements, to what extent is there a general process for the public—individuals, groups, and local communities, not just chambers of commerce and trade associations—to be invited to participate in governmental consultations? And what provisions are there for them to submit policy and other briefing materials as well as to elicit their respective interests in ensuring continued human rights protections *well before* actual treaty negotiations commence? Additionally, to what extent does the state ensure that any consultations or participation will be *meaningful* by providing open or transparent access to all constituencies in the public to information that enables them to reach their conclusions about trade, investment, finance, services, and other international economic regulations? Regulatory arbitrage, as previously discussed, flourishes in a climate of information asymmetry.

Moreover, this Article submits that, in preparing their pre-audit, states have to consolidate their international human rights law (including environmental, labor, and social) commitments, compliance reports, and other relevant records indicating their international human rights commitments into a single database accessible to the public. The consolidation of this information will enable both policy-makers and the public to determine the state of play of their "international human rights law baseline" as well as anticipate how that is supposed to be progressively realized (especially in the case of the right to development and economic, social, and cultural rights under the ICESCR). A baseline understanding, no matter how tentative, at least provides a reference point for determining if a state is violating its non-retrogression[331] obligations in international human rights law when it makes future commitments in the international economic system. By making this database of information on the state's international human rights law baseline accessible to the public, there should be more equitable opportunities for

331. *See* Ben TC Warwick, *Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression*, 65 INT'L & COMP. L. Q. 249 (2016).

individuals, groups, and local communities to make meaningful issue-specific interventions, especially for proposed international economic rule changes that their respective states are contemplating. The pathological outcome of *norm irrelevance* between new "gold standard" economic treaties with unresolved issues on regulatory burdens from other treaty regimes such as international environmental law, as well as the ongoing parallel existence of regional investment treaties with more public policy innovations than older investment treaties that are still subject to treaty-shopping by investors, could, potentially, be better detected with a substantial pre-audit. This would help states determine the consistency of their prospective rule changes with their existing international human rights law obligations. The pathological outcome of *reform gridlocks* (the resistance to, or expediting of, rule changes based on the interests of entrenched market dominant elites such as transnational enterprises and multinational corporations) could be ameliorated, if not neutralized, by transparency and fairness in the public participation and consultations conducted by the state in preparation for actual treaty negotiations. Identifying the sources of lobbying and purposely shrinking, if not completely eliminating, the channels for privileging one lobby group over another is one step towards achieving better consistency of prospective rule changes with the state's guarantees of international human rights law protection owed to its population.

The "post-audit" phase (after a tentative or proposed rule change has crystallized, and while it is being deliberated upon during treaty negotiations) is a time where states can certainly draw on the expansive literature and best practices on HRIAs. Particularly in the case of international trade and investment treaties, which take years to conclude, it would be important both for state policy-makers as well as the general public to be updated, using the best available means or empirical tools at hand, with information on the anticipated impacts of the international economic rule changes. In the case of Brexit, for example, where hundreds of the United Kingdom's treaties have to be renegotiated, which will inevitably take years (if not decades) to conclude, both parliamentarians and the general public would benefit from examining anticipated human rights consequences from the contemplated rule changes with at least a spectrum of estimated, anticipated, or assessed human rights consequences from each stage of treaty renegotiations. In the case of NAFTA renegotiations in the United States, the general public would benefit more from understanding how contemplated changes that the United States is seeking (including unilateral strategies to reduce trade deficits) would impact their rights under domestic, as well as international, human rights law. The pathological outcome of *rule inertia* (when a state fails to prepare for the social outcomes of contemplated changes to economic rules, in a manner that exacerbates inequalities from private firms' regulatory arbitrage practices) can be mitigated, if not avoided, with more information from well-designed HRIAs. Trade adjustment strategies, for example, could be better designed to anticipate and target the specific human rights impacts identified from the expected international economic rule changes.

Change rarely happens instantaneously or overnight in international economic law. States should—to the best of their abilities and in compliance with international human rights law—properly, transparently, and sufficiently inform their respective populations of the contemplated changes to the international economic system, especially insofar as it impacts their enjoyment of fundamental human rights protections. Developing the required indices and infrastructures of information for both the pre-audit and the post-audit is a critical step to ensuring that states do not compromise their international human rights commitments when they conclude, revise, terminate, or otherwise change international trade, investment, and other economic agreements.

2. Scope: Interactions between Pre-existing Commitments and Rule Change

The pathological outcome of *corruption and moral hazard activities* by firms practicing (unethical, if not outright illegal) regulatory arbitrage when states are in the process of rule changes in the international economic system could be mitigated. States could also analyze, as part of their "comprehensive human rights audit" for treaty negotiators, how their prospective rule changes will operate against a broader context of the state's pre-existing universe of broad international human rights law commitments (environmental, social, labor, rule of law, transparency, anti-corruption, nondiscrimination, and cross-border codes of ethics, among others). Assessing the interaction of the state's international commitments with the prospective rule change would not only focus on the impact of the implementation of the particular rule change on human rights law compliance, but also shed light on that impact to help create further public policy innovations that states could introduce into their new international economic treaties and instruments. It would be difficult for firms to practice tax evasion and other tax abuses, for example, if states coordinated the treatment of "tax havens" in their respective international tax treaties. It would likewise be difficult, in the context of cross-border infrastructure investment projects, for regulators, the public, and private operators not to be alerted to moral hazard activities, such as corruption in public procurement processes or distortionary practices in implementing cross-border and multi-year investment projects, if states created their own databases or indexes of their international human rights law commitments in a manner that would already form part of the regulatory fabric of the project and thus better define the scope of due diligence that private firms have to make on the laws and regulations of the host state of investment. Also, making this information publicly available would further substantiate assessments of political risk, especially for multinational investment contractors or consortium operators that see the need to take out political risk insurance against future regulatory changes of the host state (especially in the areas of environment, labor, and social protections).

The twin considerations above for a "comprehensive human rights audit" to address regulatory arbitrage when states change international economic law are, at best, preliminary at this point and intended to spur further thinking from all sectors on our international economic system. This Article likewise raises these twin considerations to invite future streams of research that could better assist states in the task of drafting and negotiating more human rights-consistent international economic treaties and agreements. These considerations are also raised to help create realistic pathways for today's disadvantaged "non-elite" citizens, individuals, groups, and local communities, to feasibly check their political representatives within the precarious (and often obscured) processes of change in international economic treaty negotiations, terminations, and revisions.

IV. Conclusion: The Shifting Sands of International Economic Law Between Neo-Liberalism, Neo-Mercantilism, and Non-Negotiable International Human Rights Law

Finding real solutions to transnational corporate abuses of regulatory arbitrage practices and devising effective innovations to ensure the implementation of economic, social, and cultural rights requires competent engagement from both ends of the public-private spectrum in international law. International lawyers—especially international economic lawyers tasked with drafting, revising, critiquing, and building the new bilateral, regional, and global constellation of economic treaties—increasingly have to deepen interdisciplinarity. And they must do so not just in the sense persuasively observed by Tom Ginsburg and Gregory Shaffer as the "empirical turn in international legal scholarship."[332] But

332. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 Am. J. Int'l L. 1, 1 (2012).

perhaps more fundamentally, international lawyers must do so because we are at present hard-pressed to approximate, if not achieve, an idea of "fairness" in the international economic system's treaties and institutions (no matter how contested that sense of "fairness" is, to begin with). If we accept that the "fairness of international law" is legitimately our concern as international lawyers and scholars (as Thomas Franck famously argued[333]), we should be more open to readily engaging the interdisciplinary assumptions marshalled in the reform and remaking of international economic treaties and institutions today.

While we may not be the experts in these other disciplines, and we should, indeed, preserve the "relative autonomy" of international law (as Jan Klabbers cautions),[334] some sharpening of our interdisciplinary sensibilities can nevertheless be useful in helping us test the "good faith" nature of any postulation or assertion on the desired weight, form, content, and structure of our international economic treaties and institutions. There are three examples of unstated assumptions in the debate over international economic treaties today that themselves illustrate a dearth in interdisciplinarity: (1) the assumption that international economic treaties can somehow erase trade deficits and permanently prevent trade imbalances;[335] (2) the assumption that international economic treaties can anticipate and provide the most appropriate and suitable dispute resolution mechanism for the particular states parties to these treaties for the entire life of these treaties;[336] and (3) the assumption that international economic treaties can be designed to fully create desired social, environmental, labor, health, education, and all public interest outcomes.[337] Given the shifting sands of the international economic system and the non-negotiability of international human rights in this time of change, interdisciplinarity may

333. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1998).

334. Jan Klabbers, *The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity*, 1 J. INT'L L. & INT'L RELATIONS 35, 45 (2004), http://stoa.usp.br/rafaelprince/files/-1/3176/texto1.pdf.

335. Leslie Shaffer, *Trump's preferred way to judge trade deals is not a good measure of their success*, CNBC (Oct. 11, 2017, 12:16 AM), https://www.cnbc.com/2017/10/11/trump-focus-on-trade-deficits-as-a-measure-for-trade-deals.html.

336. This is particularly problematic given the supposed binary choice between investor-state dispute settlement mechanisms (ISDS) and local court adjudication and/or political risk insurance. *See 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts*, CITIZEN.ORG (Oct. 24, 2017), https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

337. *UN experts voice concern over adverse impact of free trade and investment agreements on human rights*, OHCHR (June 2, 2015), https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E.

show us that international economic treaties could be a correlative, if not possibly one of the causal, factors for desired outcomes. In addition, interdisciplinarity may show that we can probably design those agreements with sensitivity and vigilance towards controlling the negative externalities they cause and encouraging positive distributive consequences. The international economic treaty-writing (and rewriting) exercise is complex. We cannot—as politicians do—simplistically oversell or lionize these treaties as somehow the definitive "one-size-fits-all" solution to remake the world towards "fair[] and reciprocal trade."[338]

The first case involves U.S. trade deficits. The seductive motivation of the United States' current moves to renegotiate, terminate, revise, or reform trade agreements is that changing the terms of market access will somehow reduce, if not eliminate, U.S. trade deficits with rivals such as China.[339] As reported by the Council on Foreign Relations, however, even among economists of different stripes, none have reached any definitive findings that the decisive actual cause of U.S. trade deficits is the nature of its trade agreements.[340] Rather, as the Cato Institute stressed:

> The most important economic truth to grasp about the U.S. trade deficit is that it has virtually nothing to do with trade policy. A nation's trade deficit is determined by the flow of investment funds into or out of the country. And those flows are determined by how much the people of a nation save and invest - two variables that are only marginally affected by trade policy.[341]

In March 2017, U.S. President Donald Trump ordered a comprehensive study of trade abuses that lead to trade deficits,[342] which to date has not yet been declared to have been completed, much less publicly

338. *See President Donald J. Trump is Keeping His Promise to Renegotiate NAFTA*, WHITE HOUSE (Aug. 27, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta/.

339. *See* OFFICE OF THE U. S. TRADE REPRESENTATIVE, *supra* note 82, at 4.

340. James McBride, *The U.S. Trade Deficit: How Much Does It Matter?*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/us-trade-deficit-how-much-does-it-matter (last updated Oct. 17, 2017).

341. Daniel Griswold, *America's Misunderstood Trade Deficit*, CATO INST. (July 22, 1998), https://www.cato.org/publications/congressional-testimony/americas-misunderstood-trade-deficit.

342. Jennifer Jacobs, *Trump to Order Study of 'Trade Abuse' Contributing to Deficits,* BLOOMBERG, https://www.bloomberg.com/news/articles/2017-03-31/trump-to-order-study-of-trade-abuse-contributing-to-deficits (last updated Mar. 31, 2017, 4:53 PM).

released. Despite the absence of this information—and the positive finding that it is the capital, investment, and savings flows of a country that actually determine a trade deficit—the United States has nonetheless embarked on a policy of renegotiating or terminating its trade treaties such as NAFTA, KORUS FTA, and the TPP. One can only wonder, despite the United States Trade Representative's stated objectives in these renegotiations, how international lawyers are drafting the new terms of U.S. economic treaties.

The second case involves investor-state dispute settlement. Various quarters immediately hailed victory when the resurrected TPP (now CPTPP) considerably narrowed, if not de facto eliminated, investor-state dispute settlement clauses, making resort to local court adjudication compulsory.[343] There was no discussion in the press as to why local court adjudication in the eleven CPTPP countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) was held to be superior to any other form of dispute settlement, or why local court adjudication ought to have been the exclusive method for dispute settlement given the prospective long duration or term of this regional agreement. The U.N. Conference on Trade and Development (UNCTAD) recognizes a spectrum of dispute settlement options for trade and investment treaties, emphasizing the importance of contextual fit, host state institutional environments, and policy coherence.[344] No such reasons, however, were furnished for the exclusive choice of local court adjudication in the CPTPP. Similarly, in NAFTA renegotiations, a public letter signed by prominent academics[345] advocated the elimination of investor-state dispute settlement in favor of exclusively taking out political risk insurance. Considering that the U.S. insurance industry suffered heavily and had to be bailed out from the accumulation of systemic risk in the 2008/2009 financial crisis,[346] it was puzzling that the proposed dispute settlement mechanism put forward was to make political risk insurance compulsory for an industry that is itself reportedly also a source of

343. Dan Satherley, *TPP 'a damned sight better' now – Ardern*, NEWSHUB (Nov. 12, 2017), http://www.newshub.co.nz/home/money/2017/11/tpp-a-damned-sight-better-now-ardern.html.

344. *See* UNITED NATIONS, INVESTOR-STATE DISPUTE SETTLEMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2014), http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

345. *230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts*, *supra* note 336, at 3.

346. David Cho, Binyamin Applebaum & Zachary Goldfarb, *Bailout Expands to Insurers*, WASH. POST (Oct. 25, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/24/AR2008102401715.html.

systemic risk.[347] All the more so when one considers the limitations on the effectiveness of such insurance policies. Unlike current open multi-stakeholder debates on the EU multilateral investment court, neither the CPTPP or NAFTA renegotiations presented interdisciplinary evidence (whether from law, economics, statistics, political science, or other social sciences) on why their exclusive choices (e.g., local court adjudication or political risk insurance) were the most appropriate dispute resolution fit for the states involved in these negotiations. Again, one can only wonder at how international lawyers are helping to draft these renegotiated terms without focused interdisciplinary dialogue and evidence-based results.

The third case involves trade and investment treaties and desired social outcomes. While many of us do write on the negative social, environmental, labor, and human rights impacts of trade and investment treaties, it was riveting to see Canada push for a "progressive" revision of the TPP into the "Comprehensive and Progressive Agreement on Trans-Pacific Partnership" (CPTPP), which presumably contains Canada's articulated preferences for trade agreements encapsulating environmental, labor, and social rights, as recently exemplified in the EU-Canada Trade Agreement (CETA). To date, however, it must be acknowledged that while the U.N. Office of High Commissioner on Human Rights (along with the Committee on Economic, Social and Cultural Rights) has spearheaded efforts to mainstream human rights into trade and investment agreements,[348] there is still not much standardization or methodological uniformity when it comes to arriving at the pragmatic details on how best to operationalize human rights into economic agreements: whether by requiring human rights impact assessments for these agreements (as proposed by U.N. Special Rapporteur Olivier de Schutter), rewriting trade and investment treaty provisions to inject human rights provisions directly, or embedding human rights norms directly into foreign investment contracts, among others.

These proposals stand alongside rather incipient human rights compliance measurement methods that are still evolving, have not yet been universally determined or fully tested, and which, correspondingly, could make it equally difficult to determine if the new "progressive" trade and investment treaties are indeed achieving desired social

347. Viral V. Acharya & Matthew Richardson, *Is the Insurance Industry Systemically Risky*?, BROOKINGS (2014) https://www.brookings.edu/wp-content/uploads/2014/09/Acharya_Richardson_paper.pdf.

348. *Mainstream human rights into trade agreements and WTO practice – UN expert urges in new report*, UHCHR (Sept. 13, 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20473&LangID=E.

outcomes. Moreover, even international human rights lawyers themselves perennially debate what compliance with human rights means for states facing different factual contexts. As U.N. Special Rapporteur on Extreme Poverty and Human Rights Philip Alston powerfully argued in a recent article, human rights in a "populist era" requires even more introspection and openness by its advocates and scholars.[349] To a certain extent, while international lawyers are drafting economic treaties in the hope of reaching this desired consistency with states' international human rights obligations, they need to engage interdisciplinary experts and methods to verify (with actual data) if the treaty language and institutional design they are prescribing to states are indeed achieving desired environmental, labor, social, and human rights outcomes.

Much of what appears missing from the public debates about trade and investment today may well be something as pedestrian as calling for more regular interdisciplinary engagement between international lawyers and experts in other disciplines. It is a conversation worth having on a regular basis, if only to better inform the work of international economic lawyers and scholars. These conversations are especially valuable to make explicit our criteria for what constitutes "fair and reciprocal trade," in light of states' non-negotiable and continuing commitments to their populations under international human rights law. Individuals, groups, families, communities, and populations—who are the real stakeholders and beneficiaries of trade and investment agreements—deserve straightforward answers on how their governments' "legislating" through trade and investment agreements is solving (or at least getting closer to solving) problems of poverty, inequality, disenfranchisement, and disempowerment. Politicians can certainly use "fair and reciprocal trade" as a soundbite in international economic summits, but to international lawyers, it is the goal of "fair and reciprocal trade" that justifies even more interdisciplinarity to help check (as well as validate) our assumptions for rewriting the legal foundations of a new international economic system.

By various accounts of contemporary scholars,[350] the international economic system has been locked in a polarized debate of ideologies and reconfiguring geopolitics. This is particularly visible since the 2016 Brexit vote and corresponding changes within the EU, the election of

349. Philip Alston, *Human Rights in the Populist Era*, JUST SEC. (Oct. 18, 2017), https://www.justsecurity.org/46049/human-rights-populist-era/.

350. *See, e.g.*, EDWARD LUCE, THE RETREAT OF WESTERN LIBERALISM (2017); Bruce Johnson, *The new geopolitics*, BROOKINGS (Nov. 28, 2017), https://www.brookings.edu/blog/order-from-chaos/2017/11/28/the-new-geopolitics/.

the Trump administration in the United States with an "America First" foreign policy, the continued growing prominence of Asia-Pacific powers such as China, India, the regional grouping of the Association of Southeast Asian Nations (ASEAN), and Asia-Pacific Economic Cooperation (APEC) powers Japan, Australia, New Zealand, and Canada, among others. After almost a decade of global financial crisis, there is resounding rejection of the neo-liberal project in the international economic system,[351] as weary electorates are now considering various alternatives from outright authoritarians jettisoning the "strings" of human rights conditions to trade, aid, and investment and dirigistes seeking more state control over capital, information, and investment flows to avowed unilateralists rejecting the international economic system under resurgent neo-mercantilisms.[352] What distinguishes this era, more than previous cycles of flux in international economic history,[353] is the rapidity and breadth of the global agitation for immediate and sweeping change to the international economic system. Since 2016, broad swathes of the international economic system have come under intense pressure for change: whether against multilateralism and the WTO;[354] investor-state dispute settlement and the production of more investment treaties to protect host states' public policy spaces;[355] the international financial system's controls over the growing shadow banking sector and attempted regulation of cryptocurrencies trading;[356] or the rising calls for more regulation of the international impacts of global

351. *See* MARK WEISBROT, FAILED: WHAT THE 'EXPERTS' GOT WRONG ABOUT THE GLOBAL ECONOMY (Oxford Univ. Press 2015); Ben Geier, *Even the IMF Now Admits Neoliberalism Has Failed*, FORTUNE (June 3, 2016), http://fortune.com/2016/06/03/imf-neoliberalism-failing/.

352. *See* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISITED: ANTI-GLOBALIZATION IN THE ERA OF TRUMP (2017); Joseph Stiglitz, *Globalization and its New Discontents*, PROJECT SYNDICATE (Aug. 5, 2016), https://www.project-syndicate.org/commentary/globalization-new-discontents-by-joseph-e–stiglitz-2016-08.

353. *See* LIONEL ROBBINS, A HISTORY OF ECONOMIC THOUGHT (Steven G. Medema & Warren J. Samuels eds., 2000).

354. Daniel Gros, *Whither the Multilateral Trading System?*, PROJECT SYNDICATE (Dec. 6, 2017), https://www.project-syndicate.org/commentary/world-trade-system-backlash-us-china-eu-by-daniel-gros-2017-12.

355. Press Release, United Nations, UNCITRAL to consider possible reform to investor-State dispute settlement (July 14, 2017), http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html.

356. Philip Stafford, *Global regulators say 'shadow banking' market has been tamed*, FIN. TIMES (July 3, 2017), https://www.ft.com/content/193c3dd0-5f40-11e7-8814-0ac7eb84e5f1; Nikolai Kuznetsov, *Regulation to Make Or Break Cryptocurrencies & ICO*, FORBES (Oct. 10, 2017, 8:38 PM), https://www.forbes.com/sites/nikolaikuznetsov/2017/10/10/regulations-to-make-or-break-cryptocurrencies-icos/#203983a8a835.

technology companies.[357] Given this appetite for rapid and massive changes throughout the international economic system, it should not at all be surprising that firms will still practice regulatory arbitrage, if not with more urgency and frequency.

Multinational firms' regulatory arbitrage practices cannot be completely abated by any single body of law or any single strategy of cross-border regulatory coordination and legal harmonization by states. While international human rights law has thus far not played a distinct role as states change, renegotiate, or exit from international economic treaties, the pathological consequences discussed in this paper—norm irrelevance, reform gridlocks, rule inertia, and corruption and moral hazards—could be better detected, mitigated, or wholly avoided if international human rights law truly functioned on behalf of those local communities and populations who are unrepresented at diplomatic negotiating tables in a time of global economic rule changes. To this extent, international human rights law, including the recent August 2017 General Comment No. 24 of the Committee on Economic, Social and Cultural Rights, has much to enrich the international economic treaty negotiation process. It is readily expected that, as with most of the Committee's General Comments, states will plead latitude during their respective periodic reviews before the Committee with respect to observing the Committee's recommendations in General Comment No. 24. That does not, by itself, detract from the ultimate value of these General Comments to current and future policy-makers, practitioners, and scholars of international human rights and international economic law. Indeed, many of the Committee's General Comments anticipated later treaty developments in labor rights protections, education, and access to health care, gaining resonance in international practice much later than when the General Comments were first issued. This Article predicts that General Comment No. 24 will follow a similar path. While this blueprint might be read by some states now as controversial overreach into their sovereign prerogatives to regulate their domestic economies, the Committee must be credited with taking the bold path of establishing the clear legal nexus between the ICESCR as a treaty binding 169 states to respect, protect, and facilitate economic, social, and cultural rights and the treaty's simultaneous role as a legal constraint on all of these states' parameters of authority to regulate, plan, and make economic decisions. More

357. *Taming the beasts - Regulating Technology Companies*, ECONOMIST (May 28, 2016), https://www.economist.com/news/business/21699465-european-governments-are-not-alone-wondering-how-deal-digital-giants-taming.

importantly, this treaty-based legal nexus also substantiates the urgent need for direct epistemological, educational, and interdisciplinary linkages between international human rights law and international economic law communities of scholars, practitioners, and authoritative decision-makers. What should ring clear, particularly in this moment of change in international economic law, is that states cannot negotiate away any of the commitments they bear under international human rights law.