INTERNATIONAL ECONOMIC LAW'S WRECKAGE: DEPOLITICIZATION, INEQUALITY, PRECARITY

Nicolás M. Perrone and David Schneiderman

Introduction

If law comes to reflect the interests the of the economically powerful, then it is the task of critical legal scholars to 'call into question every victory, past and present, of the rulers.'[1] International economic law (IEL), in our view, gives expression to the ruling ideas of our time. International trade and investment law, which we assimilate under the label of IEL, promote the movement of goods, services and capital across borders with few qualifications. Though given expression in differing legal orders, each with its own set of complex legal rules and mechanisms of enforcement, they are cognate systems of law having more than coincidental points of resemblance. They constitute part of what can be called the legal culture of capitalism,[2] having as one of its objects the depoliticization of markets rendering inequality, within and between states and regions, more difficult to address.

As with other law, trade and investment rules together with the personnel who interpret them, express preferences about how social life should be organized. While different interests struggle over the negotiation and interpretation of these rules, only some are invited to the table to participate. Most others are subject to those rules.[3] Moreover, only certain rules from certain locales are candidates for adoption in the global arena, typically those associated with property and contract articulated in Global North. In the case of international trade and investment rules, these preferences determine where raw materials will be produced, where goods will be manufactured, and how foreign investors will be treated abroad. In other words, these rules determine who will benefit, who will lose and, perhaps more importantly, who will adapt to whom so as to render the policy goals of trade and investment rules most efficacious. The result is a world of winners and losers.

We aim to scrutinize these novel systems of global legal order through the lens of critical international political economy. This is a mode of analysis that interrogates relations between dominant and subordinate forces in international spheres. These relations are also referred to,

---

[1] KARL MARX, THE GERMAN IDEOLOGY 64 (edited by C.J. Arthur) (International Publishers 1989) and Walter Benjamin, 'Thesis IV' in MICHAEL LÖWY, FIRE ALARM: READING WALTER BENJAMIN'S 'ON THE CONCEPT OF HISTORY' 37 (translated by Chris Turner) (Verso 2016).
[2] David Singh Grewal, *Book Review: The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014).
[3] DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

Electronic copy available at: https://ssrn.com/abstract=3186179

variously, as those between Centre and Periphery or between Global North and Global South. We use these pairings interchangeably, though these territorial binaries are breaking down as countries in the periphery move closer to the centre and as labour forces in the centre look more like those in the periphery.

What is emphasized is the contingent nature of global legal orders questioning, thereby, their 'aura of naturalness and necessity.'[4] While there has been much talk of the irreversibility of the rules and institutions of global economic integration, recent developments in the U.K. and U.S. suggest that they remain contested and vulnerable to changes of direction. The critical mode of political economy allows us to probe these global legal orders, then, not as 'divinely ordained' nor as the outcome of fortuitous 'blind chance' but as the product of distributive choices made by those granted privileged access to determining their content.[5] 'Structures are not "givens," advises Cox, but are 'made by collective human action and transformable by collective human action.'[6] No grand theoretical project is pursued, instead, the aim is to reveal the specificity of power rendering its mechanisms more vulnerable to resistance and rollback.[7] If the pessimist appreciates that there are constraints on future action, the 'pessimist as critic,' Cox observes, seeks out 'contradictions in the status quo that might become triggers of change.'[8]

The frame we adopt enables us to better comprehend the impact of IEL regimes upon the precarious – those not granted any solicitude by its edicts. Precarity is the legally induced condition in which certain populations suffer from failing legal networks of support, more so than others, thereby differentially exposed to economic impacts.[9] We speak of the poor – the 'part of those who have no part,' in Rancière's evocative terms.[10] Precariousness, Butler adds, 'implies living socially' but in a

---

[4] ROBERTO MANGABEIRA UNGER, FALSE NECESSITY – AN ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY: POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY, PART I 58 (1987).

[5] SUSAN STRANGE, STATES AND MARKETS, 2ND ED. 18 (1994). Joost Pauwelyn makes a similar argument, that investment law is a 'spontaneous order emerging from decentralized interactions' in Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it Can Be Reformed* 29 ICSID REV 372, 375-6 (2014).

[6] ROBERT W. COX, PRODUCTION, POWER, AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY 395 (Columbia University Press, 1987).

[7] Michel Foucault, *Powers and Strategies* in MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977 134-45, 145 (Colin Gordon, ed. Pantheon Books, 1980).

[8] Robert W. Cox, *Reflections and Transitions* in ROBERT W. COX WITH MICHAEL G. SCHECHTER, THE POLITICAL ECONOMY OF A PLURAL WORLD: CRITICAL REFLECTIONS ON POWER, MORALS AND CIVILIZATION 26-43, 37 (2002)

[9] JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 33 (2015).

[10] JACQUES RANCIÈRE, DISAGREEMENT: POLITICS AND PHILOSOPHY 11 (Julie Rose, trans. 1999).

Electronic copy available at: https://ssrn.com/abstract=3186179

disadvantaged state due to 'the fact that one's life is always in some sense in the hands of the other.'[11] With the ascendance of the neoliberal era, states are expected to be immunized from an 'overload' of fiscal demands placed upon them by citizens and interest groups.[12] States are persuaded, instead, to open up markets, privatize public services, and give up on redistributing wealth.[13] The orders of IEL have emerged as constituent elements in this endeavor, promoting the spread of private economic power while turning a blind eye to its harsh outcomes, what we label its 'wreckage.'[14] The plan of action, in short, has been to disarm states and to weaponize IEL.

Key to the success of its programme is a rationale that renders this form of voluntary subordination tolerable.[15] The project is aided by invoking a legal rationale particular to the logic of the law of capitalism. It is the distinction between law and politics. Weber famously distinguished between formally rational law, which enabled markets to spread in the occident, and law that was tainted by substantive values, such as socialism or utilitarianism.[16] It is the emphasis that Weber placed on depoliticized law that provides important discursive support for promoting the regimes of IEL.

Our argument is that depoliticization makes it more difficult to ameliorate the conditions giving rise to precarity. While the orthodoxy in policy circles is that economic globalization generates a 'rising tide' that lifts all boats, what has transpired is both persistent inequality in national income between regions and a discernable rising of inequality within states.[17] We address depoliticization claims in Part I: that states no longer have a legitimate role in managing trade and capital movements and that disagreement over their distributive consequences are to be emptied of politics. The end game is to naturalize and, thereby, internalize the depoliticization narrative. In Part II, we turn to a discussion of inequality by focussing upon inequalities of wealth and influence between and within

[11] JUDITH BUTLER, FRAMES OF WAR: WHEN IN LIFE GRIEVABLE? 14 (2010).
[12] MICHEL J. CROZIER, SAMUEL P. HUNTINGTON & JOJI WATANUKI, THE CRISIS OF DEMOCRACY: REPORT ON THE GOVERNABILITY OF DEMOCRACIES TO THE TRILATERAL COMMISSION (New York University Press, 1975).
[13] 'To get a grip on the problems of poverty, one should also forget the idea of overcoming inequality by distribution' wrote an advisor to President Reagan. See GEORGE GILDER, WEALTH AND POVERTY 67 (1981).
[14] 'Where a chain of events appear before us, he [the angel of history] sees one single catastrophe, which keeps piling wreckage upon wreckage and hurls it at its feet' in Walter Benjamin, 'Thesis IX' in LÖWY, supra note 1 at 62.
[15] MICHEL FOUCAULT, THE POLITICS OF TRUTH 47 (Lysa Hochroth & Catherine Porter, trans. 2007).
[16] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 657 (Gunther Roth & Claus Wittich eds, 2 volumes, University of California Press 1978).
[17] FACUNDO ALVEREDO ET AL., WORLD INEQUALITY REPORT 2018 65 (2017), http://wir2018.wid.world/files/download/wir2018-full-report-english.pdf.

Electronic copy available at: https://ssrn.com/abstract=3186179

states. Our aim in these two parts is to elucidate linkages between depoliticization and the maintenance and reproduction of precarity. In Part III, we take up some basic elements of the hyper-specialized regimes of trade and investment law. In the course of describing their main features, we trace a trajectory common to each: global legal orders exhibiting a structural tilt that favours mobile economic wealth, precipitating legitimacy crises and kindred responses that aim to manage the fall out. Attempts at recalibrating trade and investment rules, however, have not managed so well at minimizing their deleterious effects. We conclude that, so long as schemes like IEL do not take inequality seriously, trade and investment rules will remain vulnerable to political blowback.

I. Depoliticization

Each of the regimes of trade and investment law commits states to behave in accordance with particular norms, anything beyond which is unacceptable and which results in the imposition of penalties. These regimes produce not soft law but hard law, interpreted and applied by international institutions, with variable enforcement mechanisms, rendering these regimes a formidable limit on state capacity. These legal regimes serve to separate politics from markets, having the effect of removing a variety of options from domestic policy tables which we associate with the movement toward 'depoliticization.' By depoliticization, we refer to processes 'that remove or displace the potential for choice, collective agency, and deliberation around a particular political issue.'[18] Such laws, in short, preempt state action. Tactics of depoliticization distinguish between the promotion of rules that render markets calculable, predictable, and certain (rational law) and those which are labeled arbitrary, namely, those which result in new or 'abnormal' policy orientations (irrational law). Measures to promote social justice cannot, under this scheme, but be characterized as irrational and arbitrary.[19]

Policing the separation between law and politics was not always the main priority of IEL. There were periods, particularly in the postwar era, when developed and developing states had more room to manouevre. They were permitted to take measures that economically powerful states themselves had adopted in the course of their own development. This is what Amsden labels the first American empire, when states experimented with policies like import substitution directed at developing nascent industry. [20] In this era, non-reciprocal rules of trade and investment

[18] Paul Fawcett, Matthew Flinders, Colin Hay & Matthew Wood, *Anti-Politics, Depoliticization, and Governance* in ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE 3, 5 (Paul Fawcett, Matthew Flinders, Colin Hay & Matthew Wood, eds. 2017).
[19] WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM 59 (2014).
[20] ALICE H. AMSDEN, ESCAPE FROM EMPIRE: THE DEVELOPING WORLD'S JOURNEY THROUGH HEAVEN AND HELL (2007).

Electronic copy available at: https://ssrn.com/abstract=3186179

eschewed conventional assumptions about equal opportunities for growth in favour of a view of the global state system as economically unequal.[21] These rules were not only more flexible; the available flexibility also resulted in more just distributions. This is the period Ruggie refers to as the era of the 'embedded liberalism compromise' where 'multilateralism would be predicated upon domestic interventionism.'[22]

By the time of the second American empire, associated with the ascendance of privatization and deregulation promoted by international financial institutions like the IMF and World Bank, the developmental state was looked upon with disdain.[23] Because of the insatiable demands being made upon social welfare states, of which they were incapable of delivering, there emerged a crisis of 'ungovernability.'[24] The only proper response was to disable states from having the capacity of responding other than through market mechanisms. States were expected to open up domestic markets to overseas goods, services and capital. Nothing less would be tolerated. After the fall of the Soviet Union and the end of the Cold War, this pressure only intensified. The resolution of distributional conflicts, in so far as they touched upon trade and investment, were removed to 'organizational settings' hard to reconcile with democratic theory.[25] Instead, national democratic politics would turn their attention to other salient noneconomic issues.[26]

The resulting governing paradigm, where nothing less than markets freed from having to respond to the demands of local citizenry is tolerable, emerged as hegemonic. Political contestation would be displaced by outcomes the market would have produced, facilitating the depoliticization of distributive outcomes. To this end, at the macro-political level, World Bank General Counsel Ibrahim Shihata declared that the Bank would assist states in developing their own laws so 'long as it is based on considerations of economy and efficiency.'[27] World Bank experts insisted upon legal

---

[21] See United Nations Conference on Trade and Development [UNCTAD], Report of the Secretary General [Raúl Prebisch], *Toward a New Trade Policy for Development* in PROCEEDINGS OF UNCTAD (II) 1964 E/CONF.46/141, 18-19.

[22] John Gerald Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393 (1982).

[23] AMSDEN, supra note 19.

[24] CROZIER, HUNTINGTON, WATANUKI, supra note 12 and Clause Offe, *Ungovernability* in FRAGILE STABILITÄT – STABILE FRAGILITÄT 77-87 (Stephan A. Jansen, Eckhard Schröter, and Nico Stehr, eds. 2013).

[25] Claus Offe, *The Separation of Form and Content in Liberal Democracy* in CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE 162, 167 (John Keane ed., 1984).

[26] Timothy Hellwig, *Globalization, Policy Constraints, and Vote Choice*, 70 THE JOURNAL OF POLITICS 1128 (2008).

[27] Ibrahim Shihata, *The World Bank and 'Governance' Issues in Its Borrowing Members* in IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS, VOL. 1 53-96, 86 (1991).

Electronic copy available at: https://ssrn.com/abstract=3186179

frameworks that promoted market fundamentals. Other countervailing considerations would be off domestic policy agendas.

Each of the legal frameworks of trade and investment exemplify this hegemonic discourse. The Uruguay Round of the General Agreements on Trade and Tariffs (GATT), resulting in the establishment of the World Trade Organization (WTO), released states from having to reply upon 'power-oriented' approaches in favour of 'rule-oriented' ones.[28] Jackson likened this as a move away from the 'state of nature' to one of 'civilization' – a return to civilized justice, one could say.[29] For Jackson, what was neutralized was the power of hegemonic states relying upon coercive military might. Likewise, Shihata famously proclaimed that, with the establishment of the Convention on the Settlement of Investment Disputes (the ICSID Convention), the result would be the depoliticization of investment disputes.[30] General Counsel to the International Bank for Reconstruction and Development, Aaron Broches, similarly declared that ICSID would 'insulate [investment] disputes from the realm of politics and diplomacy.[31] The ICSID approach to investment disputes consists in granting foreign investors the right to sue host states for damages before international arbitration tribunals. Such legal innovation remains at the core of what is known today as investor-state dispute settlement (ISDS).

It is unfortunate that international lawyers would have recourse to this artifice when it was far from reality on the ground. What the WTO's and ICSID's founders meant to say is that the traditional means for resolving disputes in international law, namely via inter-state diplomacy, would be abandoned in favour of new institutional intermediaries enforcing rules intended to neutralize disagreement over market fundamentals. Disputes no longer would be subject to the political bargaining of locally elected officials responding to the inputs of their enfranchised citizenry. There also was a semblance of irreversibility to this transfer of power from below to above. Rather than being responsive to the demands of local populaces, enforcement mechanisms would bind citizens to rules of global good governance, those worthy of the appellation 'universal.'

The aim was to naturalize depoliticization and its distributive outcomes in much the same way as has Ricardo's hypothesis of

---

[28] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL AND ECONOMIC RELATIONS 110-11 (2nd ed. 1997).

[29] See David Schneiderman, *The Global Regime of Investor Rights: A Return to the Standards of Civilized Justice?*, 5 TRANSNAT'L LEGAL THEORY 60 (2014) and BENJAMIN ALLEN COATES, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY (2016).

[30] Ibrahim Shihata, *Toward Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* 1 ICSID Rev 1, 4 (1986).

[31] ICSID, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION, VOL. II, PART I 242 (1968) (per Broches, December 16, 1963).

Electronic copy available at: https://ssrn.com/abstract=3186179

comparative advantage.[32] According to Ricardo's simple formulation, states, like labouring individuals, should be expected to specialize in what they do best, e.g. textile production in England and wine production in Portugal.[33] Ricardo's argument was that specialisation works to the comparative advantage of each nation – to 'capitalists' and to 'consumers,' which 'diffuses to the general benefit.'[34] It turns out that gains from trade do not 'diffuse' to everyone but benefit certain privileged interests.[35] Nor does the theory match up well with successful paths to economic development. The evidence suggests that countries with a capacity to diversify are more likely to succeed economically rather than immediately specializing in industries in which there is some perceived advantage. It is only when countries are more highly developed that the advantages of specialization accrue to states and citizens.[36]

Ricardo overlooked important factors too, for instance, that comparative advantage requires that each country accept the production methods and labour standards of the other even if in violation of social norms in the importing country.[37] He also misled about capital mobility. He described the insecurity of capital ('fancied or real'), together with a 'natural disinclination to quit the country of his birth and connexions, and intrust himself with all his habits fixed, to a strange government and new laws,' as having the effect of 'check[ing] the emigration of capital.'[38] Yet English capital was, at the time, seeking new markets for its increased output,[39] including controlling the production and trading of Portuguese wine.[40] Comparative advantage, nonetheless, is the central peg around which modern trade orthodoxy hangs.

Depoliticized law results in the naturalization of these and other policy choices, unleashing the political power of multinational firms. Economic power thereby translates into political power. The challenge for critical scholars of law is to identify how these choices are made and then normalised. International trade and investment lawyers prefer that we

---

[32] Mill described Ricardo's 'doctrine [as] now universally received by political economists' in JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 348, fn. (Longmans Green & Co. 1911 [1848]).

[33] DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 135 (Piero Saffra ed. 1951 [1817]).

[34] Id. at 136.

[35] Dani Rodrik, *The Great Globalisation Lie* PROSPECT MAGAZINE (January 2018), https://www.prospectmagazine.co.uk/magazine/the-great-globalisation-lie-economics-finance-trump-brexit.

[36] DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 103 (2007).

[37] DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 34 (1997).

[38] RICARDO, supra note 32, at 136.

[39] SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY 47-51, 76 (Vintage 2015).

[40] L. M. E. SHAW, THE ANGLO-PORTUGUESE ALLIANCE AND THE ENGLISH MERCHANTS IN PORTUGAL 1654–1810 141-57 (2017).

Electronic copy available at: https://ssrn.com/abstract=3186179

overlook this partiality, in favour of rules having abstract and universal forms. They appeal, for instance, to the seemingly unobjectionable principle of national treatment or non-discrimination in the GATT. It means that every member of the WTO has the same abstract right to export and to import goods. The principle is one of formal equality and overlooks what states can export or import or whether they can export or import anything at all. While the principles of non-discrimination and gains form trade appear universally appealing, they cannot have universal effects on the ground.[41]

There are, admittedly, special rules in some areas for countries in Global South (called 'special and differential treatment'). For the most part, however, the abstract principle of non-discrimination disregards the legacy of past imposed or unfair choices. This means that, in practice, countries in the Global North focus on high-skilled activities while Global South countries dedicate themselves to low-skilled labour. The GATT members' tariff commitments also favour the production of raw materials in the Global South and manufacturing of those resources in the Global North. These outcomes are encouraged by tariffs that increase to the extent that value is added to imported products (known as tariff escalation). It is in the interests of more economically powerful states that the average Organization for Economic Cooperation and Development (OECD) country tariff on imports from developing countries is four times higher than imports from other OECD countries.[42] These tariffs operate as inducements for producing cocoa and coffee beans in the Global South and manufacturing chocolate and coffee in the Global North.[43]

Such inducements are given even clearer expression in international investment law. The field is premised on the idea that foreign investment is good for development and that mitigation of political risk is required to lure investors. Foreign investors therefore require special protections, such as national treatment because, after mixing (in Lockean fashion)[44] their ownership advantages with local resources, they are at the mercy of host

[41] Particularly in light of the legacies of colonialism. According to Peer Vries, "what occurred in the nineteenth century with Western industrialization and imperialism was *not* simply a changing of the guard. What emerged was a gap between rich and poor nations, powerful and powerless nations, that was *unprecedented* in world history" (emphasis in the original). PEER VRIES, ESCAPING POVERTY: THE ORIGINS OF MODERN ECONOMIC GROWTH 46 (2013).
[42] JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT 47 (2005).
[43] See Nasredin Elamin & Hansdeep Khaira, *Tariff escalation in agricultural commodity markets* FAO COMMODITY MARKET REVIEW 101 (2003-2004).
[44] For a critical discussion of the influence of Lockean theories of property in foreign investor rights, see Nicolás M. Perrone, *The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights,* 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 673 (2017).

Electronic copy available at: https://ssrn.com/abstract=3186179

state political forces (the so-called 'obsolescing bargain').[45] Foreign capital turns out not to be so vulnerable, according to empirical analyses. Relying upon World Bank data that draws on the experience of companies operating in 80 countries during the period 1999-2000, Aisbett finds that foreign firms are 'no more or less influential' than domestic firms and that 'both foreign and domestic multinationals are significantly more influential' than other firms.[46] This is not to say that states do not behave badly, only that large data sets do not support the obsolescing hypothesis. Nor do signing treaties often result in development outcomes favourable to host states. In a 2014 survey of 301 senior executives in companies with more than US$ 1 billion in annual revenue, respondents indicated that the existence of BITs were of far less importance in making investment decisions than the character of host state laws.[47] A meta-analysis of the existing empirical evidence exploring the correlation between signing BITs and attracting foreign direction investment (FDI) indicates that their effects appear to be 'economically negligible.'[48]

We maintain that the rules and institutions of IEL are intended to discourage, if not outlaw, policy options lying outside the range of what is considered 'normal.' The object, 'first and foremost,' writes Lang, is to discredit 'the idea that economic governance ought to involve the mobilization and pursuit of collective goals and values.' The rise of imperial bureaucracies gives way to control by 'formal-technical governance, working through general legal principles, interpreted and applied in concert with technical knowledge,' he writes.[49] All of which is aimed at dampening social and political imaginaries. The object is to internalize depoliticization. Politics is not to be conducted on the premise that 'here the people rule' but, instead, that 'we are open for business.' It signals not only governance without the people, but government without politics.[50]

It might be assumed that the object of IEL regimes is to constrain policy options to only those that metropolitan economic actors will tolerate.

---

[45] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 47 (1971).

[46] Emma Aisbett, *Powerful Multinational or Persecuted Foreigners: 'Foreignness' and Influence Over Government*, Australian National University (Centre for Economic Policy Research Discussion Paper No. 638 19, April 2010).

[47] Hogan Lovells et al., *Risk and Return: Foreign Direct Investment and the Rule of Law* (2015) 41, http://f.datasrvr.com/fr1/415/10099/10071_D4_FDI_Main_Report_V4.pdf. The survey results also indicated that the existence of a BIT affected investment decisions, which is hard to square with the fact that 'answers to other questions showed that they had indeed made investment in ... regions ... [where] no BITs were present' (id. at 47).

[48] Christian Bellak, *Economic Impact of Investment Agreements* Department of Economics, Vienna University of Economics and Business (Working Paper No. 200, 19, 2015), https://epub.wu.ac.at/4625/1/wp200.pdf.

[49] ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 7 (2011).

[50] JACQUES RANCIÈRE, HATRED OF DEMOCRACY 80 (Steve Corcoran, trans. 2006).

Electronic copy available at: https://ssrn.com/abstract=3186179

This suggests that not all programmes for egalitarian redistribution will be ruled out of order,[51] rather, only those that are deemed unacceptable to actors operating at the centre of the world trading and investment system. Something more, however, is expected from states in the periphery. They are not permitted to initiate policies that these states used 'to get where they are now.'[52] It becomes a matter, as Chang puts it, of 'kicking away the ladder' that home state governments climbed in order to secure their own economic success.[53] Even then, mostly similar policy initiatives will be more closely scrutinized if issuing out of states in the periphery than in the core. Financial markets, for instance, are more sensitive and respond to a wider range of indicators in developing than in developed countries. This disparity of treatment grants to latter states 'wider latitude to pursue a variety of policy objectives.'[54] The trick is to have the institutions of IEL apply rules in ways that do not precipitate a backlash within the powerful states that define the content of those rules.

Yet there remains an instability generated by the law's distributive functions, even within the 'civilized' states of the OECD. Legal strategies, it turns out, are not so successful in separating out what are legitimate from illegitimate policy options. There must, of necessity, be room for discretion built into these instruments that allow for the determination of what is in the common good. In most developed states property, for instance, is heavily regulated even though property rights might be entrenched constitutionally.[55] For this reason, exercises of policy discretion will remain deeply contested. Political disagreement inevitably will arise as these conflicts get played out at the transnational stage. To label the rules and processes of IEL as depoliticized misses this point entirely.

II. Inequality

The economic and legal terrain has changed since Ricardo's time. Yet the gains from trade and investment, even when premised upon the equality of states, continue to cause social suffering. According to Pascal Lamy, former Director General of the WTO, trade 'works because it is painful... [b]ut the pain is more poignant for the weak.' 'Appropriate

---

[51] E.g. Samuel Bowles, *Egalitarian Redistribution in Globally Integrated Economies* in GLOBALIZATION AND EGALITARIAN REDISTRIBUTION 120-47 (Pranab Bardhan, Samuel Bowles & Michael Wallerstein, eds. 2006).

[52] HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 127 (2002).

[53] Id.

[54] Layna Mosley, *Constraints, Opportunities, and Information: Financial Market-Government Relations Around the World* in GLOBALIZATION AND EGALITARIAN REDISTRIBUTION, supra note 50, at 87, 96-97.

[55] LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003).

Electronic copy available at: https://ssrn.com/abstract=3186179

policies,' he acknowledges, 'are thus needed for social justice.'[56] The mechanics of free trade and investment provide cheaper and better products but only after allocating pain in notably unequal amounts. The preferences we formalise in trade and investment treaties generate precarity and contribute to inequality of wealth by creating 'losers' who are expected to catch up, often on their own, with global economic patterns.[57] The North American Free Trade Agreement (NAFTA), for instance, was a choice in favour of shifting manufacturing from the United States and Canada to Mexico. As Baldwin explains, this choice brought about a nearly unbeatable team consisting of US technology and cheap Mexican labour. The notable losers were the labour forces of the United States and Canada. These workers require either retraining, where available, or reliance upon subsistence benefits at poverty levels.[58] What occurred can be described as the 'peripheralization of the labour force' at the core of the global economy.[59]

Similar outcomes can be seen in other places with comprehensive free trade agreements (FTAs) that include investment chapters. These agreements promote the offshoring of production to locales where labour is cheaper. Many proponents purport to take a global view and describe the loss of jobs as a trade-off for more jobs and better salaries in the Global South.[60] But the evidence to date is not as convincing as proponents might think. It is true that overall inequality between states has declined, principally because of economic growth in China and, to a lesser extent, in India.[61] Nevertheless, inequality within most states, even within developed ones, has increased dramatically and shows no signs of easing off.[62] For many populations suffering as a consequence of these processes, the problem appears to be that the pain inflicted by these new circumstances appears to have no end in sight.

The premise that states and peoples need to continuously adjust to global markets makes sense to most economists, who focus on economic

---

[56] Pascal Lamy, *Looking Ahead: The New World of Trade - Jan Tumlir Lecture* (ECIPE, Brussels, 9 March 2015) 2, https://pascallamyeu.files.wordpress.com/2017/03/2015-03-09-ecipe-brussels-speech-pascal-lamy-final.pdf.

[57] MICHAEL J. TREBILCOCK, DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS (OUP 2014).

[58] RICHARD BALDWIN, THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION 237, 227 (2016). See also IMF, *Fiscal Monitor: Tackling Inequality* (2017), http://www.imf.org/en/Publications/FM/Issues/2017/10/05/fiscal-monitor-october-2017

[59] Cox, supra note 6, at 324.

[60] BALDWIN, supra note 57, at 105-8. In 2000, Krugman made a similar argument in Paul Krugman, *Reckonings; Once And Again, New York Times* (January 2, 2000).

[61] BRANKO MILANOVIC, GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION 122 (2016).

[62] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (HUP 2014); WORLD BANK GROUP, POVERTY AND SHARED PROSPERITY 2016: TAKING ON INEQUALITY (2016) and ALVEREDO ET AL., supra note 16, at 44.

Electronic copy available at: https://ssrn.com/abstract=3186179

growth and trade-offs.[63] They purport to do value free empirical work with little or no appreciation of social costs, however. The problem, Rodrik observes, 'is that mainstream economics shades too easily into ideology, constraining the choices that we appear to have and providing cookie-cutter solutions.'[64] It is imperative, therefore, that legal scholars remain attentive to the role of law and the legal profession in contributing to the spreading tentacles of inequality. If the economics profession appears less concerned with the distributive consequences of legal rules, the same should not be said of lawyers who like to speak in the language of 'fairness' and 'justice.'

Yet, it seems as if lawyers are shying away from the debate on inequality. This is not good news for the precarious. Those economists who take inequality seriously conclude that politics, law, and institutions are determinative in either exacerbating or easing inequality. Piketty notes that '[w]henever one speaks about the distribution of wealth, politics is never very far behind.'[65] Similarly, Milanovic reminds us that '[m]ost political battles are fought over the distribution of income.'[66] Rather than removing distributive questions from law and politics, they remain perpetually at the heart of contemporary social struggles. These struggles take place in the context of an economic and technological environment that has dramatically changed in the past few decades. This does not alter the political nature of distributional struggles, however. New technologies create economic gains and actors struggle to exclude others from these gains.

The social and political preferences that shape global distribution are the consequence of these battles. To focus on these battles, it is important to reconsider our approach to IEL. For one, this requires understanding each rule and its interpretation as a move in a broader terrain where different actors struggle for economic gain and control over the content of rules that govern their distribution. For another, the struggle is dynamic: each battle occurs in the shadow of previous victories and defeats. 'Over time,' writes Kennedy, 'victories and defeats on the terrain of law add up, reproducing patterns of empowerment and disempowerment.'[67] These previous outcomes are distributive in material and in political terms. The final prizes are not merely economic gains but the possibilities for politics.

As for the content of these depoliticized rules, as we suggest above, their substance largely is determined by those having the power and prestige to be invited to the table to participate in defining the rules of the game. This is a much smaller club than usually is acknowledged and

[63] Milton Friedman, *Value Judgments in Economics* in HUMAN VALUES AND ECONOMIC POLICY 85, 86 (Sidney Hook, ed. 1967).
[64] Dani Rodrik, *Rescuing Economics from Neoliberalism* BOSTON REVIEW (2017), http://bostonreview.net/class-inequality/dani-rodrik-rescuing-economics-neoliberalism.
[65] PIKETTY, supra note 61, at 10.
[66] MILANOVIC, supra note 60, at 86.
[67] KENNEDY, supra note 3, at 61.

Electronic copy available at: https://ssrn.com/abstract=3186179

contributes to an inequality of influence. It is 'global' only to the extent that the strategic sites for global calculation are almost exclusively the privileged actors within regions and states of the Global North. It is, after all, the law of those states that gets taken up and represented as 'universal' standards that make up international law. These actors present their positions in the form of expert knowledge, namely, abstract, universal and depoliticized knowledge. This manoeuvre reflects an inequality in power/knowledge – an inequality in producing the regimes of truth that are considered reliable and trustworthy.[68] States and their representatives, for this reason, are not disinterested in the outcome of the competition over who gets to name the content of the universal.[69] They, instead, have an interest in labeling the law of their rival competitors as 'local,' giving expression only to chauvinistic preferences, in contrast to those values labeled universal and representing global rules for good governance.[70] The local and the partial are relegated to 'social forms of non-existence,' observes Santos, 'because the realities to which they give shape are present only as obstacles vis-à-vis the realities deemed relevant.'[71] By parading legal particulars as universal standards, international economic regimes not only serve particular local interests, they perpetuate the inequality accorded to those denied the ability of making a contribution.

States thereby are restructured. If, as Polanyi explains, states are fundamental to the success of markets,[72] then the realignment of states generated by neoliberal rationality produces a more narrowly cast agenda that can create conflict between international commitments and domestic political ones.[73] Gradually, however, the realignment of states serves precisely to control this conflict and occlude alternative choices. As Sassen explains, the increasing relevance of trade and investment disciplines has changed the organisation of authority within states. It is not that states are not sovereign anymore but that this sovereignty is now organised differently.[74] Global capital has made claims on national states,' she writes,

---

[68] Michel Foucault, *Two Lectures* in FOUCAULT, POWER KNOWLEDGE, supra note 7, at 72, 93; Michel Foucault, *Entretien avec Michel Foucault* in MICHEL FOUCAULT, DITS ET ÉCRITS II, 1976-1988 140, 158 (Paris: Gallimard, 2001) and PAUL VEYNE, FOUCAULT: HIS THOUGHT, HIS CHARACTER 32 (Janet Lloyd, trans. 2010).

[69] TIM BÜTHE AND WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 12 (2011) and PIERRE BOURDIEU, PASCALIAN MEDITIATIONS 65 (Richard Nice, trans. 2000).

[70] Boaventura de Sousa Santos, *Globalizations*, 23 THEORY, CULTURE & SOCIETY 393, 396 (2006).

[71] BOAVENTURA DE SOUSA SANTOS, THE RISE OF THE GLOBAL LEFT: THE WORLD SOCIAL FORM AND BEYOND 18 (2006).

[72] KARL POLANYI THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Beacon Press 2001 [1957]).

[73] COX, supra note 6, 221.

[74] Saskia Sassen, *The State and the Global Economy,* 6 *The Journal of the International Institute* 1 (1999).

Electronic copy available at: https://ssrn.com/abstract=3186179

'which have responded through the production of new forms of legality.'[75] As competition for trade and capital grows, states 'shed some powers, but take [] on others.'[76] Trade ministries now rule the roost as they surveil other ministries, ensuring they do not act in violation of international trade and investment commitments. These changes reciprocally influence both internal and external relations. Trade and investment facilitation initiatives are a good example of this. The rules on facilitation aim to improve business climate and facilitate trade. Designated state agencies, consequently, bend over backwards to attract new economic activity by adopting what are considered best practices.[77] The rest of the population is expected to fend for themselves as they face similar, if not higher, barriers to accessing benefits, medical treatment or pensions. Though premised on the idea of level playing fields, the terrain of economic globalization is tilted, privileging those already having an advantage.

This can be observed in the fields of trade and investment, which prompt a process of export and FDI-led restructuring of states. When it is determined that each country should focus on those goods and services that it produces efficiently, exporters gain a vital advantage over other domestic actors contributing to the inequality within states. Once a country signs a trade agreement, exporters have an incentive to invest and hire labour. Exporting sectors grow beyond the needs of the domestic market in their desire to supply global markets. This creates an inherent tension. As countries become more dependent on their exporting sectors, these sectors increasingly operate according to international determinants of prices and incentives. For the losers, the opposite is the case: they lose political influence. On occasion, the cost is higher than the closure of local businesses. In the case of food, cheap imports come at the cost of not only jobs but of food security.

By admitting rice and corn imports under the WTO's Agreement on Agriculture, not only did rice production in the Philippines substantially decline, corn production was 'wiped out.'[78] The dairy and edible oil sectors in India have been destroyed and replaced by a flood of cheap imports and substitutes.[79] High commodity prices results in a shift towards large-scale export-oriented agriculture and ensuing domestic food shortages. The Agreement on Agriculture, after all, was structured by Northern states and

[75] SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 25 (1996).
[76] JOHN M. STOPFORD & SUSAN STRANGE WITH JOHN S. HENLEY, RIVAL STATES, RIVAL FIRMS: COMPETITION FOR WORLD MARKET SHARES 56 (1991).
[77] United Nations Conference on Trade and Development, *National Trade Facilitation Committees: Beyond Compliance with the WTO Trade Facilitation Agreement?* (2017), http://unctad.org/en/PublicationsLibrary/dtltlb2017d3_en.pdf.
[78] WALDEN BELLO, THE FOOD WARS 61 (2009).
[79] VANDANA SHIVA, YOKED TO DEATH: GLOBALISATION AND CORPORATE CONTROL OF AGRICULTURE 39 (2001).

Electronic copy available at: https://ssrn.com/abstract=3186179

works mostly to privilege Northern interests.[80] After unregulated trade triggered a food crisis in 2008, states began to rethink priorities, choosing food security and local production over access to global markets. This has led to a renewed focus on the agricultural trade agenda and the ability to raise limits on stockpiled food for security purposes as an aspect of special and differential treatment. An interim agreement was reached in 2013, permitting stockpiled increases above previously allotted amounts.[81] Because of its 'trade distorting' effects, however, these measures have not been made permanent due to U.S. opposition.[82]

Large foreign investors enjoy similar advantages in this uneven playing field. States are expected to rely upon foreign investment in order to exploit natural resources and generate jobs. The rules that favour foreign over domestic investment, given expression in bilateral investment treaties, contribute to creating an overreliance on foreign investment. Discussing the importance of Global Value Chains (GVCs) in improving development outcomes, the United Nations Conference on Trade and Development (UNCTAD) insists that many states 'may not have a choice.'[83] They must make efforts to join these GVCs and climb the value ladder. Attracting foreign investment as well as increasing exports, UNCTAD maintains, are important to achieving macroeconomic stability and internal peace. But these objectives can come at the cost of land grabbing, over-exploitation of natural resources ('neo-extractivism') and precarious work. If these policies appear to be voluntarily embraced by states they, in fact, are only 'choices' made under the constraints imposed by prior victories and defeats on the trade and investment terrain.[84]

The interplay between inequality and depoliticization is both material and epistemological. The result is predictability and flexibility for some and precarity for others. Actors struggle over the gains of trade and investment in ways that reinforce the narrative of depoliticization. As we discuss below, taking measures that speak in overtly political terms increases the odds of

---

[80] MATTHEW EAGLETON-PIERCE, SYMBOLIC POWER IN THE WORLD TRADE ORGANIZATION 130 (OUP 2013).

[81] World Trade Organization, *Public stockholding for food security purposes* (Ministerial Decision of 7 December 2013), https://www.wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm.

[82] Indian Express, *What is the food stockpiling issue at the WTO?* (December 13, 2017), http://indianexpress.com/article/what-is/what-is-the-food-stockpiling-issue-at-the-wto-4980749/. Also Michael Fakhri, *A History of Food Security and Agriculture In International Trade Law, 1945-2015* in INTERNATIONAL ECONOMIC LAW: NEW VOICES, NEW PERSPECTIVES (Akbar Rasulov & John Haskell eds. 2018).

[83] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT xi, xxiv (2013).

[84] Some of these constraints and their implications are discussed in more detail in Nicolás M. Perrone, *UNCTAD's World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights,* 19 JOURNAL OF WORLD INVESTMENT & TRADE 1 (2018).

Electronic copy available at: https://ssrn.com/abstract=3186179

losing trade and investment disputes. Social and political preferences have more chances when they are planned, described and implemented in a seemingly depoliticised, expert manner that mimics the behaviour of private economic actors. We have also argued that previous victories and defeats constitute a terrain that occludes other social and political imaginaries. Certain arguments, certain ways of thinking, are forbidden. For the precarious, the regimes of IEL place them firmly at the margins.

III. Rules

The rules and institutions of IEL are productive in a number of different ways. They, first, govern the world of legal possibilities – they aim to narrow the spectrum of policy options to those deemed to fall within the range of the normal and acceptable. They also, second, have distributive consequences that favour some interests over others. If we understand legal regimes of IEL as exhibiting a 'strategic selectivity,'[85] they enhance the conditions of those privileged by its distributive tilt while rendering those outside the ambit of its concern as precarious. In Butler's account, they 'maximize precariousness for some and minimize precariousness for others.'[86] Following upon this last feature, the legal regimes of IEL produce the conditions giving rise to the regime's own legitimacy problems, even crises. In this section, we trace the outlines of two cognate regimes of IEL in order to disclose their structural tilt, ensuing legitimacy crises, and the responses of legal agents seeking to manage the fall out. In the course of doing so, we hope to show how policy choices are significantly constrained in order to favour mobile economic wealth. In Bentham's apt phrasing, there are state policy options that remain on the agenda while others are non-agenda items – these are options that continue to be treated as beyond the pale.[87]

A critical international political economy approach suggests that the constraints produced by these two regimes are not strictly technical, nor unavoidable. Rather, they are contingent and perpetually political. Their objectives are enhanced by allied governance institutions and dispute settlement bodies. They include global governance institutions dedicated to producing qualitative and quantitative indicators that contribute to state compliance with the rules of IEL.[88] Among them, the WTO regularly reviews the trade policies of its member states through its Trade Policy Review

[85] Bob Jessop's term in BOB JESSOP, STATE THEORY: PUTTING CAPITALIST STATES IN THE THEIR PLACE 260 (1990).
[86] BUTLER, FRAMES OF WAR supra note 11, at 2-3. Also ISABELL LOREY, STATE OF INSECURITY: GOVERNMENT OF THE PRECARIOUS 20-21 (Aileen Derieg, trans. 2015).
[87] JEREMY BENTHAM, WORKS, VOL. III 41-42 (John Bowring ed. 1843).
[88] See, for instance, Kerry Rittich, *Governing by Measuring: The Millennium Development Goals in Global Governance* in SELECT PROCEEDINGS OF THE ESIL, Vol. 2, 463 (2008) and KEVIN DAVIS, ANGELINA FISHER, BENEDICT KINGSBURY & SALLY ENGLE MERRY (EDS), GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS (2012).

Electronic copy available at: https://ssrn.com/abstract=3186179

Mechanism. The OECD and UNCTAD assess the investment policies of selected countries. The World Bank has popularized the use of quantitative indicators via its *Investing Across Borders* and *Doing Business* initiatives. Not only international organisations, but private institutions generate vital data about state behaviour. Credit rating agencies, for instance, ascertain sovereign credit risk and the likelihood that states will default on their debt. These agencies are also more interested in scrutinizing the behaviour of developing than developed states.[89] Overall, these public and private institutions set the table for the regimes of IEL. Few states can be indifferent to the information they produce as that data purports to shape trade and investment flows.

Despite increasing interest in indicators and governance, most scholarship has focused on the rules and institutions of IEL, undertaking detailed examination of the decisions of trade and investment dispute panels. These are worthwhile endeavours, as these details do matter. While we discuss selected cases below, we are not preoccupied with parsing their finer points. As Koskenniemi reminds us, the problem is not with the cases but with the system.[90] In which case, we undertake this analysis not for the purpose of bringing legitimacy to the regimes of IEL but to situate them in the larger project of repoliticizing IEL thereby rendering its distributive consequences more vulnerable to contestation.

In undertaking these detailed analyses of the jurisprudence, mainstream scholars typically focus on IEL interactions with other systems, typically having to do with the environment, health or human rights (the so-called 'linkages' debate). The research question often asked is whether there is regulatory chill or policy shifts resulting from either cognizance of the rules or from pending or resolved disputes. While we discuss the problem of the 'right to regulate' below, we are of the view that a focus on linkages misses the point. Framing the current debate in IEL through a sovereign right to regulate elides the fundamental question of what sort of regulatory imagination remains possible under regimes fashioned by a dominant political frame that aspires to unfettered economic freedom.

In contrast to rules intended to facilitate equality and social justice – those that better attend to the needs of the precarious – the rules and institutions of IEL are designed to remove barriers to international trade and investment flows. These forms of legality turn out not to give rise to many concerns on the part of most IEL scholars. Such legal innovations are rarely characterized as amounting to regulatory interventions in markets, despite the fact that they constitute regulatory *givings* (in contrast to regulatory takings) that facilitate business activities.[91] Most of the trade

[89] Mosley, supra 53 at 96-97.
[90] Martti Koskenniemi, *It's Not the Cases, It's the System* 18 JOURNAL OF WORLD INVESTMENT & TRADE 343 (2017).
[91] See Abraham Bell & Gideon Parchomovsky, *Givings,* 111 YALE L.J. 547 (2001).

Electronic copy available at: https://ssrn.com/abstract=3186179

and investment literature concerns itself, instead, with states' ability to curb negative externalities, address market failures and defend normative preferences embedded in local standards. The degree to which these run up against the systemic logic of IEL is the main preoccupation of scholars and dispute settlement bodies.

On the other hand, the terms of this debate have remained quite irresponsive to the demand for measures to protect the precarious, those harmed by global economic expansion, western imperialism or colonialism.[92] Such measures might be aimed at protecting indigenous lands or *campesino* property rights or having the effect of redistributing wealth to those who are disadvantaged by the regime's binding strictures. Similarly, the linkages and right to regulate debates have overlooked the possibility of opening up the policy toolkit of less wealthy states to catch up with the richer nations, to restore the ladder of development, so to speak. The discussion of WTO flexibility to promote new (or old) development policies is relegated to a marginal place in most trade law textbooks, which only briefly discuss measures that allow for special and differential treatment.[93] The general contours of the right to regulate, which overlook these other regulatory possibilities, are symptomatic of the significant role that IEL plays in normalising rules that favour historic winners over historic losers, both between and within states. In order to fill out the contours of IEL regimes, we turn next to a discussion of the content of two of its principal legal orders, those of trade and investment. Given the breadth of the subjects that could be covered, the discussion is meant only to be illustrative.

A. World Trade Law

Prior to the establishment of the WTO, trading rules under the GATT were enforced through inter-state diplomacy. With the finalization of the Uruguay Round GATT in 1995, a new dispute settlement mechanism was initiated based on the 'rule of law' and lawyers. It consists of an initial Panel to investigate and report on disputes and an Appellate Body to hear appeals against Panel reports. Crucially, under the rule of negative consensus, WTO members must accept these decisions unless there is a consensus against it.

At the height of the 'roaring nineties,' outcomes in trade disputes were unabashedly about the primacy of markets over politics. The first dispute panel and Appellate Body reports emphasized the priority of eliminating market distortions, relying on the marketplace as the

[92] Anghie has noted that international law has remained irresponsive to demands to compensate the injustices committed during formal colonial rule. See ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 2, 313 (2007).

[93] E.g. the popular text PETER VAN DEN BOSSCHE & WERNER ZDOUC THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION (4th ed. 2017).

Electronic copy available at: https://ssrn.com/abstract=3186179

benchmark to decide vital legal questions. This is best illustrated by turning to interpretations of national treatment (the principle of non-discrimination) and, in particular, the interpretation of 'likeness.'[94] Trading rules are organised around the idea of non-discrimination and the prohibition of protectionism. Disputes resolved during the 1980s and 1990s, however, shifted the emphasis from curbing protectionism to upholding the requisite 'predictability needed to plan future trade'[95] and protecting the 'expectations of competitive opportunities.'[96] No matter the meritorious purposes motivating any given policy, if resulting in discriminatory effects, it would run afoul GATT Article I and III. What was of interest to dispute settlement bodies was whether a measure impeded competition from 'like' products – a determination that was to be made with reference almost exclusively to market factors. Another, more deferential, line of authority associated with 'aims and effects' briefly made an appearance in this period. This mode of inquiry evaluates the measure in light of the policy's aims and effects. These decisions looked to the public purpose sought to be achieved as a crucial factor in assessing the measure's discriminatory effects.[97]

The dominant mode of interpretation, which favoured the rights of traders over other public policy rationales, precipitated a backlash in the late 1990s and early 2000s, exemplified by street protests at the 1999 WTO ministerial meetings in Seattle. By way of response, the WTO Appellate Body in 2001 suggested, in passing, that non-market factors could be significant in determining issues of 'likeness.'[98] This was developed in subsequent reports, where both the Panel and Appellate Body focused on whether the effects of a measure were the result of legitimate policy goals or, instead, were disguised restrictions on trade based on a product's foreign origins.[99] Mere market distortion was now insufficient to

---

[94] E.g. GATT Article III, paragraphs 2 and 4 where the comparison is to 'like domestic products.'

[95] Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, adopted on 17 June 1987, para. 5.2.2.

[96] Panel Report, *Korea – Taxes on Alcoholic Beverages* , WT/DS75/R and WT/DS84/R, adopted 17 February 1999, para. 10.92.

[97] This second approach was accepted in two disputes against the United States, and in favour of this country, but was rejected by the WTO in Appellate Body Report, *Japan – Taxes on Alcoholic Beverages, WT/DS8/ AB/R*, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996. See Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11, unadopted, 11 October 1994; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1999.

[98] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 100 [hereinafter Appellate Body Report, *European Communities – Asbestos*].

[99] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 96; Panel report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*,

Electronic copy available at: https://ssrn.com/abstract=3186179

engage WTO rules on national treatment. Required now was a determination that there was discrimination based on product origins. If, by so doing, the WTO Appellate Body appeared to be relaxing scrutiny of restrictions on trade, it did little to disturb the logic of the system of global trading rules. States were expected to open their borders to traders. Some policy aims would be tolerated – many would not. All of it would be subject to the oversight of trade lawyers.

A second response prompted by the legitimacy crisis that accompanied the rise of the WTO focused on the general exceptions clause in Article XX. This clause allows WTO members to discriminate against like products, enabling the breach of GATT Articles I and III, if 'necessary' to achieve a closed list of non-trade goals, such as the protection of public morals, or the protection of human, animal or plant life or health. Not included among general exceptions are those measures that might be characterized as advancing social justice – measures, for example, that are designed to enhance local employment opportunities or further the goal of economic redistribution. If the general exceptions clause was meant to tilt the inquiry in favour of public interest measures that deviate from trade strictures, the necessity test gave rise to the strictest of scrutiny. WTO institutions interpreted the clause as requiring that states adopt the least trade restrictive alternative. After all, as we have learned from similar inquiries undertaken by apex courts, it is quite easy for judges to imagine less restrictive alternatives. This precipitated all sorts of second-guessing, even rejecting the advice of the World Health Organization on best practices to reduce cigarette smoking.[100]

Recognizing that strict scrutiny would not relieve the WTO of lingering legitimacy concerns, more recent Appellate Body reports have relaxed the requirement of necessity. In *Korea – Beef*, the Appellate Body crafted a balancing test similar to a three-step proportionality inquiry.[101] In later cases, the Appellate Body even abandoned the last, overall balancing step of proportionality. In *EC – Asbestos*, the Appellate Body noted that WTO members have the freedom to decide the level of protection they want concerning public morals, life or heath.[102] Even as dispute bodies vacillated between strict and loose interpretations of general exceptions, the

---

WT/DS291-3/R, para. 7.2499-&.2517. This was an interpretation of the GATT functionally equivalent to the aims and effects test, observes LANG, supra note 48, at 318.

[100] Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, BISD 37S/200,* adopted on 7 November 1990, para. 75. Also Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 5 April 2001, para. 8.209.

[101] Namely, (i) suitability, (ii) less-restrictive means, and (iii) weighing benefits against deleterious effects (proportionality *strictu sensu*). See Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* , WT/DS161/9/AB/R, WT/DS169/9/AB/R, adopted on 10 January 2001), para. 164.

[102] Appellate Body Report, *European Communities – Asbestos*, para. 168.

Electronic copy available at: https://ssrn.com/abstract=3186179

Appellate Body also has shown an interest, as indicated in its 1998 *US – Shrimp* decision,[103] in ensuring that due process has been accorded to foreigners. This turn to process, as in the turn to proportionality, is intended to underscore that dispute settlement review under the WTO is neutral, impartial, and focussed on the means rather than on the substantive ends states choose to pursue. Yet, an emphasis on process disguises the values that are at stake. While the WTO appears not wanting to impose its own preferences when weighing those values, it necessarily takes sides. As Lang observes, even if preoccupied with process, 'there is no conceivable way that WTO review can be neutral as to the substance of domestic regulation in anything but a trivial sense.'[104] This is underscored by the emphasis accorded to Article XX's chapeau, which directs dispute settlement bodies to remain attentive to 'arbitrary or unjustifiable discrimination' and to 'disguised restrictions on international trade.' Given the few instances in which Article XX has been successfully invoked, the balance remains firmly in favour of trader's rights.[105]

For developing countries, in addition, any flexibility in the GATT or other WTO agreements is weakened by the expectation that they adopt the standards of the developed world. As trade disciplines move from tariff to non-tariff barriers, there is increasing awareness that access to developed country markets requires compliance with environmental, health and technical standards set out in the latter jurisdictions.[106] Litigation over sanitary and phytosanitary measures in the WTO suggests that only rich countries, such as the United States and the EU, can afford to have different standards. For Global South countries, most will lack the resources to produce scientific evidence to either protect their standards or challenge those of other members. Global South countries, in this regard, can only aspire to receive technical advice to adapt to the standards of the Global North. In the meantime, local producers on the ground increasingly struggle to comply with private standards defined by global value chains or large multinational corporations.[107]

Despite these problems, a triumphalist narrative has taken hold in trade law circles in recent years. Whatever legitimacy crisis imperilled the

---

[103] Appellate Body Report, *United States* – Import Prohibition of Certain *Shrimp* and *Shrimp* Products, WT/*DS58*/AB/R, adopted 6 November 1998, para. 181. Also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007.

[104] LANG, supra note 48 at 246.

[105] Appellate Body Report, *European Communities – Asbestos*. See Public Citizen, *Only one of 44 attempts to Use the GATT Article XX/GATS Article XIV 'General Exception' Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception* (August 2015), https://www.citizen.org/sites/default/files/general-exception.pdf.

[106] Lamy, supra 55, at 4-5.

[107] Id. at 5.

Electronic copy available at: https://ssrn.com/abstract=3186179

trading regime had been vanquished by reason of the successful judicialization of trade disputes. The Appellate Body had become the 'jewel in the crown' of the WTO.[108] As is often the case in the WTO's short life, this state of affairs would not remain static. Trade insiders are, at present, worried about paralysis in WTO negotiations and attacks by the U.S. upon the Appellate Body. As to the former, the WTO has made very little progress in furthering the multilateral trade agenda because of a 'too politicized' process and overly complex agenda.[109] In respect of the latter, the Trump administration has blocked the appointment of new members, putting at risk the functioning of the WTO's judicial functions. At this pace, there is a likelihood that the Appellate Body will not have enough members to function properly or at all. Though the situation is turning critical, these problems predate President Trump's election. In 2016, the Obama administration expressed concerns with the Appellate Body's tendency to 'make law,' accusing its members of using appeals 'as an occasion to write a treatise on a WTO agreement.'[110]

This complaint about 'making law' is a mantra familiar to conservative legal discourse in the U.S. Critical legal theorists, however, long have emphasized that the distinction between interpreting and making law is unstable and that 'judicial activism' is a character trait of common law judging.[111] It is unsurprising to learn that investment tribunals, tasked with evaluating investor claims against host states, similarly seized the opportunity to exercise typical judicial functions by filling in the content of laconic treaty text. In the course of so doing, tribunals have developed a body of law that is expansive in its reach, precipitating numerous legitimacy problems. We turn next to a discussion of these latitudinarian tendencies and consequent developments.

B. World Investment Law

This companion global legal order largely is the product of thousands of bilateral investment treaties signed in the two decades after the fall of the Berlin Wall. Over three thousand currently are in force having as their object the protection of foreign investors and their investments.

[108] Lorand Bartels. *The separation of powers in the WTO: how to avoid judicial activism*, 53 INT'L & COMP. L.Q. 861, 861 (2004). We note the colonial connotations, which raises interesting questions not pursued here.

[109] International Centre for Trade and Sustainable Development & World Economic Forum, *The Functioning of the WTO: Options for Reform and Enhanced Performance. Synthesis of the Policy Options* (E15Initiative, 2016), at 2, http://e15initiative.org/wp-content/uploads/2015/09/E15_no9_WTO_final_REV_x1.pdf.

[110] Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016, https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.

[111] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] 177 (1998) and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 16 (2015).

Electronic copy available at: https://ssrn.com/abstract=3186179

States thereby commit to: non-discrimination (national treatment and most favoured nation), not impeding the transfer of funds, not imposing performance requirements (prohibiting preferences for local labour or services), not taking measures amounting to direct or indirect expropriation (not without full and immediately realizable compensation), and commitments to provide treatment in accordance with the minimum standard available under international law together with fair and equitable treatment (FET). The absolute, rather than relative, standards of expropriation and FET, which we discuss below, have emerged as core disciplines in international investment law. Most investment tribunals are responding to claims that either or both of these standards have been violated by host states.

As in the case of the Uruguay Round of the GATT, most standards of protection have been authored by powerful capital exporting states, often times drawing upon their own legal standards of protection. As the United States Trade Representative put it, the US has not lost an investment dispute because its protections mirror those rights protected under its Bill of Rights.[112] This is what the US Congress ordered the executive branch to provide once Congress realized, in 2002, that the standards of protection in the event of an expropriation clearly exceeded standards provided in the US constitution.[113] The President was directed to negotiate new treaties incorporating the multi-factor analysis identified by the US Supreme Court in Penn Central that helps determine when a regulation rises to a compensable taking.[114] Many other national states, and even regional political units like the EU, have followed suit, seemingly unaware that they are promoting US constitutional law as global law.[115] It has been the case, then, that states in the Global South mostly have been rule takers rather than rule makers. According to Poulsen, many countries signed agreements seemingly unaware of their effects on regulatory space,[116] a puzzling fact given the long history of resistance to the content of international law promoted by countries of the North Atlantic.

In the late 1990s and early 2000s, when investors succeeded in their claims before investment tribunals, arbitrators seemed focussed upon

---

[112] United States Trade Representative, *The Facts on Investor-State Dispute Settlement*, TRADEWINDS: The Official Blog of the United States Trade Representative (March 2014), https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors.

[113] See DAVID SCHNEIDERMAN, RESISTING ECONOMIC GLOBALIZATION: CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW 80-83 (2013).

[114] See *Penn Central Transportation Co. v. New York City*, 438 US 104, 124 (1977). Those factors include the character of the measure, its duration, economic impact and extent to which it upsets investor expectations.

[115] Annex X. 11 in CETA.

[116] This story is told in LAUGE SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (CUP 2015).

Electronic copy available at: https://ssrn.com/abstract=3186179

investor impacts, above all else. This was exemplified by a mode of analysis, developed in adjudicating expropriation claims, labelled as 'sole effects' doctrine.[117] In these cases, arbitrators were preoccupied with the effects of a measure upon an investment rather than upon any public policy rationales that were offered in support. The 'government's intention is less important than the effects of the measure' on the investor,' the tribunal wrote in *Tecmed*.[118] The investment tribunal in *Santa Elena v. Costa Rica*, for instance, decided that the measure at issue, which aimed at preserving the rainforest environment, constituted an indirect expropriation as it 'deprived the owner of his rights or has made those rights practically useless.' Even where measures are 'beneficial to society as a whole – such as environmental protection,' the tribunal concluded, the obligation to pay compensation remains.[119] It is not that arbitrators simply could ignore policy rationales. Rather, those rationales would be subsumed under investor effects or simply be dismissed as being driven by 'politics.' States were not permitted to behave politically but, instead, were expected to behave, and rewarded if they so behaved, in ways expected of rational economic actors.[120] Excising politics from state calculations enabled the regime's defenders to cast investment law as a legitimate constraint upon state action.

Given the impossibility of achieving such a state of anti-politics, some of these awards raised alarm bells for those country negotiators who had failed to appreciate the regime's muscularity. Nor could states, on the other hand, lose too often. Such an outcome would almost immediately heighten legitimacy concerns and deepen suspicion about the regime's structural tilt. There is some disagreement over the data but, according to UNCTAD, states prevail in 36.6 per cent of the cases while foreign investors win in only 26.9 per cent (in the so-called 'merits phase' of an arbitration).[121] It is harder to account for settlements that, according to UNCTAD, occur in approximately 23.5 per cent of the disputes. We surmise, as do others, that a significant number of these settlements likely benefit investors.[122] In sum, it can be said that states and investors win in roughly equal amounts. This helps render the regime more palatable.

---

[117] Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 64 (2002).
[118] *Técnicas Medioambientales Tecmed SA v. Mexico* (ICSID ARB(AF)/00/2) Award, 29 May 2003, para. 116.
[119] *Compañía del Desarrollo de Santa Elena v. Costa Rica* (ICSID case No. ARB/96/1) Award, 17 February 2000, 78, paras. 72, 76.
[120] E.g. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 18 July 2008.
[121] See UNCTAD Statistics on ISDS, http://investmentpolicyhub.unctad.org/ISDS.
[122] Thomas Waelde and George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation* 31 TEX. INT'L L.J. 215, 260 (1996).

Electronic copy available at: https://ssrn.com/abstract=3186179

An emphasis on the economic effects of a measure alleged to be equivalent to expropriation, as opposed to an inquiry focussed upon the aims or intentions of government, was quickly perceived by many actors as a threat to the right to regulate. Investment tribunals responded in two different ways. First, they purported to balance the effects of a regulation on investors against the importance of the public measure. In *LG&E* v. *Argentina*, for instance, the arbitrators admitted that 'there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature.'[123] Alternatively, tribunals noted that regulations rarely had an effect equivalent to expropriation, reducing the frequency of regulatory expropriation to a few marginal cases. The *SD Myers v. Canada* tribunal, for instance, emphasized that '[e]xpropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.'[124] By reducing the ambit for regulatory expropriations, investment lawyers turned to FET as a means of filling in the void. If the factors deemed determinative in characterizing an expropriation included, among other things, investor expectations, the focus could now be directed exclusively upon the single factor of legitimate expectations. Arbitrators dutifully followed suit.

In awards such as *Occidental v. Ecuador I*, arbitrators interpreted FET as requiring that states offer stable and predictable business environments.[125] This, in practice, generated the equivalent of what is known in the law of state contracts as a 'stabilisation' clause, rendering legal regimes irreversible without grandfathering affected investors or paying them compensation. With a focus on stability and predictability, arbitrators could rely upon what they characterized as the 'universal' doctrine of legitimate expectations.[126] Foreign investors are to be compensated when regulatory changes frustrate representations made by the host state – representations made by whatever means, including contract, license, legislation or regulation – and relied upon by the foreign investor at the moment the investment is established.

While there have been attempts at narrowing the doctrine of legitimate expectations in subsequent awards, it continues to serve the interests of foreign investors who seek to challenge changes to existing regulatory frameworks. The doctrine of legitimate expectations, for

[123] *LG&E v. Argentina* (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006, 194.
[124] *SD Myers v. Canada* (NAFTA – UNCITRAL) Partial Award, 13 November 2000, para. 282.
[125] *Occidental v. Ecuador I* (LCIA Case No. UN3467), Award, 1 July 2004, para. 183.
[126] As explained in the lengthy dissent of Thomas Wälde in *International Thunderbird Gaming Corporation v Mexico* (Ad hoc—UNCITRAL Arbitration Rules) Separate opinion, 1 December 2005, paras. 21-30. For a critical discussion of foreign investor legitimate expectations, see Nicolás M. Perrone, *The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 673 (2017).

Electronic copy available at: https://ssrn.com/abstract=3186179

instance, was crucial to investor success in a series of disputes against Argentina precipitated by its 2001 economic crisis. Having taken measures to lessen the effects of the economic and social crisis, no investment tribunal found Argentina liable for indirect expropriation. Most tribunals, instead, concluded that Argentina was liable for breaching FET by upsetting investors' legitimate expectations. These awards clearly bring to the surface the distributive implications of this legal order. Investment law not only favoured foreign over domestic investors but also over the rest of the Argentine population that could not claim to have an expectation to their jobs or salaries.[127] Ironically, these were the same Argentines who were pressured to open their economy, privatize public enterprises and sign bilateral investment treaties a decade earlier.

As in the case of the WTO, these awards were criticized for second guessing the substantive aims of state policy. An emphasis on process provided a way of eliding these critiques. Investment tribunals, not surprisingly, began to show an interest in procedural questions as a means of dampening critique. Arbitrators interpreted the procedural dimension of FET as requiring states to operate in a non-discriminatory, transparent, and non-arbitrary manner while penalizing states that did not provide to foreign investors the ability to participate in administrative processes that affected their interests. This focus on procedure has become useful as investment tribunals increasingly address disputes concerning the application and issuance of licences to exploit natural resources.

The case of *Clayton v. Canada* is emblematic of this turn toward process. It also underscores how intimately connected is process to substance. Canada was ordered to pay compensation for violation of the North American Free Trade Agreement (NAFTA), having acted arbitrarily in refusing to permit the construction of a rock quarry and ferry terminal on sensitive shoreline in the province of Nova Scotia. While the U.S. investor was encouraged to proceed with the investment, it was understood that the investment would have to go through environmental screening as required by local law. An independent review panel undertook this assessment, convening thirteen days of hearings, and recommended the application be denied as the investment would cause harm to the marine, natural and human environments. The investment tribunal treated the review panel decision as procedurally flawed because it emphasized something the panel called 'community core values.' This was a focus denied to the panel by reason of its statutory authority, the tribunal concluded. This was by no means an obvious conclusion. It was, instead, a contentious interpretation of the panel's enacting authority. As dissenting arbitrator McRae pointed out, community core values described a set of statutorily mandated considerations. The majority of the tribunal, nevertheless, accepted the

[127] Nicolás M. Perrone, *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?* 23 IND. J. GLOBAL LEGAL STUD. 603, 616-9 (2016).

Electronic copy available at: https://ssrn.com/abstract=3186179

investor's claim that its discussion of community core values was an 'essential basis of the Panel's decision' and that the panel, therefore, acted in an arbitrary fashion.[128] This produced, according to the dissenting arbitrator, a 'disturbing result' leading to a 'remarkable step backwards in environmental protection.'

As in the case of WTO law and with the encouragement of scholars, some investment tribunals have turned to proportionality review as a means of securing legitimacy.[129] Neglecting this popular mode of inquiry, it is said, risks jeopardizing the future of investment arbitration.[130] Despite this urging to embrace proportionality, few tribunals have been receptive nor, when they have been, have they performed this function very well. Instead, they have exhibited confusion by, for instance, assimilating proportionality into a determination of whether a treaty breach has occurred rather in relying upon it in the context of determining whether a deprivation of rights can be justified. Tribunals also have collapsed the requisite steps associated with the inquiry (suitability, necessity, and proportionate effect).[131] In sum, proportionality as a response to legitimacy concerns has not worked out as hoped.

Yet another strategy for responding to nagging legitimacy concerns is the proposal for an investment court.[132] This is a project advanced by the European Commission in response to worries about arming US investors with the ability to launch disputes under the now stalled US-European trade and investment agreement (TTIP). After halting negotiations with the US and undertaking a European-wide consultation, the Commission returned with a proposal for an investment court having a tribunal of first instance together with an appellate body. Rather than exhibiting the features of a court, with security of tenure and independence, the European proposal appears to mimic, in its outlines, the dispute settlement bodies in the WTO. This is a strategy, in other words, that appropriates the features of what is perceived to be a successful global legal order, having overcome some of

---

[128] *Clayton v. Canada* (Permanent Court of Arbitration (PCA) Case No. 2009-04) Award on Jurisdiction and Liability, 17 March 2015, para. 548.

[129] Discussed in more detail in David Schneiderman, *Global Constitutionalism and its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law*, JOURNAL OF LAW & ETHICS OF HUMAN RIGHTS (forthcoming 2018).

[130] Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*' in EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA: DESAFÍOS PARA LAS INVERSIONES EXTRANJERAS, LA REGULACIÓN NACIONAL Y EL FINANCIAMIENTO PARA EL DESARROLLO 276 (Benedict Kingsbury et al. eds., 2009), www.iilj.org/GAL/documents/GALBAbook.pdf.

[131] Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 124 (2012). See, e.g. *Técnicas Medioambientales Tecmed SA v. Mexico* (ICSID ARB(AF)/00/2) Award, 29 May 2003.

[132] Discussed in more detail in David Schneiderman, *International Investment Law's Unending Legitimation Project*, LOYOLA UNIVERSITY CHICAGO LAW JOURNAL (forthcoming 2018).

Electronic copy available at: https://ssrn.com/abstract=3186179

its own legitimacy concerns. This could lend legitimacy to an allied regime that has yet to generate the same confidence. While only a couple of states, such as Canada and Vietnam, have shown a willingness to join in this project, we expect the EU will have some success in conscripting partners, given its economic influence, as it seeks to secure new trade and investment agreements.[133]

Rather than relying on reforms having to do with process, some states have sought to reform treaty obligations by expressly incorporating a 'right to regulate.'[134] Such clauses have been proliferating in newly minted investment treaties with the hope, again, of imitating the experience under GATT Article XX. While such textual signals might make a difference to some investment arbitration outcomes, they are as likely not to make much difference. This is because investment tribunals have a lot of interpretive scope and can choose to do with such clauses what they will. In any event, each of the standards of protection in investment law purport to incorporate exceptions, such as a public interest justification under national treatment or a police powers exception under expropriation and nationalization. Standards already are interpreted so as to incorporate consideration of what might be called a right to regulate, and yet legitimacy concerns persist.

There is also little reason to be confident that an express adoption of a right to regulate will make much of a difference given another feature of investment arbitration. The regime is structured in such a way that arbitrators have an incentive both to accept jurisdiction (tribunals have this exclusive competence) and to interpret standards of protection widely. If we treat arbitrators as rational economic actors – they assume, after all, that everyone else is motivated by economic self-interest – we can assume that they would want to encourage new claimants to come forward. As the system is triggered only at the behest of investors, there is impetus for arbitrators to issue reasons that facilitates future arbitration business. As we have mentioned, this cannot mean that investors will win all of the time. Rather, arbitrators will endeavor to strike a balance between investors and states that will not drive either party away. Yet the system does not appear to serve even investors very well. There are persistent complaints that it is costly and slow and not easily available to small and medium sized enterprises. It turns out that investment dispute settlement best serves the

[133] There remains some difficulty in securing approval from each member of the European Union for investment chapters in European-wide trade agreements. This helps to explain the omission of an investment chapter in the recent European trade agreement with Japan, while agreement with Mexico on an investment court has yet to be ironed out. See Investment Treaty News, 'EU–Japan EPA Negotiations Finalized Without Investment; EU–Mexico Updated FTA Nears Completion' (21 December 2017), https://www.iisd.org/itn/2017/12/21/eu-japan-epa-negotiations-finalized-without-investment-eu-mexico-updated-fta-nears-completion/

[134] See discussion in Schneiderman, supra note 131.

Electronic copy available at: https://ssrn.com/abstract=3186179

interests of arbitrators, lawyers, and some large multinational corporations.[135]

To conclude, IEL shows a growing convergence towards a single imaginary of the right to regulate. Even then, general, non-discriminatory, reasonable measures to curb negative externalities and market failures are not so easily defended at the WTO or before investment tribunals. Whatever successes states and citizens can secure before these dispute resolution bodies are not sufficient to redistribute the costs and benefits of the global economy. IEL contributes to dampening the role of states and the potential for democracies to come to the defence of their populations. The people are, accordingly, limited in their ability to respond to the social costs of markets. The right to regulate grants to states only a passive role. Interference with trade or investment transactions is discouraged if not forbidden. Problems begin with any attempt either to reduce pain and precarity or to change the rules that unevenly distribute that pain and precarity.

Conclusion

We have argued that states are expected to behave in ways that do not encumber trade and investment flows. Should they do so, they will run afoul of global legal rules. Existing distributions of wealth thereby remain secure while the insecurities experienced by many remain unaddressed. The precarious condition of populations, in both the developed and developing world, is more difficult to address or is worsened. Yet states remain the most salient political actor in the world today and it is to them that the most vulnerable will look for protection.

By emphasizing the distributional effects of IEL, we hope to challenge both the triumphalist tone of the trade lawyers and the tepid response of investment lawyers to these challenges. According to Piketty, inherited wealth is coming to predominate over earned income in the 21st century, just as it did in the age of the Belle Époque. As this is a problem that traditionally is addressed by national measures,[136] Piketty proposes a global wealth tax to supplement local income taxation. 'A progressive levy on individual wealth,' he writes, 'would reassert control over capitalism in the name of the general interest.'[137]

---

[135] See Cecilia Olivet & Pia Eberhardt, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, TRANSNATIONAL INSTITUTE (2012); Gus Van Harten & Pavel Malysheuski. *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants* (Osgoode Legal Studies Research Paper No. 14/2016).

[136] PIKETTY supra note 61, at 44.

[137] PIKETTY id. at 532.

Electronic copy available at: https://ssrn.com/abstract=3186179

Piketty does not seek out a remedy by addressing the governing legal rules of trade and investment. He does acknowledge, however, that a rise in foreign investment does not enhance equality but is, instead, likely to hinder it.[138] It is no coincidence, in our view, that the period identified by Piketty in which wage inequality really takes off – the 1980s – is the very same period in which neoliberal values took hold in international financial institutions and those of IEL.

As states remove trade barriers and reregulate so as to smooth capital flows, they contribute to deepening inequality within their own countries. Indisputably, new technologies and increasing integration provide a different terrain for the global struggle over who wins and who loses. But this terrain is neither static nor preordained. For the critical lawyer, piercing the veil of the complex and expert discussions within IEL is not enough. It is also necessary to both consider recovering old and developing new legal imaginaries. In this regard, placing inequality at the centre of IEL, for us, is just the first step.

[138] PIKETTY id. at 68, 70 (speaking of Africa).

Electronic copy available at: https://ssrn.com/abstract=3186179