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Coming Full Circle on Human Rights in The Global Economy: International Economic Law Tools to Realize the Right to Development

Diane A. Desierto
Notre Dame Law School, ddesiert@nd.edu

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COMING FULL CIRCLE ON HUMAN RIGHTS IN THE GLOBAL ECONOMY: INTERNATIONAL ECONOMIC LAW TOOLS TO REALIZE THE RIGHT TO DEVELOPMENT

Diane A. Desierto*

Abstract

This article argues that the discipline and profession of international economic law has undergone a significant architectural change to focus on human rights law as both the premise and promise of the international economic system. Contrary to prevailing currents that focus on the irrelevance of the global economic system to realize human rights, this article argues that international economic law tools have already been converging within the last decade to authentically realize the Right to Development of individuals, groups, and populations. The Draft Convention on the Right to Development defines the right as the enjoyment, participation, and contribution of individuals, groups, and populations towards their civil, economic, political, social, and cultural development, in a manner that is based on and consistent with all human rights and fundamental freedoms. The tools of treaty reform, accountability processes and mechanisms, adjudication innovations, civil society engagement, and the pedagogic transformation of international economic law critique the realization and implementation of human rights. All are converging to place human rights at the center of global economic decision-making. The global COVID-19 pandemic and its associated economic, social, and political crises sharpen the necessity for international economic law to evolve towards the definition of the right to development as development that is “based on and consistent with all human rights and fundamental freedoms.”

Keywords

International economic law, international human rights law, treaty reform, accountability, right to development, civil society, teaching and practice of international economic law

* *Professor of Law and Global Affairs, L.L.M. Faculty Director*, Notre Dame Law School, joint appointment with the Keough School of Global Affairs, University of Notre Dame (USA). The author can be reached at ddesierto@nd.edu.

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I. Introduction: The Global Economic System and the State of Global Development

Permit me to extend my gratitude to the organizers of this Conference for the opportunity to address fellow scholars and practitioners of international economic law in this Closing Keynote.¹ I have just concluded Expert duties at this week’s 21st Session of the United Nations Working Group on the Right to Development,² where States are deliberating on the Draft Convention on the Right to Development³ that was authored by a Drafting Group of which I am a member. If this Draft Convention is approved, this legally binding instrument on the Right to Development would be the tenth major human rights treaty, and the first to be concluded since the Convention on the Rights of Persons with Disabilities, over fourteen years ago.

On this note, I find it quite crucial to observe that, in 2021, it is no longer controversial to speak of human rights at this premier global international eco-

¹ This article was delivered as the Closing Keynote of the 10th Conference of the Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law, May 2021 Scotland, organized by the University of Dundee, the University of Edinburgh, and the University of Glasgow. I am grateful to Andrew Lang, Christian Tams, and my colleagues and fellow participants at SIEL for the fruitful exchanges.

² See U.N. Office of the High Commissioner for Human Rights, 21st Session of the Working Group on the Right to Development (May 17-21, 2021), <https://www.ohchr.org/EN/Issues/Development/Pages/21stSession.aspx> (access to view reports and working documents).

³ U.N. Human Rights Council, Working Group on the Right to Development, 21st Session, *Draft Convention on the Right to Development, with Commentaries*, U.N. Doc. A/HRC/WG.2/21/2/Add.1 (Jan. 20, 2021), <https://undocs.org/A/HRC/WG.2/21/2/Add.1>.

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conomic law conference. This was not always the case. I still recall speaking at SIEL's 3rd Biennial Conference in 2012, hosted by the National University of Singapore, presenting some of my initial work on the topic entitled *Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions*,⁴ at the Society's Investment Law Network session. As I recall, that work elicited strong reactions from a few voices who literally yelled questions and strong objections while I was presenting the paper. The comments were, in nature, substantive (e.g., *how could human rights norms be legally internalized in the complex web of international economic law treaties and customary law?*), as well as defensive of the technical rigors of the discipline (e.g., *international economic law and regulation should be seen and evaluated wholly from its own architecture*). The reactions reminded me of the classic debates hosted by the European Journal of International Law between Professor Ernst Ulrich-Petersmann (who saw certain pathways for the multilevel governance of international economic law to accommodate human rights concerns) and Professor Philip Alston (who at that time appeared resistant to complicating human rights with the technical premises and utilitarian tools of international economic law).⁵ So much of the literature then was about navigating the interaction between the legal systems of international human rights and international economic law.⁶

What prompted my own work⁷ on this subject were the seeming monolithic approaches that were being taken to the interaction of these two fields. Such approaches were, in my view, conceptually valuable from a systemic point of view, but not from the standpoint of granular implementation of each and every human right involved in an economic transaction, especially considering States' counterpart international economic law obligations. While in and of themselves useful from a general perspective, systemic approaches⁸ did not often assist policymaking with the operational details necessary for translating the normative intricacies and policy complexities of individual and collective civil, political, economic, social, and cultural rights, into the equally vast and differentiated sub-disciplines within international economic law. These subdisciplines range from

⁴ Diane A. Desierto, *Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises*, 10 *TRANSNAT'L DISP. MGMT.* 1 (2013).

⁵ See Ernst Ulrich-Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *EUR. J. INT'L L.* 621 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *EUR. J. INT'L L.* 815 (2002).

⁶ See, e.g., *HUMAN RIGHTS AND INTERNATIONAL TRADE* (Thomas Cottier et al. eds. 2005); *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (Pierre-Marie Dupuy et al. eds., 2009); ISABELLA D. BUNN, *THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS* (Frederico Ortino et al. eds., 2012).

⁷ See DIANE A. DESIERTO, *PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT* (2015).

⁸ See, e.g., Elizabeth M. Iglesias, *Human Rights in International Economic Law*, 28 *UNIV. MIA. INTER-AM. L. REV.* 361 (1997); BARNALI CHOUDHURY, *PUBLIC SERVICES AND INTERNATIONAL TRADE LIBERALIZATION: HUMAN RIGHTS AND GENDER IMPLICATIONS*, 15-43 (2012) (discussing international economic law and human rights); Ernst Ulrich-Petersmann, *Human Rights and International Economic Law*, 4 *TRADE L. & DEV.* 283 (2012); *HUMAN RIGHTS AND INTERNATIONAL TRADE*, *supra* note 6.

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the main fields of world trade law, foreign investment law, international financial law, international monetary law, international intellectual property law, international tax law, to the burgeoning frontiers of global digital governance and international law regulating the internet economy. Many systemic approaches, for example, focused on using treaty interpretation techniques to expand the reach of international economic law treaties to “accommodate”⁹ human rights norms. However, this type of academic scholarship rarely, if at all, strategized specific correspondences between an individual yet complex human right (e.g., the right to work and just and favorable conditions of work) and existing treaty-based guarantees. Building such relationships might have included guarantees such as non-discriminatory foreign market access in world trade law, protected investment in foreign investment law, prudential regulation, and stable credit systems in international financial law.¹⁰ My own journey into rethinking the operational intersections of human rights law and international economic policy grew out of this perceived vacuum.

Around a decade ago, the academic focus was on the nature of the duality between “public” and “private” spheres of law and regulation governing the interaction of human rights and economic law.¹¹ Of course, this question is critical to understanding the design of international economic law norms and institutions as well as the evolution of international human rights law norms and institutions. However, it has unfortunately left little space for more archaeological explorations of underlying questions of values represented,¹² ideologies contested,¹³ and political economy paradigms¹⁴ that prevail in the international economic system in its current architecture. In these more modern times, the question becomes,

⁹ See e.g., Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT’L ECON. L. 133 (2002); Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMPAR. L. REV. 273 (2002); HEEJIN KIM, REGIME ACCOMMODATION IN INTERNATIONAL LAW: HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW AND POLICY (2016).

¹⁰ *But see*, e.g., LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW (2013); ANA GONZALEZ-PELAEZ, HUMAN RIGHTS AND WORLD TRADE: HUNGER IN INTERNATIONAL SOCIETY (2005); WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION (Alvaro Santos et al. eds., 2019); ANETA TYC, GLOBAL TRADE, LABOUR RIGHTS AND INTERNATIONAL LAW: A MULTILEVEL APPROACH (2021).

¹¹ See, e.g., Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005); Sungjoon Cho & Jurgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT’L L. 169 (2018); Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT’L L. 367 (2014); Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT’L ECON. L. 469 (2011); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45 (2013).

¹² See DONATELLA ALESSANDRINI, VALUE MAKING IN INTERNATIONAL ECONOMIC LAW AND REGULATION: ALTERNATIVE POSSIBILITIES (2016); MARIANA MAZZUCATO, THE VALUE OF EVERYTHING: MAKING AND TAKING IN THE GLOBAL ECONOMY (2018).

¹³ See JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018).

¹⁴ See THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF THE LAW (Poul F. Kjaer ed., 2020); Marc D. Froese, *Political Economy and International Economic Law*, in THE PALGRAVE HANDBOOK OF CONTEMPORARY INTERNATIONAL POLITICAL ECONOMY 59 (Timothy M. Shaw et al. eds., 2019).

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what do we, as *a collective humanity* composed of a multitude of diversities as *individuals* from the ideological, ideational, cultural, political, sociological, and existential senses, ultimately value when our respective States reach decisions on how to regulate, configure, arrange, use, and distribute natural, human, and capital resources? Much has been written about the Manichaeic polarities of globalization from its critics and advocates, and what these discourses mean for the future of international economic law.¹⁵ There are significant works that challenge the historically perpetuated narratives about the international economic order.¹⁶ These challenges are raised predominantly by TWAIL scholars (Third World Approaches to International Law), whose international law scholarship is fast becoming the new mainstream.¹⁷

My focus here is not to summarize the long-standing debates on the techniques and scope of the interaction between international economic law and human rights. Neither do I intend to focus on the merits and demerits of globalization – its consequences, inequalities, and the many well-established (and almost self-evident) cyclical discontents that exist in its wake.¹⁸ This is the tenth conference of SIEL/PEPA. In the past decade of global and regional economic and financial crises and ensuing related conflicts, all the way through the most recent months of this COVID-19 pandemic, another Thomas Piketty epic should not be required to provoke us into seriously rethinking how capitalism creates wealth but also generates massive income inequality within and among societies.¹⁹

We have lived the consequences of inequality in all its forms sharply in the time since emergency measures and lockdowns have become internationally ubiquitous.²⁰ Since then, some have had faster access to vaccines and health facilities and resources more than millions of others.²¹ Some have had the luxury of

¹⁵ See Alessandra Arcuri, *International Economic Law and Disintegration: Beware the Schmittian Moment*, 23 J. INT'L ECON. L. 323 (2020); Gregory Shaffer, *How Do We Get Along? International Economic Law and the Nation-State*, 117 MICH. L. REV. 1229 (2019); Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113 (1999); Michael J. Trebilcock, *Critiquing the Critics of Economic Globalization*, 1 J. OF INT'L L. & INT'L REL. 213 (2004); Jochen von Bernstorff, *International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization*, 26 EUR. J. INT'L L. 279 (2015).

¹⁶ See, e.g., BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava et al. eds., 2017).

¹⁷ See, e.g., SUNDHYA PAHUJA, DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY 3 (James Crawford & John Bell eds., 2011); James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (manuscript at 3) (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2019) (available at SSRN: <https://ssrn.com/abstract=3304767>).

¹⁸ JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS xiv-v (W.W. Norton & Co. 2003); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISITED: ANTI-GLOBALIZATION IN THE ERA OF TRUMP 2 (W.W. Norton & Co. 2017).

¹⁹ See THOMAS PIKETTY, CAPITAL AND IDEOLOGY (Arthur Goldhammer trans., 2020); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

²⁰ U.N. Comm. on Coordination of Stat. Activities, *How COVID-19 is Changing the World: A Statistical Perspective* (2020), <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>.

²¹ See N. Jensen et al., *The COVID-19 Pandemic Underscores the Need for an Equity-Focused Global Health Agenda*, 8 HUMANITIES & SOC. SCI. COMM'NS 1 (2021), <https://www.nature.com/articles/s41599-020-00700-x>.

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stocking up on food supplies, with the full resources to work from home, even as millions of others lost jobs, businesses, and livelihoods. Even more around the world remain without the cushion of social protection and welfare safety nets they never had access to even *before* pandemic times.²² Further, the pace of decarbonization in the global economy for humanity to survive is uneven throughout the world and hardly on track as a whole in relation to Paris Agreement targets.²³ This is literally a time, more than any other, where geography determines one's chances of survival,²⁴ let alone any notion of resilience, recovery, success, thriving, or flourishing. The stakes for the international economic system – and the current global, regional, and national legal systems that undergird it – could not be higher.

In 2021, we are certainly no longer in the era of just trying to “accommodate”²⁵ human rights that are often otherwise depicted as “social constitutions”²⁶ or “non-trade concerns” in international economic law.²⁷ Our individual and collective experiences during the COVID-19 pandemic this far can attest to the normalization of the wholesale erosion of human rights in every sphere of life.²⁸ Some may say this erosion stems from civil and political restrictions on freedom of speech, expression, privacy, and assembly. Others claim it arises from limitations on our economic, social and cultural rights to education, the right to work and just and favorable conditions of work, the right to the highest attainable standard of physical and mental health, the right to social security, the right to an adequate standard of living which includes food security, water, and housing, as

²² See, e.g., Paul Blake & Divyanshi Wadhwa, *2020 Year in Review: The Impact of COVID-19 in Charts*, WORLD BANK VOICES (Dec. 14, 2020), <https://blogs.worldbank.org/voices/2020-year-review-impact-covid-19-12-charts>; U.N. Comm. for Dev. Pol’y, *Comprehensive Study on the Impact of COVID-19 on the Least Developed Country Category* (Apr. 2021).

²³ See generally David G. Victor, *Deep Decarbonization: A Realistic Way Forward on Climate Change*, YALE ENV’T 360 (Jan. 28, 2020), <https://e360.yale.edu/features/deep-decarbonization-a-realistic-way-forward-on-climate-change>; Deloitte, *The 2030 Decarbonization Challenge: The Path to the Future of Energy* (2020), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/gx-eri-decarbonization-report.pdf>; Kemal Dervis & Sebastian Strauss, *The Decarbonization Paradox*, BROOKINGS (Feb. 18, 2021), <https://www.brookings.edu/opinions/the-decarbonization-paradox/>.

²⁴ See e.g., Brea L. Perry et al., *Pandemic Precarity: COVID-19 is Exposing and Exacerbating Inequalities in the American Heartland*, 118 J. PROC. NAT’L ACAD. SCIS. U.S., no. 8, 2021, at 1, <https://www.pnas.org/content/118/8/e2020685118>; Esmé Berkhout et al., *The Inequality Virus*, OXFAM INTERNATIONAL 11 (Jan. 2021); U.N. Dep’t of Economic and Social Affairs, *The Sustainable Development Goals Report 2020* (2020), <https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf>.

²⁵ REGIME ACCOMMODATION IN INTERNATIONAL LAW, *supra* note 9, at 266.

²⁶ Cecilia J. Flores Elizondo, *Social Constitutions in International Economic Law: Power Differentiation as a Construct for Resistance in the Making of Law*, 13 MANCHESTER J. INT’L ECON. L. 186 (2016).

²⁷ Regis Y. Simo, *Trade and Morality: Balancing Between the Pursuit of Non-Trade Concerns and the Fears of Opening the Floodgates*, 51 GEO. WASH. INT’L L. REV. 407 (2019).

²⁸ U.N. Sustainable Development Group, *COVID-19 and Human Rights: We Are All in This Together* (Apr. 2020), https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf.

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well as protection against forced evictions.²⁹ Whether either view or a combination of both are true, with the very fabric of our existence at stake, the issue for international economic law is no longer the mere accommodation of human rights, but rather how best to use the tools of international economic law to realize our individual and collective human rights. These are rights that, during this pandemic, States have imperiled, suppressed, muted, and reinterpreted both through rhetoric and actual implementation of ‘emergency measures’³⁰ all over the world. With progress on achieving the Sustainable Development Goals severely set back by this pandemic – a pandemic which, by the way, has exposed all the fissures of inequality within our societies³¹ – is there space for those of us in international economic law to enquire, *what is the nature of our vision of the ‘development’ that animates the current state of international economic law and regulation?* Classical and neoclassical efficiency³² rationales abound in international law. These include ensuring fair and non-discriminatory market access in world trade law, protection of investor property rights in many early foreign investment law treaties, prudential risk regulation in international financial law, incentivization and protection of innovation in international intellectual property law, and ensuring level playing fields in international competition and global antitrust law, among all other fields of international economic law. The most pertinent question today is, do these rationales hold up in times of worsening precarity, growing extreme poverty and instability, more rampant racism and discrimination, and rapidly widening inequalities within and among countries in the international system?³³ Should the *raison d’être* of international economic law remain regulation of market conditions for economic growth?³⁴

²⁹ See Sarah Repucci & Amy Slipowitz, *Democracy Under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom*, FREEDOM HOUSE (2020), https://freedomhouse.org/sites/default/files/2020-10/COVID-19_Special_Report_Final_.pdf.

³⁰ See Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and The Impending Authoritarian Pandemic*, 7 J.L. BIOSCIENCES, Jan.–June 2020, at 1.

³¹ See Barry B. Hughes et al., *Pursuing the Sustainable Development Goals in a World Reshaped by COVID-19*, FREDERICK S. PARDEE CTR. FOR INT’L FUTURES & U.N. DEV. PROGRAMME (2021), https://sdgintegration.undp.org/sites/default/files/Foundational_research_report.pdf; Org. for Econ. Coop. & Dev. (OECD), *Social Economy and the COVID-19 Crisis: Current and Future Roles* (July 30, 2020), https://read.oecd-ilibrary.org/view/?ref=135_135367-031kjiq7v4&title=social-economy-and-the-COVID-19-crisis-current-and-future-roles&_ga=2.108058050.1931404398.1622564986-240774934.1622564986.

³² Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT’L ECON. L. 33 (1996); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT’L ECON. L. 17 (1996).

³³ See, e.g., Margot E. Salomon, *Better Development Decision-Making: Applying International Human Rights Law to Neoclassical Economics*, 32 NORDIC J. HUM. RTS. 44 (2014); Andy Sumner et al., U.N. University World Institute for Development Economics Research (WIDER), *Precarity and the Pandemic: COVID-19 and Poverty Incidence, Intensity, and Severity in Developing Countries* (Working Paper 2020/77) (June 2020) (available at <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2020-77.pdf>).

³⁴ See GEORG SCHWARZENBERGER, *The Principles and Standards of International Economic Law* 117 COLLECTED COURSES HAGUE ACAD. INT’L L. 1, 7-8 (1966); Ignaz Seidl-Hohenveldern, *International Economic Law: General Course on Public International Law*, 198 COLLECTED COURSES HAGUE ACAD. INT’L L. 9, 21-22 (1986).

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My own intuition – drawn from both developing world lived realities of this pandemic as well as from the stark contrast of developed world counterparts – says that the last decade of international economic law scholarship, which has already been incrementally moving towards human rights internalization in various forms (whether through the amendment, revision, or wholesale redesign of international economic law treaties, or through the adaptation or restructuring of institutions and dispute resolution processes),³⁵ will be due for a sharp interrogation of *what international economic law can do to help reinstate human rights into the fabric of our vision of what ‘development’³⁶ looks like*. In the last ten years, we have learned much about the multidimensionality of poverty and extreme poverty,³⁷ and the intersectionality³⁸ of human rights violations with the populations hardest hit or most neglected by decisions related to development.³⁹ We have also witnessed the need for deeper international cooperation to address a full spectrum of connected transnational threats⁴⁰ towards the pillar inputs of capital, labor, human, and natural resources in the international economic system. These threats include climate change and the uneven transition to decarbonized economies;⁴¹ labor and environmental violations in global business supply chains;⁴² forced displacement and human trafficking that can infiltrate labor markets;⁴³ the appropriation of cultural heritage and cultural knowledge using intellectual property paradigms inaccessible to the indigenous peoples whose heritage and knowledge is being appropriated;⁴⁴ the deprivations of economic, social, and cultural rights that can arise from mass austerity measures during economic cri-

³⁵ See, e.g., JAMES HARRISON, REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE (Ernst Ulrich-Petersmann ed., 2005); Frank J. Garcia et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT’L ECON. L. 861 (2015); THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE (Antonio Segura Serrano ed., 2018); Stephan W. Schill, *Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT’L ECON. L. 649 (2017).

³⁶ See Bunn, *supra* note 6, at 151-76.

³⁷ See U.N. Dev. Programme & Oxford Poverty & Hum. Dev. Initiative, *Global Multidimensional Poverty Index 2020: Charting Pathways Out of Multidimensional Poverty: Achieving the SDGs* (2020), http://hdr.undp.org/sites/default/files/2020_mpi_report_en.pdf; see also Share of Multidimensional Poverty, *infra* note 68.

³⁸ See INTERSECTIONALITY AND HUMAN RIGHTS LAW (Shreya Atrey & Peter Dunne eds., 2020).

³⁹ See Global Multidimensional Poverty, *supra* at 37.

⁴⁰ See JEAN-HERVÉ LORENZI & MICKAËL BERREBI, A VIOLENT WORLD: MODERN THREATS TO ECONOMIC STABILITY 1-5 (2016).

⁴¹ DECARBONISATION AND THE ENERGY INDUSTRY: LAW, POLICY, AND REGULATION IN LOW-CARBON ENERGY MARKETS, GLOB. ENERGY L. & POL’Y (Tade Oyewunmi et al. eds., 2020).

⁴² See *Human Rights in Supply Chains: A Call for a Binding Global Standard in Due Diligence*, HUMAN RIGHTS WATCH (May 30, 2016), <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence#>.

⁴³ International Labour Organization, *Ending Forced Labour by 2030: A Review of Policies and Programmes* (2018), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—ipec/documents/publication/wcms_653986.pdf (last visited Dec. 21, 2021).

⁴⁴ See INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH (Matthew Rimmer ed., 2015); INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (Christoph C. Graber et al. eds., 2012).

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ses;⁴⁵ fewer employment and professional opportunities for women and girls,⁴⁶ the disabled,⁴⁷ the elderly,⁴⁸ persons of color,⁴⁹ persons adhering to certain religions or belief systems,⁵⁰ ethnic minorities,⁵¹ refugees,⁵² migrants,⁵³ and internally displaced peoples; the manipulation and mass surveillance by authoritarian regimes⁵⁴ – sometimes even tapping the behemoth technology companies⁵⁵ themselves – of consumer electronic data;⁵⁶ and, the distortion of online informa-

⁴⁵ U.N. Office of the High Commissioner for Human Rights, *Report on Austerity Measures and Economic and Social Rights* (2013), https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf; Diane A. Desierto, *Austerity Measures and International Economic, Social and Cultural Rights*, in HUMAN RIGHTS IN EMERGENCIES 241-276 (Evan J. Criddle ed., 2016).

⁴⁶ *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development*, U.N. WOMEN, (2018), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf?la=en&vs=4332>.

⁴⁷ U.N. Dep't of Econ. & Soc. Affs., *Disability and Development Report: Realizing the Sustainable Development Goals for and with Persons with Disabilities* (2018), <https://social.un.org/publications/UN-Flagship-Report-Disability-Final.pdf>.

⁴⁸ U.N. Dep't of Econ. & Social Affs., *World Population Ageing 2020 Highlights: Living Arrangements of Older Persons* (2020), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesd_pd-2020_world_population_ageing_highlights.pdf.

⁴⁹ See, e.g., Joe Lasavio, *What Racism Costs Us All*, INT'L MONETARY FUND FIN. (Fall 2020), <https://www.imf.org/external/pubs/ft/fandd/2020/09/pdf/the-economic-cost-of-racism-losavio.pdf>; Beth Maina Ahlberg et al., *Invisibility of Racism in the Global Neoliberal Era: Implications for Researching Racism in Healthcare*, FRONTIERS IN SOCIO. (Aug. 14, 2019), <https://www.frontiersin.org/articles/10.3389/fsoc.2019.00061/full>; Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928 (1995).

⁵⁰ See U.S. Dep't of State, *2020 Report on International Religious Freedom* (May 21, 2021), <https://www.state.gov/reports/2020-report-on-international-religious-freedom/>; Brian J. Grim, *The Link Between Economic and Religious Freedoms*, WORLD ECON. F. (Dec. 18, 2014), <https://www.weforum.org/agenda/2014/12/the-link-between-economic-and-religious-freedoms/>.

⁵¹ See generally Jessica Belmont, *Everyone Equal: Making Inclusive Growth a Priority for Ethnic Minorities*, WORLD BANK (July 13, 2020), <https://www.worldbank.org/en/news/feature/2020/07/13/everyone-equal-making-inclusive-growth-a-priority-for-ethnic-minorities>.

⁵² Dany Bahar & Meagan Dooley, Brookings, *Refugees as Assets Not Burdens: The Role of Policy*, 8 BROOKE SHEARER SERIES (Feb. 6, 2020).

⁵³ TIMOTHY J. HATTON & JEFFREY G. WILLIAMSON, GLOBAL MIGRATION AND THE WORLD ECONOMY: TWO CENTURIES OF POLICY AND PERFORMANCE (2008).

⁵⁴ Alina Polyakova & Chris Meserole, BROOKINGS, *Exporting Digital Authoritarianism* (Aug. 2019), <https://www.brookings.edu/research/exporting-digital-authoritarianism/> (select the “Download the full policy brief” hyperlink for a PDF edition of the report); Tiberiu Dragu & Yonatan Lupu, *Digital Authoritarianism and the Future of Human Rights*, INT'L ORG. 1 (2020); Adrian Shahbaz, *The Rise of Digital Authoritarianism: Fake News, Data Collection, and the Challenge to Democracy*, FREEDOM HOUSE (2018), <https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism>; Darren Linvill & Patrick Warren, *The Real Target of Authoritarian Disinformation: Autocrats Care More About Domestic Control than Influence*, FOREIGN AFFS. (Mar. 24, 2021), <https://www.foreignaffairs.com/articles/russian-federation/2021-03-24/real-target-authoritarian-disinformation>.

⁵⁵ Robert Morgus & Justin Sherman, *How U.S. Surveillance Technology is Propping Up Authoritarian Regimes*, WASH. POST (Jan. 17, 2019) <https://www.washingtonpost.com/outlook/2019/01/17/how-us-surveillance-technology-is-propping-up-authoritarian-regimes/>; Lydia Khalil, *Digital Authoritarianism, China, and COVID*, LOWY INST. ANALYSIS (Nov. 2, 2020), <https://www.lowyinstitute.org/publications/digital-authoritarianism-china-and-covid>.

⁵⁶ Erol Yayboke & Sam Brannen, Cent. for Strategic & Int'l Stud. (CSIS), *Promote and Build: A Strategic Approach to Digital Authoritarianism*, CSIS BRIEFS (Oct. 2020), <https://csis-website>

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tion for political or ideological ends.⁵⁷ These human rights violations, deprivations, and erosions operate and proliferate by drawing on the key regulatory levers (as well as gaps⁵⁸) of the global economy.⁵⁹ On this front, international economic law can therefore do more than just ‘accommodate’ human rights. International economic law can help realize, if not help respect, protect, and fulfil *all* human rights. I lay this somewhat unconventional gauntlet down for all of us in international economic law who know this history and have lived during these pandemic times and continue living related consequences throughout the world.

The particular frame in which I think international economic law tools can be of deep significance is in realizing the Right to Development which, as defined in Article 4(1) of the Draft Convention on the Right to Development, is the right of “[e]very human person and all peoples [. . .] to participate in, contribute to and enjoy economic, social, cultural, civil and political development *that is consistent with and based on all human rights and fundamental freedoms.*”⁶⁰ This is a multidimensional and intersectional vision of development that transcends the material concerns of economic growth,⁶¹ because it strives for consistency and is based on all human rights and fundamental freedoms. In my view, international economic law tools can indeed contribute to widening participation in, incentivizing contribution to, and furthering the enjoyment of development. Beyond the critiques of international economic law that we have witnessed in the past decade, there has also been some measure of progress.⁶²

But before I elaborate on what international economic law tools can do in our legal and judicial imaginations, permit me to briefly give the state of play on the global economic system and the most vulnerable within this system since the COVID-19 pandemic began.

It is useful to remember, at the outset, that the pace of globalization has been steep and rapid only in the last century (*see Figure 1*).⁶³

prod.s3.amazonaws.com/s3fs-public/publication/201015_Yayboke_Brannen_PromoteAndBuild_Brief.pdf.

⁵⁷ Samantha Bradshaw & Philip N. Howard, *The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation*, UNIV. OF OXFORD (2019), <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>.

⁵⁸ See Diane A. Desierto, *Shifting Sands in the International Economic System: Arbitrage in International Economic Law and International Human Rights*, 49 GEO. J. OF INT’L L. 1019 (2018).

⁵⁹ See Subhan Ullah et al., *Multinational Corporations and Human Rights Violations in Emerging Economies: Does Commitment to Social and Environmental Responsibility Matter?*, 1280 J. ENVTL. MGMT. 1 (2021).

⁶⁰ See U.N. Hum. Rts. Council, Draft Convention on the Right to Development, art. 4(1), U.N. Doc. A/HRC/WG.2/21/2 (Jan. 17, 2020) (emphasis added).

⁶¹ See, e.g., Hum. Rts. Council of the U.N., Draft Convention on the Right to Development, with Commentaries, U.N. Doc. art. 4(1) cmt. 7, A/HRC/WG.2/21/2/Add.1 (Jan. 20, 2020).

⁶² See, e.g., Edward A. Laing, *International Economic Law and Public Order in the Age of Equality*, 12 L. & POL’Y INT’L BUS. 727 (1980); Frank J. Garcia, *Globalization, Inequality, and International Law*, 8 RELIGIONS 1 (2017); Joel Niyobuhungiro, *International Economic Law, International Environmental Law, and Sustainable Development: The Need for Complementarity and Equal Implementation*, 49 ENVTL. POL’Y & L. 36 (2019); MARC D. FROESE, SOVEREIGN RULES AND THE POLITICS OF INTERNATIONAL ECONOMIC LAW 185-212 (2018).

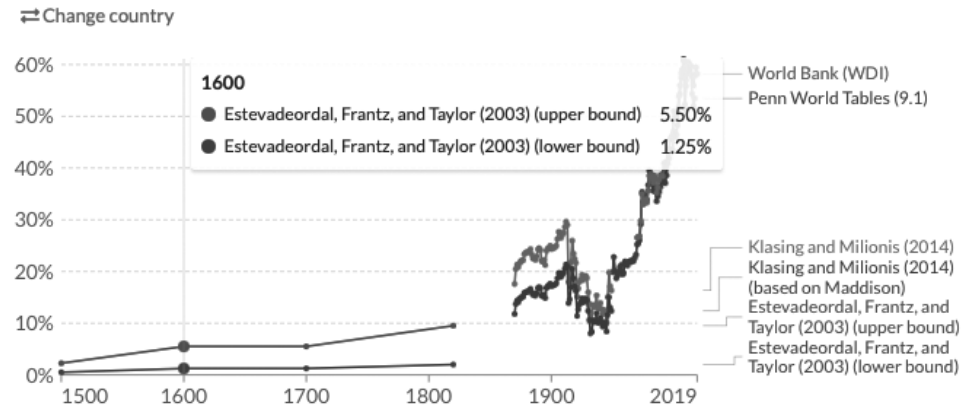
⁶³ *Globalization Over 5 Centuries*, World, OUR WORLD IN DATA, https://ourworldindata.org/grapher/globalization-over-5-centuries?country=~OWID_WRL (last visited Dec. 26, 2021).

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Figure 1: Globalization tracking chart

Globalization over 5 centuries, World

Shown is the "trade openness index". This index is defined as the sum of world exports and imports, divided by world GDP. Each series corresponds to a different source.

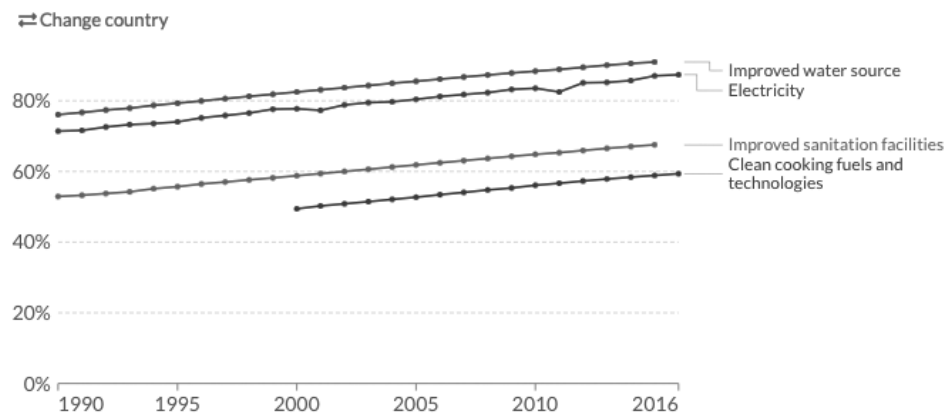


Source: Klasing and Milionis (2014), Estevadeordal, Frantz, and Taylor (2003), World Bank, Feenstra et al. (2015) Penn World Tables 9.1
 OurWorldInData.org/trade-and-globalization • CC BY

Arguably, globalization under international economic law has widened access to basic resources around the world (*see Figure 2*).⁶⁴

Figure 2: Access to basic resources

Share of the population with access to basic resources, World, 1990 to 2016



Source: World Bank (World Development Indicators)
 Note: Access to clean cooking fuels is important for the reduction of indoor air pollution. Improved sanitation facilities include flush/pour flush, ventilated improved pit latrine, pit latrine with slab, and composting toilets.

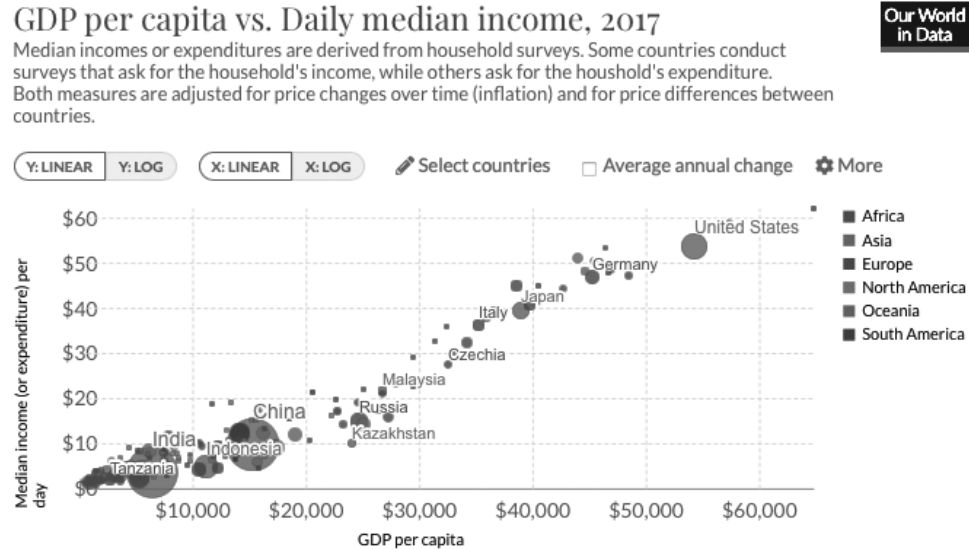
CC BY

⁶⁴ *Share of the Population with Access to Basic Resources, World, 1990-2016*, Our World in Data, https://ourworldindata.org/grapher/access-to-basic-resources?country=~OWID_WRL (last visited Dec 26, 2021).

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However, there remains a wide disparity among economic options for billions of people in the world – most of the world’s human population live on income of less than \$20 per day (see Figure 3).⁶⁵

Figure 3: GDP per capita vs. daily median income, 2017



Source: PovCal (2021), World Bank

CC BY

Without a doubt, economic growth over the last century has heavily favored the United States, Canada, New Zealand, and Western Europe, notwithstanding the rapid increases of wealth in a single generation in the People’s Republic of China (see Figure 4).⁶⁶

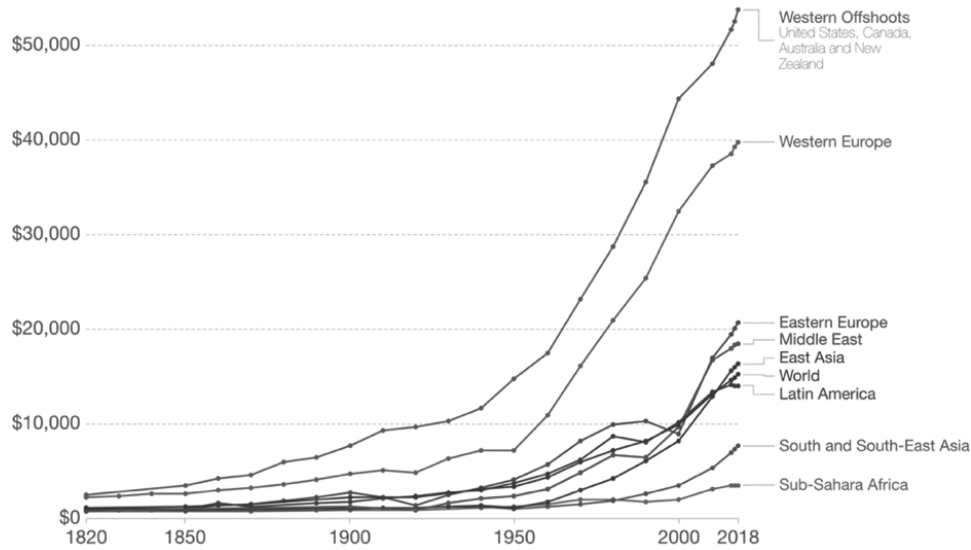
⁶⁵ *GDP Per Capita vs. Daily Median Income or Expenditure, 2017*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/median-daily-per-capita-expenditure-vs-gdp-per-capita> (last visited Dec 26, 2021).

⁶⁶ *GDP Per Capita, 1820 to 2018*, Our World in Data, <https://ourworldindata.org/grapher/gdp-per-capita-maddison-2020> (last visited Dec. 26, 2021).

Figure 4: Historical figures of per capita GDP

GDP per capita, 1820 to 2018

GDP per capita adjusted for price changes over time (inflation) and price differences between countries – it is measured in international-\$ in 2011 prices.



Source: Maddison Project Database 2020 (Bolt and van Zanden (2020))

OurWorldInData.org/economic-growth • CC BY

We have also barely scratched the surface towards meeting the U.N.’s Sustainable Development Goal 1 (zero poverty).⁶⁷ The percentage of people living in extreme poverty – those unable to secure basic goods and services such as food and nutrition, heating and energy, and housing – remains highest in sub-Saharan Africa, Latin America and the Caribbean, and South and Southeast Asia (*see Figure 5*).⁶⁸

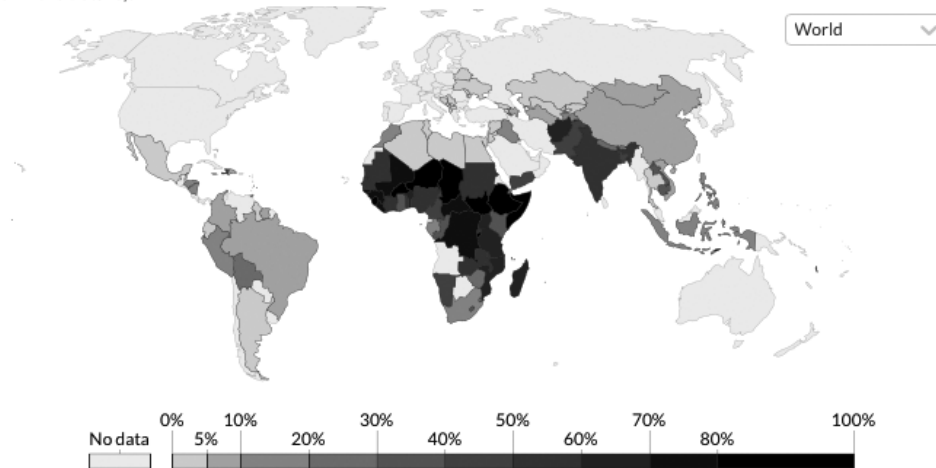
⁶⁷ *The Sustainable Development Goals Report 2020*, *supra* note 24.

⁶⁸ *Share of Multidimensional Poverty, 2014*, Our World in Data, <https://ourworldindata.org/grapher/share-multi-poverty> (last visited Dec. 26, 2021).

Figure 5: Map of extreme poverty

Share of population living in multidimensional poverty, 2014

Proportion of people who are poor according to the Multidimensional Poverty Index (MPI). The MPI weights ten indicators of deprivation in the context of education, health and living standards. Individuals are considered poor if deprived in at least one third of the weighted indicators (see source for more details).



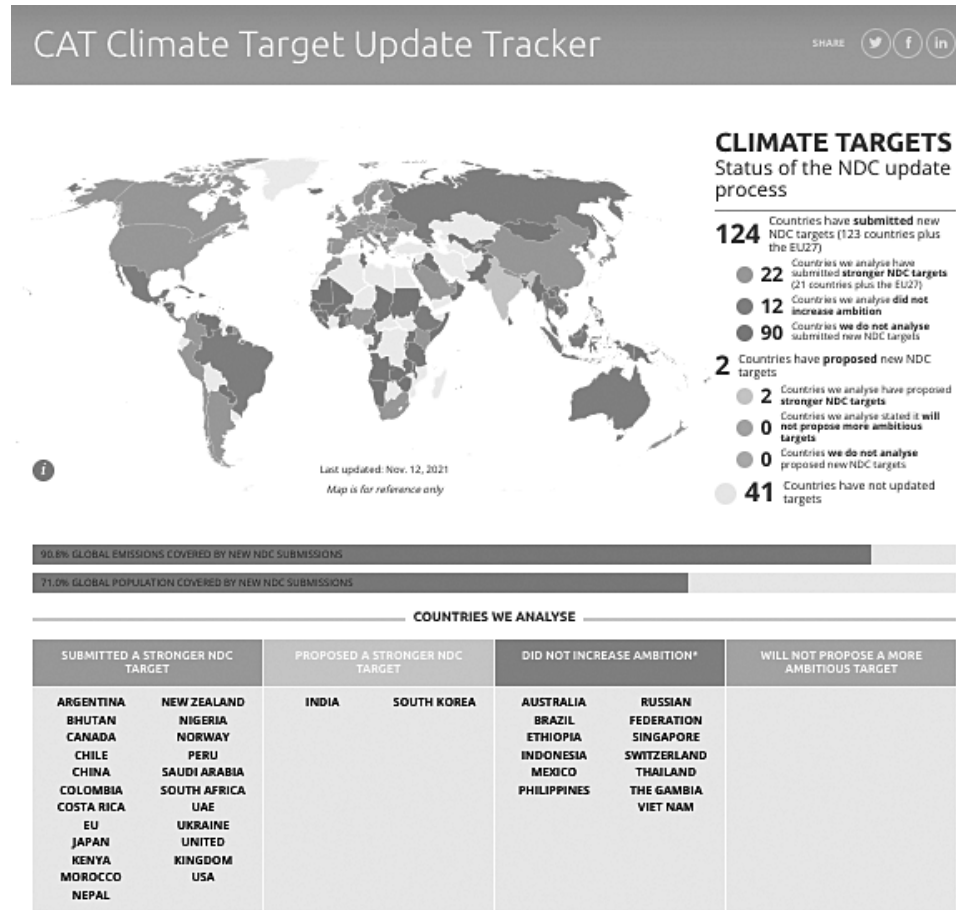
Source: OPHI Multidimensional Poverty Index - Alkire and Robles (2016)

OurWorldInData.org/extreme-poverty/ • CC BY

Compounding the challenges of continuing extreme poverty is ongoing failure to achieve decarbonization consistent with the Paris Agreement commitments. As the Climate Action Tracker allows us to see (*see Figure 6*),⁶⁹ virtually no region of the world is even close to taking sufficient action to address climate change, although several States are increasing their Nationally Determined Contributions (NDC) targets.

⁶⁹ CAT Climate Target Update Tracker, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/climate-target-update-tracker/> (last visited Dec. 26, 2021).

Figure 6: Climate action tracker



During these pandemic times, most of the world has been (and continues to be) subject to emergency declarations and other measures affecting freedoms of expression, assembly, and privacy (see Figure 7).⁷⁰

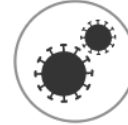
⁷⁰ COVID-19 Civic Freedom Tracker, INT’L CENTER FOR NON-PROFIT LAW, <https://www.icnl.org/covid19tracker/> (last visited Dec. 26, 2021).

Figure 7: COVID-19 civic freedom tracker
COVID-19 Civic Freedom Tracker

Keep Civic Space Healthy

This tracker monitors government responses to the pandemic that affect civic freedoms and human rights, focusing on emergency laws. [For information about our methodology, click here.](#)

For more information and analysis by region, [click here.](#)



Unsurprisingly, the United Nations has emphasized the human rights as crucially central for all COVID-19 responses, noting, “[t]he COVID-19 crisis has exacerbated the vulnerability of the least protected in society. It is highlighting deep economic and social inequalities and inadequate health and social protection systems that require urgent attention as part of the public health response.”⁷¹

II. International Economic Law Tools to Realize the Right to Development

The previous section’s data-driven snapshot of the state of the most vulnerable in the international economic system should drive home the urgency of re-examining how international and domestic economic decision-making in the areas of trade, investment, finance, digital regulation, intellectual property, antitrust and competition, risk regulation, corporate social responsibility, and business and human rights regulation and adjudication, among others, ultimately impact the right to development. *How do these decisions impact the ways by which all peo-*

⁷¹ U.N., *We Are All In This Together*, *supra* note 28, at 2.

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ples participate in, contribute to, and enjoy economic, social, cultural, civil, and political development that is consistent with all human rights and fundamental freedoms? Somewhat counter-intuitive for those who focus mainly on the backlash against the neoliberal political economy paradigm in the international economic system,⁷² my own lens focuses on the limited set of international economic law tools that still *do* exist to strengthen how we participate in, contribute to, and enjoy such human rights-based and human rights-consistent development. The remainder of this paper focuses its observations on five ongoing phenomena in international economic law.

a. Ongoing International Economic Law Treaty Evaluation and Human Rights-Driven Reform as the Norm.

The decade leading up to the global pandemic saw a global financial crisis and associated emergencies and political upheavals (particularly those engineered by the populist resurgence against international law and multilateral institutions, emphasizing the destructive consequences, asymmetries, and disparities of protection, voice, participation, accountability in trade, investment, sovereign debt financing, and international economic dispute resolution).⁷³ Since then, we have witnessed a distinct shift towards populations and voters pushing their respective governments to review, reassess, recalibrate, and reform their respective international economic partnership treaties.⁷⁴ Human rights due diligence,⁷⁵ and to a certain extent, human rights auditing or impact assessments⁷⁶ for baseline intergenerational impacts of trade concessions, foreign investment commitments, public-private partnership projects, foreign debt incurred, international tax rules, and others, are steadily gaining traction inside and outside governments.⁷⁷ Dia-

⁷² See WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* (2019); ECONOMICS AFTER NEOLIBERALISM (Joshua Cohen ed., 2019).

⁷³ See BARRY EICHENGREEN, *THE POPULIST TEMPTATION: ECONOMIC GRIEVANCE AND POLITICAL REACTION IN THE MODERN ERA 1-14* (2018); Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019); Dani Rodrik, *Populism and the Economics of Globalization 1*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 23559, Jul. 2017) (available at https://www.nber.org/system/files/working_papers/w23559/w23559.pdf).

⁷⁴ See, e.g., Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 UNIV. ILL. L. REV. 1 (2019); Diane A. Desierto, *The Human Costs of Exiting and Revising Trade and Investment Agreements: Local Community Interests, Human Rights, and Global Politics*, 32 EMORY INT'L L. REV. 1039 (2018).

⁷⁵ See U.N. Off. of the High Comm. for Hum. Rts., *Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies* (Jun. 2020), https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf; David Gaukrodger, OECD, *Business Responsibilities and Investment Treaties* (Jan. 15, 2020), <https://www.oecd.org/daf/inv/investment-policy/Consultation-Paper-on-business-responsibilities-and-investment-treaties.pdf>.

⁷⁶ See ETO Consortium, *Human Rights Impact Assessments for Trade and Investment Agreements, Rep. of the Expert Seminar* (June 2010), at https://www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUId%5D=44; Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 J. INT'L & COMPAR. L. Q. 573 (2011).

⁷⁷ See Jennifer Zerk, Chatham House, *Human Rights Impact Assessment of Trade Agreements* (Feb. 2019), <https://www.chathamhouse.org/sites/default/files/2019-02-18HumanRightsTradeAgreements.pdf>; U.N. Hum. Rts. Council, *Report of the Independent Expert on the Promotion of a Democratic and Equi-*

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logues on treaty reform and related issues of what used to be dubbed “non-trade” or “non-economic” concerns are now readily taking place at the World Trade Organization,⁷⁸ UNCITRAL Working Group III on Investor-State Dispute Settlement Reform,⁷⁹ the International Monetary Fund,⁸⁰ the World Bank Group, and other multilateral and regional development institutions.⁸¹ Such organizations no longer dismiss local protection and inclusiveness,⁸² consistent with sustainable development objectives in these fora, as extraneous concerns their mandates and processes. The challenges of realizing the urgent and necessary transformation and transition towards decarbonized economies,⁸³ deepening gender equality in the private sector,⁸⁴ and embedding human rights-based approaches in development decision-making⁸⁵ are, at the very least, now routinely recognized in global

table International Order (2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/151/19/PDF/G1615119.pdf?OpenElement>; The World Bank & The Nordic Trust Fund, *Study on Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development* (Feb. 2013), <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf>.

⁷⁸ Pascal Lamy, Director-General, World Trade Org. (WTO), Speech to the U.N. Inst. for Training and Rsch. (Sept. 26, 2010) (transcript available at https://www.wto.org/english/news_e/sppl_e/sppl172_e.htm); Press Release, WTO, Director General Azevêdo Meets with Members of the United Nations Working Group on Business and Human Rights (Feb. 8, 2019), https://www.wto.org/english/news_e/news19_e/dgra_08feb19_e.htm; Joint Statement by WTO Leaders, A New Commitment for Vaccine Equity and Defeating the Pandemic (June 1, 2021), https://www.wto.org/english/news_e/roadmap_igo_01jun21_e.htm.

⁷⁹ See U.N. Comm’n on Int’l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS)*, A/CN.9/WG.III/WP.166 (July 30, 2019).

⁸⁰ See Christine Lagarde, Int’l Monetary Fund (IMF), *Forging a Stronger Social Contract – The IMF’s Approach to Social Spending* (Jun. 14, 2019), <https://www.imf.org/en/News/Articles/2019/06/14/sp061419-md-social-spending>; IMF, *A Strategy for IMF Engagement on Social Spending* (June 14, 2019), <https://www.imf.org/-/media/Files/Publications/PP/2019/PPEA2019016.ashx>.

⁸¹ See *Results and Performance of the World Bank Group: An Independent Evaluation 2020*, WORLD BANK GRP. (2020), <https://ieg.worldbankgroup.org/sites/default/files/Data/Evaluation/files/RAP2020.pdf>; *Knowledge Flow and Collaboration Under the World Bank’s New Operating Model*, WORLD BANK GRP. (Apr. 8, 2019), <https://ieg.worldbankgroup.org/sites/default/files/Data/reports/kfc.pdf>; OECD Dev. Ctr., *Optimising the Role of Development Partners for Social Protection* (2019), https://www.oecd.org/dev/inclusivesocietiesanddevelopment/Lessons_learned_social_development_partners_for_social_protection.pdf; Colin Andrews et al., *The State of Economic Inclusion Report 2021: The Potential to Scale*, WORLD BANK GRP. (2021), <https://openknowledge.worldbank.org/bitstream/handle/10986/34917/9781464815980.pdf?sequence=24&isAllowed=CY.>

⁸² See Lutz Leisering, *The Calls for Universal Social Protection by International Organizations: Constructing a New Global Consensus*, 8 J. SOC. INCLUSION, no. 1, 2020, at 90.

⁸³ See Grzegorz Peszko et al., *Diversification and Cooperation in a Decarbonizing World: Climate Strategies for Fossil-Fuel Dependent Countries*, WORLD BANK GRP. (2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/34011/9781464813405.pdf?sequence=2&isAllowed=Y>; Cinnamon P. Carlarne & J.D. Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement and the Future of International Climate Change Law*, 27 N.Y. UNIV. ENV’T L.J., no. 2, 2019, at 107.

⁸⁴ See Taylor Stoneman, *International Economic Law, Gender Equality, and Paternity Leave: Can the WTO Be Utilized to Balance the Division of Care Labor Worldwide?*, 32 EMORY INT’L L. REV. 51 (2017); Uche U. Ewelukwa, *Women and International Economic Law: An Annotated Bibliography*, 8 LAW & BUS. REV. OF THE AMERICAS 603, 603-616 (2002); Elvira Nica, *Economic Processes and Gender Equality*, 4 J. RES. IN GENDER STUDS. 1050 (2014); U.N. Women & Int’l Fin. Corp., *Bridging the Gap: Emerging Private Sector Response and Recovery Measures for Gender Equality Amid COVID-19* (2020), https://www.weps.org/sites/default/files/2020-12/Bridging_the_Gap_UN_Women_IFC_1.pdf.

⁸⁵ See Peter Uvin, *From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development*, 17 DEV. IN PRACTICE 597 (2007); Morten Broberg & Hans-Otto Sano,

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multilateral fora, even as approaches remain heatedly contested among various constituencies.⁸⁶ Economic policy reforms are scrutinized for their promised effectiveness and overall legitimacy, often due to reasons derived from the desire to address vexing human rights concerns.⁸⁷ One can plausibly make the case, at least in 2021, that the gap between human rights and development objectives in international economic law is decreasing.⁸⁸ This is the case even as international economic lawyers finesse and socialize their respective argumentative practices⁸⁹ from a wider prism of public interest and private allocations in international economic decision-making.⁹⁰ We may rightly contest how to realize human rights and what legal pathways are better in getting us there in the international economic system,⁹¹ but at least in the last decade a quiet consensus is emerging that that we can no longer teach, research, prescribe, or practice international economic law with any sharp isolation from human rights law. If the last decade of global financial crises and the COVID-19 pandemic are any indication, there are serious consequences for all when our international, regional, and domestic economic arrangements ignore human rights.

b. Accountability Is a Featured Agenda in International Economic Law and International Economic Institutions and No Longer Anathema.

What used to be the hermetically regulated profession of international economic law has achieved more openness over the last decade, due to demands for transparency⁹² and some measure of accountability,⁹³ as visible in the Mauritius

Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences, 22 INT'L J. HUM. RTS. 664 (2018).

⁸⁶ See, e.g., Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach*, BROOKINGS (Mar. 17, 2021), <https://www.brookings.edu/research/reforming-the-investment-treaty-regime/>; Rob Davies et al., U.N. Conf. on Tr. and Dev. (UNCTAD), *Reforming the International Trading System for Recovery, Resilience, and Inclusive Development*, UNCTAD Research Paper No. 65, UNCTAD/SER.RP/2021/8 (Apr. 2021), https://unctad.org/system/files/official-document/ser-rp-2021d8_en.pdf; THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE (Antonio Segura Serrano ed., 2018).

⁸⁷ Aoife Nolan & Juan Pablo Bohoslavsky, *Human Rights and Economic Policy Reforms*, 24 INT'L J. HUM. RTS. 1247 (2020).

⁸⁸ See Sarah Joseph, *Human Rights and International Economic Law*, 7 EUR. J. INT'L L. 461 (2016).

⁸⁹ For a significant debate, see Ernst Ulrich-Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 EUR. J. INT'L L. 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EUR. J. INT'L L. 945 (2008); Ernst Ulrich-Petersmann, *Human Rights, International Economic Law and Constitutional Justice: A Rejoinder*, 19 EUR. J. INT'L L. 955 (2008).

⁹⁰ See Bradley J. Condon, *Treaty Structure and Public Interest Regulation in International Economic Law*, 17 J. INT'L ECON. L. 333 (2014).

⁹¹ See M.G. Kaladharan Nayar, *Human Rights and Economic Development: The Legal Foundations*, 2 UNIVERSAL HUM. RTS. 55 (1980).

⁹² See, e.g., Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. OF INT'L L. 579 (2006); Anne Peters, *The Transparency Turn of International Law*, 1 CHINESE J. GLOB. GOV. 3 (2015).

⁹³ See Dirk Ulrich Gilbert et al., *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23 (Jan. 2011); August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOB. GOVERNANCE 131 (2001); Kate MacDonald,

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Convention on Transparency in Treaty-Based Investor-State Arbitration,⁹⁴ the new World Bank Accountability Mechanism,⁹⁵ and heightened transparency obligations emphasized by WTO Director-General Azevêdo⁹⁶ during the pandemic. While the particular contours of transparency and accountability mechanisms continue to be debated,⁹⁷ at least such discussions are taking place as prominent features of the operational agendas of international economic institutions and legal regimes.⁹⁸

Unlike a decade ago, many of our discussions are now about ensuring the quality and effectiveness of transparency and accountability mechanisms in international economic law and institutions, and the quality of such institutions' decisions in influencing development outcomes within States.⁹⁹ We have shifted ground in the international economic system away from punting these questions to domestic means of implementation.¹⁰⁰ This is in stark contrast to the constant refrain of those resistant to the environmental, health, and related development concerns in the failed Doha Development Round at the World Trade Organization¹⁰¹ – a shift towards exploring how the international economic system can

Accountability in Global Economic Governance, in THE OXFORD HANDBOOK OF INTERNATIONAL POLITICAL THEORY 453 (Chris Brown & Robyn Eckersley eds., 2018).

⁹⁴ G.A. Res. 69/116, Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 18, 2014) (the “Mauritius Convention on Transparency”).

⁹⁵ Press Release, World Bank, World Bank Enhances Its Accountability (Mar. 9, 2020) (available at <https://www.worldbank.org/en/news/press-release/2020/03/09/world-bank-enhances-its-accountability>); Diane Desierto et al., *The ‘New’ World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab*, EJIL:TALK! (Nov. 11, 2020), <https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/>.

⁹⁶ Press Release, WTO, DG Azevêdo Requests WTO Members to Share Information on Trade Measures Related to COVID-19 (Mar. 25, 2020), https://www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm.

⁹⁷ Alex Konanykhin, *How Transparency Can Help the Global Economy to Grow*, WORLD ECONOMIC FORUM (Oct. 10, 2018), <https://www.weforum.org/agenda/2018/10/how-transparency-can-help-grow-the-global-economy/>; Simon Taylor, *COVID-19 Demands Global Economic Order Rethink: Address the Debt, Climate and Extinction Crises for a Sustainable and Corruption-Free Future*, TRANSPARENCY INT’L (July 23, 2020), <https://www.transparency.org/en/blog/debt-covid-19-extinction-climate>.

⁹⁸ See, e.g., Mark Halle & Robert Wolfe, Int’l Inst. for Sust. Dev. (IISD), *A New Approach to Transparency and Accountability in the WTO*, IISD ISSUE BRIEF 1 (Sept. 16, 2010), <https://www.iisd.org/system/files/publications/IssueBrief6-2010-09-14-low.pdf>; Mathias Risse, *Justice, Accountability, and the World Trade Organization*, in LEADERSHIP AND GLOBAL JUSTICE 23 (Douglas A. Hicks & Thad Williamson eds., 2018); Miles Kahler, *Defining Accountability Up: The Global Economic Multilaterals*, 39 GOV’T & OPPOSITION 132 (2004); Jorge Dajani & Bertrand Andre Rossert, *Embedding Ethics in Organisations and Their Operations: A Dynamic Approach*, 3 J. OF FIN. COMPLIANCE 198 (2020); Bernard Hoekman & Petros C. Mavroidis, *WTO Reform: Back to the Past to Build for the Future*, 12 GLOB. POL’Y, Supp. 3, Apr. 2021, at 5.

⁹⁹ See, e.g., *Reforming the WTO Towards a Sustainable and Effective Multilateral Trading System*, EUROPEAN COMMISSION, (2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159544.1329_EN_02.pdf; *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption*, WORLD BANK GRP. (Sept. 2020), <https://documents1.worldbank.org/curated/en/235541600116631094/pdf/Enhancing-Government-Effectiveness-and-Transparency-The-Fight-Against-Corruption.pdf>.

¹⁰⁰ See David Blandford et al., *Nontrade Concerns: Reconciling Domestic Policy Objectives with Freer Trade in Agricultural Products*, 85 AM. J. AGRIC. ECON. 668 (2003).

¹⁰¹ Fiona Smith, *Non-Trade Concerns and Agriculture in a Post-Doha Environment: Thinking Outside the Green Box*, 9 ENV’T L. REV. 89 (2007); Larry A. DiMatteo et al., *The Doha Declaration and*

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intentionally confront questions of accountability and transparency. This is a welcome phenomenon, especially since accountability and transparency directly impact the Right to Development as to how individuals, groups, and peoples can themselves meaningfully participate in, contribute to, and enjoy civil, economic, social, cultural, and political development in a manner that is consistent with, and based on, all their human rights and fundamental freedoms. There are many players to be considered – communities, consumers, households, small and medium enterprises, large industries, among others. It is best when everyone directly impacted by international economic decision-making is empowered as a result of better communication and transparency of information as to what our governmental representatives commit to, negotiate, jettison, or obligate for their populations. Such transparency should apply to world trade law, foreign investment law, international financial and monetary law, intellectual property law, global law, and technology in digital governance, and many others. In this moment, there are many opportunities to seek accountability for these ultimately distributive decisions, whether at the domestic, regional, or international level. Without this needed transparency at the outset, we are all left to passively absorb externalized negative human rights impacts, and only thereafter may attempt to cobble together forms, processes, and institutions to create genuine legal accountability for the negative human rights impacts of international, regional, and domestic economic decision-making. As observed in the examples above, it is noteworthy that the international economic law profession is not undertaking transparency and accountability discussions in isolation, but rather with deliberate engagement of international human rights and global public interest constituencies.

c. Adjudication Now Integrates States' Right to Regulate Human Rights and Public Interest, Alongside Duties to Economic Partners.

It is remarkable to note that the past decades have witnessed international economic adjudication routinely taking up human rights concerns.¹⁰² This may partly be owing to broader arguments advanced by attorneys and academics. Further, there is a significant body of jurisprudence from the WTO Appellate Body and WTO Panels on culture and trade commitments,¹⁰³ as well as environmental protection within the context of trade commitments,¹⁰⁴ and national security and

Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime, 36 VAND. J. TRANS-NAT'L L. 95 (2003); Regis Y. Simo, *Trade and Morality: Balancing Between the Pursuit of Non-Trade Concerns and the Fear of Opening the Floodgates*, 51 GEO. WASH. INT'L J. INT'L L. & ECON. 407 (2019).

¹⁰² See generally Ernst Ulrich-Petersmann, *Need for a New Philosophy of International Economic Law and Adjudication*, 17 J. INT'L ECON. L. 639 (2014).

¹⁰³ See, e.g., Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (adopted May 22, 2014).

¹⁰⁴ See, e.g., Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

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trade commitments,¹⁰⁵ which are primarily anchored on GATT Article XX general exceptions, GATT Article XXI security exceptions, and the SPS and TBT Agreements, and others. However, the assault on the WTO dispute settlement system resulting from appointments the United States blocked during the Trump administration, an administration that was critical of WTO judges' encroachment on domestic prerogatives, has also stalemated many possibilities for deepening that body of jurisprudence.¹⁰⁶ With latest change of administration in the United States, one hopes that world trade adjudication may resume course in engaging States' rights to regulate for human rights and the public interest,¹⁰⁷ as well as non-discrimination and fair market access under world trade law.¹⁰⁸

Foreign investment jurisprudence is also witnessing its own quiet changes, with decisions such as *Urbaser v. Argentina*,¹⁰⁹ *Perenco v. Ecuador*,¹¹⁰ *Aven v. Costa Rica*,¹¹¹ *Allard v. Barbados*,¹¹² and others deliberately referring to international human rights law as relevant sources of law in investor-State disputes. Further, human rights issues have featured increasingly in international investment arbitration,¹¹³ alongside parallel developments in business and human rights litigation (including victories for plaintiffs in *Urgenda v. State of the Netherlands*,¹¹⁴ *Okpabi v. Royal Dutch Shell PLC*,¹¹⁵ and *Vedanta Resources*

¹⁰⁵ See, e.g., Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted April 5, 2019); Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (adopted June 16, 2020).

¹⁰⁶ Clark Packard, *Trump's Real Trade War is Being Waged on the WTO*, FOREIGN POLICY (Jan. 9, 2020, 1:54 PM), <https://foreignpolicy.com/2020/01/09/trumps-real-trade-war-is-being-waged-on-the-wto/> (“[T]he WTO will remain intact as a system of rules that will largely be adhered to, as well as a forum to negotiate new rules. But the dispute settlement system, the ‘crown jewel’ of the WTO, has been damaged—perhaps irrevocably so.”); Gregory Shaffer et al., *U.S. Threats to the WTO Appellate Body* (Dec. 13, 2017) (Research Paper No. 2017-63, U.C. Irvine School of Law) (available at <https://ssrn.com/abstract=3087524>).

¹⁰⁷ See Frank J. Garcia, *Restoring Trade's Social Contract in the United States*, in WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 233 (Alvaro Santos et al. eds., 2019).

¹⁰⁸ See generally WILLIAM J. DAVEY, NON-DISCRIMINATION IN THE WORLD TRADE ORGANIZATION: THE RULES AND EXCEPTIONS (2012).

¹⁰⁹ *Urbaser S.A. et al. v. The Argentine Republic*, Case No. ARB/07/26, Award (ICSID Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

¹¹⁰ *Perenco Ecuador Limited v. The Republic of Ecuador*, Case No. ARB/08/6, Award (ICSID Sept. 27, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10837.pdf>.

¹¹¹ *David R. Aven et al. v. The Republic of Costa Rica*, Case No. UNCT/15/3, Award (ICSID Sept. 18, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf.

¹¹² *Peter A. Allard v. The Government of Barbados*, Case No. 2012-06, Award (Perm. Ct. Arb. June 27, 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7594.pdf>.

¹¹³ See Ursula Kriebaum, *Human Rights and International Investment Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 150 (Thomas Schultz & Frederico Ortino eds., Oxford Univ. Press 2020).

¹¹⁴ Hague Dist. Ct. Oct. 9, 2018, C/09/00456689 / HA ZA 13-396 (unofficial court English translation) (*Urgenda Foundation v. State of the Netherlands*) (Neth.), <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>.

¹¹⁵ *Okpabi et al. v. Royal Dutch Shell PLC et al.* [2021] UKSC 3 (appeal taken from EWCA Civ.), <https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf>.

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*PLC v. Lungowe*¹¹⁶) and business and human rights arbitration (including the famous *Bangladesh Accord* arbitration awards¹¹⁷ and the Hague Rules on Business and Human Rights Arbitration¹¹⁸). Plus, arbitral institutions such as the Permanent Court of Arbitration have developed their own rules specific to environmental disputes.¹¹⁹ Climate change law is also now utilized in investor-State arbitrations pertaining to State regulations relating to transitions to renewable energies.¹²⁰ For example, States have thus far had some measure of success in defending their climate change and renewable energy regulations¹²¹ – see, e.g., cases from Spain,¹²² the Czech Republic,¹²³ and Italy.¹²⁴

¹¹⁶ *Vedanta Resources PLC et al. v. Lungowe et al.* [2019] UKSC 20 (appeal taken from EWCA Civ), <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment-accessible.pdf>.

¹¹⁷ See *Industrial Global Union & Uni Global Union v. [redacted names of Respondents]*, Case No. 2016-36, Termination Order (Perm. Ct. Arb. 2018), <https://pcacases.com/web/sendAttach/2438>; *Industrial Global Union & Uni Global Union v. [redacted names of Respondents]*, Case No. 2016-37, Termination Order (Perm. Ct. Arb. 2018), <https://pcacases.com/web/sendAttach/2439>.

¹¹⁸ *Hague Rules on Business and Human Rights Arbitration*, CENTER FOR INTERNATIONAL LEGAL COOPERATION (Dec. 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

¹¹⁹ *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, PERMANENT COURT OF ARBITRATION (June 19, 2001), https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf; *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or The Environment*, PERMANENT COURT OF ARBITRATION (Apr. 16, 2002), https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

¹²⁰ See generally Anatole Boute, *Combating Climate Change Through Investment Arbitration*, 35 *FORDHAM INT'L L.J.* 613 (2012); Dae-Jung Kim, *Standards of Protection in Investment Arbitration for Upcoming Climate Change Cases*, 24 *J. ARB. STUDS.* 33 (2014); Brian D. Burstein, *Green Investment Disputes: The Interaction Between Investment Arbitration and the Climate Change Agenda*, 17 *REVISTA BRASILEIRA DE ARBITRAGEM*, no. 68, 2020, at 97 (2020); Lucy Greenwood, *The Canary Is Dead: Arbitration and Climate Change*, 38 *J. INT'L ARB.* 309 (2021).

¹²¹ See Charles A. Patrizia, et al., *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty*, *GLOBAL ARBITRATION REVIEW* (Jan. 31, 2019), <https://www.lexology.com/library/detail.aspx?g=301e8347-1a70-4175-b22c-97309e698cac>.

¹²² *Charanne B.V. & Construction Investments S.A.R.L. v. The Kingdom of Spain*, Case No. 062/2012, Final Award (Stockholm Chamber Com. Arb. 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf>; *Isolux Infrastructure Netherlands, B.V. v. The Kingdom of Spain*, Case No. V2013/153, Award (Stockholm Chamber Com. Arb. 2016), <https://www.italaw.com/sites/default/files/case-documents/italaw9219.pdf>. However, for cases where Spain was found internationally responsible, see *Eiser Infrastructure Limited & Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, Case No. ARB/13/36, Final Award (ICSID May 4, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Case No. 2015/063, Final Award (Stockholm Chamber Com. Arb. Feb. 15, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf>. See also Fernando Dias Simoes, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, 45 *DEN. J. INT'L L. & POL'Y* 251 (2017); Isabella Reynoso, *Spain's Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development*, *IISD INVESTMENT TREATY NEWS* (June 27, 2019), <https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>.

¹²³ See, e.g., *Mr. Jürgen Wirtgen et al. v. The Czech Republic*, Case No. 2014-03, Final Award (Perm. Ct. Arb. Oct. 11, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw9498.pdf>; *Antaris Solar GmbH & Dr. Michael Göde v. The Czech Republic*, Case No. 2014-01, Award (Perm. Ct. Arb. May 2, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf>; *I.C.W. Europe Investments Limited v. The Government of the Czech Republic*, Case No. 2014-22, Award (Perm. Ct. Arb. May 15, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10678.pdf>.

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As I have discussed in other fora, the regulatory and legal changes that will accompany the implementation of climate change law will inevitably put international economic dispute settlement front and center in the interpretation and application of a very broad spectrum of interrelated climate change, environmental law, and human rights norms vis-à-vis market access and property rights that have traditionally been asserted in world trade law and foreign investment law.¹²⁵ In turn, one can expect the expanding *ratione materiae* in international economic disputes to exert counterpart demand pressures over time for a more diversified expertise in international economic law, international human rights law, and international environmental law in the composition of international economic tribunals.¹²⁶ In global antitrust and anticompetition law, we are seeing transatlantic litigation taking place as European Union defends its values against abuse of market dominance and other public interest consequences resulting from the actions of tech giants from the United States.¹²⁷ Such issues are attracting not just the regulatory scrutiny of Margrethe Vestager at the European Commission,¹²⁸ but also the investigation of the United States Congress¹²⁹ as obviated by that body's recent inquiries over the ethics of monopolistic business practices of tech giants Facebook, Amazon, Google, Netflix, and Apple. Accountability for digital

¹²⁴ *Blunson S.A. et al. v. Italian Republic*, ICSID Case No. ARB/14/3, at ¶¶ 63-65 (2016), <https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>; but see *Greentech Energy Systems A/S et al. v. The Italian Republic*, Arb. Case No. V 2015/095, Final Award (Stockholm Chamber Com. Arb. Dec. 23, 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf>.

¹²⁵ See Olivia Lu, *TagTime with Prof. Diane Desierto – Invoking Climate Change, Environmental Law, and Human Rights Law in International Arbitration: Utopia or Opportunity?*, AMERICAN REVIEW OF INTERNATIONAL ARBITRATION BLOG, TAGTIME (Feb. 8, 2021), <http://blogs2.law.columbia.edu/aria/tagtime-with-prof-diane-desierto-invoking-climate-change-environmental-law-and-human-rights-law-in-international-arbitration-utopia-or-opportunity/>; Diane Desierto, *COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?*, EJIL:TALK! (Dec. 19, 2019), <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/>.

¹²⁶ See, e.g., Olof Larsson et al., *Selection and Appointment of International Adjudication: Insights from Political Science*, ACADEMIC FORUM ON ISDS 391, 392 (Concept Paper 2019/10, Sept. 17, 2019), <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf>; Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L RELS. (2014), <https://journals.sagepub.com/doi/abs/10.1177/1354066112448201>; Robert Howse, *Appointment with Destiny: Selecting WTO Judges in the Future*, 12 GLOB. POL'Y 71 (2021), <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12933>.

¹²⁷ See, e.g., *Amazon Charged with Abusing EU Competition Rules*, BBC NEWS (Nov. 10, 2020), <https://www.bbc.com/news/business-54887650>; Jonathan Watson, *Toe to Toe with the Tech Giants*, INTERNATIONAL BAR ASSOCIATION, <https://www.ibanet.org/article/b0cb42ca-012c-4346-b116-4f1b4d8a2ba5> (last visited Dec. 27, 2021); Javier Espinoza, *EU vs Big Tech: Brussels' Bid to Weaken the Digital Gatekeepers*, FINANCIAL TIMES (Dec. 8, 2020), <https://www.ft.com/content/4e08efbb-dd96-4bea-8260-01502aaf1bd7>.

¹²⁸ See Ravi Agrawal, *Margrethe Vestager is Still Coming for Big Tech*, FOREIGN POLICY (July 4, 2020), <https://foreignpolicy.com/2020/07/04/margrethe-vestager-is-still-coming-for-big-tech/>.

¹²⁹ INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

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governance,¹³⁰ as well as for the future of artificial intelligence,¹³¹ is now playing out in administrative agencies' rule-making and quasi-adjudication functions in Europe and the United States,¹³² and to a certain extent, in administrative agencies across Asia.¹³³

Domestic business and human rights legislation and national litigation has also continuously proliferated in the international economic system.¹³⁴ In addition to the monumental *Kiobel* decision of the United States Supreme Court,¹³⁵ jurisdictions such as the United Kingdom,¹³⁶ the Netherlands,¹³⁷ Australia,¹³⁸ Canada,¹³⁹ and others have been receptive to human rights plaintiffs seeking to hold transnational and multinational corporations to account for the injurious consequences of their actions. Many corporations themselves are embracing corporate social responsibilities in the U.N. Global Compact,¹⁴⁰ the U.N. Principles on Responsible Investment,¹⁴¹ and the Equator Principles,¹⁴² and are also engaging in human

¹³⁰ See Ansgar Koene et al., Eur. Parl. Rsch. Serv., *A Governance Framework for Algorithmic Accountability and Transparency*, PE 624.262 (Apr. 2019), [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU\(2019\)624262_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624262/EPRS_STU(2019)624262_EN.pdf).

¹³¹ See, e.g., Thomas Wischmeyer, *Artificial Intelligence and Transparency: Opening the Black Box*, in *Regulating Artificial Intelligence* 75 (Thomas Wischmeyer & Rimo Rademacher eds., 2020); Mark MacCarthy & Kenneth Propp, *Machines Learn that Brussels Writes the Rules: The EU's New AI Regulation*, BROOKINGS (May 4, 2021), <https://www.brookings.edu/blog/techtank/2021/05/04/machines-learn-that-brussels-writes-the-rules-the-eus-new-ai-regulation/>.

¹³² *Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM(2021) 206 final (Apr. 21, 2021); *Legislation Related to Artificial Intelligence*, U.S. NAT'L CONFERENCE OF STATE LEGISLATURES (Sep. 15, 2021).

¹³³ See Ayesha Khanna & Parag Khanna, *Where Asia is Taking the World with AI*, FORBES (May 21, 2020), <https://www.forbes.com/sites/insights-ibmail/2020/05/21/where-asia-is-taking-the-world-with-ai/?sh=6662c01b7947>.

¹³⁴ See Danielle Anne Pamplona & Franz Christian Ebert, *Editorial: Business and Human Rights: Taking Stock of Trends in International Governance and Domestic Litigation*, 15 REVISTA DE DIREITO INTERNACIONAL, no. 3, 2018, at 2; Florian Wettstein, *Human Rights, Emerging Markets, and International Business*, in OXFORD HANDBOOK OF MANAGEMENT IN EMERGING MARKETS (2019); Elise Groulx Diggs et al., *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309 (2019).

¹³⁵ *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 U.S. 108 (2013).

¹³⁶ Richard Meeran, *Multinational Human Rights Litigation in the UK: A Retrospective*, 6 BUS. & HUM. RTS. J. 255 (2021), <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/multinational-human-rights-litigation-in-the-uk-a-retrospective/64E3C1721B8E1BA1D929A5EE89DC6910>.

¹³⁷ See Juliane Kippenberg, *Netherlands Takes Big Step Toward Tackling Child Labor*, HUM. RTS. WATCH (June 4, 2019, 1:30 AM), <https://www.hrw.org/news/2019/06/04/netherlands-takes-big-step-toward-tackling-child-labor>; REVISION OF THE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS, GOV'T NETH., <https://www.government.nl/topics/responsible-business-conduct-rbc/national-action-plan-on-business-and-human-rights> (last visited Dec. 27, 2021).

¹³⁸ Amanda Murphy et al., *First-Step Analysis: Business and Human Rights in Australia*, LEXOLOGY (Feb. 28, 2020), <https://www.lexology.com/library/detail.aspx?g=79229884-c466-461f-ad12-0c51192b50c2>.

¹³⁹ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (Case No. 37919) (Can.), <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>.

¹⁴⁰ *The Ten Principles of the U.N. Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Dec. 27, 2021).

¹⁴¹ *About the PRI*, U.N. PRINCIPLES FOR RESPONSIBLE INVESTMENT, <https://www.unpri.org/pri/about-the-pri> (last visited Dec. 27, 2021).

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rights benchmarking¹⁴³ and human rights due diligence.¹⁴⁴ Importantly, some Fortune 500 companies are markedly shifting away from the notion of strict *shareholder* accountability and towards *stakeholder* accountability.¹⁴⁵ The Bangladesh Accords arbitrations following the Rana Plaza tragedy involving garments sector laborers in Bangladesh¹⁴⁶ also paved the way for subsequent efforts on business and human rights arbitration, most recently in the adoption of the 2019 Hague Rules on Business and Human Rights Arbitration.¹⁴⁷

d. International Economic Law Institutions Are Creating Space for Civil Society Participation and Contribution, Though Such Spaces Remain Contested.

As other scholars have narrated,¹⁴⁸ civil society actors used to operate more from the fringes of international economic decision-making at the World Trade Organization (WTO) (recall the 1997 Seattle protests),¹⁴⁹ UNCITRAL,¹⁵⁰ the World Bank Group,¹⁵¹ and the United Nations,¹⁵² as well as regional institutions

¹⁴² THE EQUATOR PRINCIPLES (EP4) (Jul. 2020) <https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf>.

¹⁴³ See 2020 Methodology for the 2020 Corporate Human Rights Benchmark, WORLD BENCHMARKING ALLIANCE (Apr. 2, 2020), <https://www.worldbenchmarkingalliance.org/research/2020-methodology-for-the-2020-corporate-human-rights-benchmark/> (providing an overview of the organization's goal and providing links to updated benchmarks for several covered business sectors).

¹⁴⁴ See Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L.Q. 789 (2020); Bjorn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225 (2017).

¹⁴⁵ Vivian Hunt, *Who's Afraid of Stakeholder Capitalism?*, FORTUNE (May 16, 2021, 8:00 AM), <https://fortune.com/2021/05/16/stakeholder-capitalism-milton-friedman-business-roundtable-statement-esg/>; *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf>.

¹⁴⁶ Gaukrodger, *supra* note 75, at 71.

¹⁴⁷ *Id.* at 72.

¹⁴⁸ See, e.g., Wolfgang Benedek, *The Emerging Global Civil Society: Achievements and Prospects*, in AUTHORITY IN THE GLOBAL POLITICAL ECONOMY 170 (Volker Rittberger et al. eds., 2008); Gordon A. Christenson, *World Civil Society and the International Rule of Law*, 19 HUM. RTS. Q. 724 (1997); Joana Gomes Beirao, *The Role of Non-Governmental Organizations in International Economic Law*, LAWYR.IT (Jun. 8, 2019), <http://www.lawyr.it/index.php/articles/international-focus/1374-the-role-of-non-governmental-organisations-in-international-economic-law>.

¹⁴⁹ Gregory Scruggs, *What the Battle of Seattle Means 20 Years Later*, BLOOMBERG (Nov. 19, 2019, 9:31 AM), <https://www.bloomberg.com/news/articles/2019-11-29/what-seattle-s-wto-protests-mean-20-years-later>.

¹⁵⁰ See IISD, *Coalition of Civil Society Groups, Trade Unions Caution Against MIC Option at UNCITRAL*, INVESTMENT TREATY NEWS (Mar. 10, 2020), <https://www.iisd.org/itn/en/2020/03/10/coalition-of-civil-society-groups-trade-unions-caution-against-mic-option-at-uncitral/>.

¹⁵¹ See THE WORLD BANK, CIVIL SOCIETY, <https://www.worldbank.org/en/about/partners/civil-society/overview#:~:text=the%20Bank%20has%20steadily%20increased,88%25%20in%20fiscal%20year%202015> (last visited Dec. 27, 2021) (World Bank overview of its relationship with civil society organizations, or CSOs).

¹⁵² See U.N. High Commissioner for Human Rights, Rep. of the Hum. Rts. Council, Civil Society Space: Engagement with International and Regional Organizations, U.N. Doc. A/HRC/44/25 (Apr. 20, 2020) <https://undocs.org/A/HRC/44/25>.

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such as the European Union¹⁵³ and more technical institutions of global economic governance such as the World Intellectual Property Organization.¹⁵⁴ In the span of a decade, however, more spaces for participation and contribution have gradually been made available, although many might critique these opportunities as token spaces or symbolic consultations. Participation methods include consultative mechanisms, deliberative sessions, trade and investment policy engagement, calls for inputs, and Track 1.5 events,¹⁵⁵ among others.¹⁵⁶ These spaces remain vigorously contested,¹⁵⁷ especially when it comes to diversifying and verifying the sources of information States and international economic institutions rely upon for international economic decision-making beyond the usual channels of State-based intelligence and information from diplomatic constituencies.¹⁵⁸ Participation of non-disputing parties (*amici* participation) has also become a constant feature of investor-State arbitrations.¹⁵⁹ However, as is the case in critiques of non-disputing member participation in WTO disputes,¹⁶⁰ one can certainly critique whether such participation achieves its functional objectives,¹⁶¹ especially as to whether it truly assists arbitral tribunals to appreciate the essentiality and complexity of international human rights law.¹⁶²

Notwithstanding these, in my view, welcome contestations, the push towards further mainstreaming the participation and contribution of individuals, groups, and peoples through civil society involvement in international, regional, and do-

¹⁵³ E.U. Agency for Fundamental Rights *Challenges Facing Civil Society Organisations Working on Human Rights in the EU* (2017), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf.

¹⁵⁴ *World Intellectual Property Organisation*, GLOBAL INFORMATION SOCIETY WATCH (2007), https://giswatch.org/sites/default/files/gisw_wipo_0.pdf.

¹⁵⁵ Jennifer Staats et al., *A Primer on Multi-Track Diplomacy: How Does It Work?*, UNITED STATES INST. OF PEACE (July 31, 2019), <https://www.usip.org/publications/2019/07/primer-multi-track-diplomacy-how-does-it-work> (explaining that Track 1.5 diplomacy brings to one diplomatic table both government officials participating in unofficial capacity and non-governmental experts).

¹⁵⁶ See, e.g., George Ingram, *Civil Society: An Essential Ingredient of Development*, BROOKINGS (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/civil-society-an-essential-ingredient-of-development/>; U.N. Special Rapporteur on the Rights to Peaceful Assembly and to Association, Human Rights Council, *Civil Society Participation in the Implementation of the 2030 Agenda for Sustainable Development*, U.N. Doc. A/HRC/41/41/Add.2 (Sept. 30, 2019), <https://undocs.org/A/HRC/41/41/Add.2>.

¹⁵⁷ See, e.g., *Challenges Facing Civil Society Organisations*, *supra* note 153.

¹⁵⁸ See *The Future Role of Civil Society*, WORLD ECONOMIC FORUM WORLD SCENARIO SERIES (Jan. 2013), http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf; Agnes Köver, *The Relationship Between Government and Civil Society in the Era of COVID-19*, 12 NONPROFIT POL'Y F. 1, 21 (Feb. 2021), <https://www.degruyter.com/document/doi/10.1515/npf-2021-0007/html>.

¹⁵⁹ See Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMPAR. L. Q. 373 (Apr. 2010); Thomas Leary, *Non-Disputing Parties and Human Rights in Investor-State Arbitration*, 18 J. WORLD INV. & TRADE 1062 (2017); Christina Knahr, *The Role of Non-State Actors in International Investment Arbitration*, 32 S. AFR. Y.B. INT'L L. 455 (2007).

¹⁶⁰ See Nick M. Covelli & Rajeev Sharma, *Due Process, Judicial Economy and Procedural Rights: Non-Disputing Member Participation in WTO Disputes*, 5 J. WORLD INTELL. PROP. 591 (2002).

¹⁶¹ See Fernando Dias Simoes, *Myopic Amici: The Participation of Non-Disputing Parties in ICSID Arbitration*, 42 N.C. J. INT'L L. 791 (2017).

¹⁶² See Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L.R. 1269 (2009); see also FRANCISCO JOSÉ PASCUAL VIVES, *Amicus Curiae and Investment Arbitration*, 27 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 351 (2011) (in Spanish).

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mestic economic decision-making still augurs well for the prospects of realizing the Right to Development in the international economic system. Civil society participation, engagement, and critique are essential to public deliberations and our continuing investigation into the values that animate and motivate State and non-State authoritative decision-making in the international economic system, and will necessarily influence which groups are favored and disfavored by these decisions.¹⁶³ Civil society participation is even more crucial when considering our daily task to realize our individual and collective human rights, which encompass civil, political, economic, social, and cultural dimensions, and which must be considered in both their territorial and extraterritorial¹⁶⁴ applications. Though we currently use a baseline of expected global public goods against which we measure the ultimate salience and true success of the modern global economy, civil society participation quality and quantity should in fact be considered the true rubric.¹⁶⁵

III. Human Rights and the Right to Development Are Increasingly Included in International Economic Law Education, Scholarship, and Policy Practice.

Most importantly, in my view, the long-term pedagogic and epistemological landscape of international economic law is itself changing to embrace the questions, challenges, and urgencies of human rights not just as artifacts, phenomena, or occasional impacts of economic transactions but as inimitably necessary normative elements in the multitude of simultaneous decisions that States and non-State actors make in the global economic system.¹⁶⁶ Approaching thematic and granular questions of international economic law through an interdisciplinary lens has quickly become the methodology *de rigeur*.¹⁶⁷ Some have lamented the resulting loss of the law as an individual discipline in and of itself and, as it was

¹⁶³ See Isabella D. Bunn, *Linkage Between Ethics and International Economic Laws*, 19 U. PA. J. INT'L ECON. L. 319, 320-21 (1998); see generally THE VALUE OF EVERYTHING, *supra* note 12; KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019); HUMAN DIGNITY AND THE FUTURE OF GLOBAL INSTITUTIONS (Mark P. Lagon & Anthony Clark Arend eds., 2014).

¹⁶⁴ See YUVAL SHANY, *The Extraterritorial Application of International Human Rights Law*, 409 COLLECTED COURSES HAGUE ACAD. INT'L L. 21 (2020).

¹⁶⁵ See WILLIAM F. FELICE & DIANA FUGUITT, *HUMAN RIGHTS AND PUBLIC GOODS: THE GLOBAL NEW DEAL* (2020).

¹⁶⁶ See Hans W. Baade, *Teaching International Economic Law*, 16 J. LEGAL EDUC. 59 (1963); Myres S. McDougal, *The Teaching of International Law*, 2 GA. J. INT'L & COMP. L. 111 (1972); Egon Schwelb, *Human Rights and the Teaching of International Law*, 64 AM. J. INT'L L. 355 (1970); Duncan French, *Personal Opinion: Studying (and Teaching) International Economic Law to Undergraduates*, 10 MANCHESTER J. INT'L ECON. L. 125 (2013); Seema Sapra, *An Agenda for Teaching International Economic Law in Indian Law Schools*, 2 INDIAN J. INT'L ECON. L. 80 (2009).

¹⁶⁷ See, e.g., FRONTIERS OF INTERNATIONAL ECONOMIC LAW: LEGAL TOOLS TO CONFRONT INTERDISCIPLINARY CHALLENGES (Freya Baetens & José Caiado eds., 2014); Diane Desierto, *Remaking the World Towards 'Fair and Reciprocal Trade? The Case for (More) Interdisciplinarity in International Economic Law*, EJIL:TALK! (Nov. 17, 2017), <https://www.ejiltalk.org/remaking-the-world-towards-fair-and-reciprocal-trade-the-case-for-more-interdisciplinarity-in-international-economic-law/>; Outi Korhonen, *Within and Beyond Interdisciplinarity in International Law and Human Rights*, 28 EUR. J. INT'L L. 625 (May 2017).

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historically considered, separate from distinct methods and approaches of the social sciences, humanities, and natural sciences.¹⁶⁸ However, we must welcome the proliferation of scholarship, especially from forthcoming new generations of PhD dissertations that creatively and carefully operationalize international economic law questions against more overarching questions of development and how development is both defined and realized with the agency of all populations, especially considering the most vulnerable in the international economic system.¹⁶⁹ The intentional pedagogic and academic engagement with these concerns is, to me, central not just to driving the global technical expertise of future international economic lawyers, but also to kindling their wider professional consciousness about the ethical consequences and human rights impacts of their own roles as counsel in the international economic system.¹⁷⁰ This, in my view, is what will ensure intergenerational continuity among international legal scholars, and allow populations to enjoy the Right to Development in its core authentic sense – as economic, social, cultural, civil, and political development consistent with and based on all human rights and fundamental freedoms.

IV. Conclusion

In closing, let me end with this point of reflection. We have endured almost two years of the shared predicaments stemming from this pandemic and its counterpart normalization of human rights deprivations. This, of course, within the context of a decade of stark political, economic, and sociological consequences ensuing from continuing inequalities in the international economic system. So, I must strongly emphasize that we are *far past* the era of ‘human rights accommodation’ in the teaching, study, and practice of international economic law. Instead, we are well-steeped in the pedestrian, but truly urgent, daily tasks of human rights realization and implementation *through* international economic law. We can more easily deploy its vast range of tools available in the areas of, for example, trade, finance, investment, intellectual property, taxation, digital governance, and risk regulation. Thus, the arena of ‘human rights’ is no longer the territorial preserve of any single professional discipline or sub-field within international law but, as Hersch Lauterpacht himself contemplated at the dawn of the Charter of the United Nations era, human rights *is* both the premise and promise of postwar international law.¹⁷¹ I can recall no time in recent memory where the survival of the global economic system depends so starkly on the cooperation and solidarity of we human beings who have collectively created it.

¹⁶⁸ Jan Klabbers, *Counter-Disciplinarity*, 4 INT’L POL. SOCIO. 308 (2010).

¹⁶⁹ See Nicolás Perrone & David Schneiderman, *International Economic Law’s Wreckage, Depoliticization, Inequality, Precarity*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 446 (Emilios Christodoulidis et al. eds., 2019); Nicolas M. Perrone, *Vulnerability and the Speed of the Global Economy: Searching [sic] a New Vocabulary for International Economic Law*, AFRONOMICS LAW (Aug. 21, 2020), <https://www.afronomicslaw.org/2020/08/21/vulnerability-and-the-speed-of-the-global-economy-searching-a-new-vocabulary-for-international-economic-law/>.

¹⁷⁰ See, e.g., H. Patrick Glenn, *The Ethic of International Law*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 246 (Donald Earl Childress, III ed., 2011).

¹⁷¹ HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (Archon Books 1968).

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These times should remind us that, as the Universal Declaration of Human Rights proclaims, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. [. . .] Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”¹⁷² International economic law, premised and focused on realizing human rights, can help regenerate our fractured global system to realize this coveted human rights-based social and international order. In this spirit, I congratulate all who are part of the vastly expanding international network of international economic lawyers for the human rights and development challenges of our times. It is an honor to work in these trenches together.

¹⁷² G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1, 28 (Dec. 10, 1948).