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THE HUMAN COSTS OF EXITING AND REVISING TRADE AND INVESTMENT AGREEMENTS: LOCAL COMMUNITY INTERESTS, HUMAN RIGHTS, AND GLOBAL POLITICS

Diane A. Desierto*

*International law is both a process of assertion and reliance **and** a system of principles and rules: together they constitute the course of international law, confounding those critics who simplemindedly assert that it can be one (process) or the other (system) but not both. . . . we treat the international legal system as an axiom—a social fact. We differ on many other ideas: new subjects, the limits of multilateralism, fragmentation, pluralism and universality, as a result of which we continue to debate the true characteristics of the international system.¹*

States intent upon effecting changes in the law will naturally prefer to take the risk of a comprehensive and ruthless change of which they themselves are the authors than to entrust the international community with the task of an alteration of the status quo on the basis of justice.²

Exit and Change in Treaty-Making Processes

In the ordinary course of diplomatic exchanges, treaty exits and treaty revisions are pedestrian matters for states.³ They are just as much an instrument for deploying any state's foreign policy strategy—and exacting the desired political leverage in international relations—as any ordinary treaty-making process.⁴ One would be hard-pressed to find examples throughout history of modern international cooperation (especially since the beginnings of

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¹ James Crawford, *Chance, Order, Change: The Course of International Law*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, at 22–23 (Martinus Nijhoff, 2013).

² 5 HERSCH LAUTERPACHT, DISPUTES, WAR, AND NEUTRALITY 25 (Cambridge Univ. Press 2004).

³ See Malgosia Fitzmaurice, *Exceptional Circumstances and Treaty Commitments*, in THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed., Oxford Univ. Press 2012); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582–86 (2005).

⁴ See William L. Langer, *The Mechanism of American Foreign Policy*, 24 INT'L AFF. 319, 320 (1948) (recognizing treaties as part of the tools of US foreign policy).

the League of Nations⁵) of any state that purposely concluded treaties of a perpetual duration and that are intended to be immune from any change or termination.⁶

The possible closest analogues to seemingly immutable agreements—or at least treaties that are most resistant to change or termination—are those treaties that are forged under a shared desire of the States Parties thereto to deliberately give their political, economic, and social cooperation agreements a long-term and stable character, such as those treaties referred to under Article 56 of the Vienna Convention on the Law of Treaties that do not have provisions for termination, denunciation, or withdrawal.⁷ Examples of treaties that might be resistant to change or termination are territorial and maritime boundary delimitation treaties, which are crafted to ensure border stability and avoid future boundary disputes,⁸ and multilateral treaties that establish global institutions that are reasonably expected to have a constitutionalizing nature (and, as such, ordinarily cannot be terminated as a whole without the application of Article 56 of the Vienna Convention on the Law of Treaties)—such as the Charter of the United Nations,⁹ the Marrakesh Agreement Establishing the World Trade Organization,¹⁰ the Rome Statute of the

⁵ See DANIEL GORMAN, *INTERNATIONAL COOPERATION IN THE EARLY 20TH CENTURY* 86–88 (Bloomsbury 2017); Randall Lesaffer, *Peace Treaties and the Formation of International Law*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 91–92 (Bardo Fassbender & Anne Peters eds., Oxford Univ. Press 2012).

⁶ See Int'l Law Comm'n, Second Rep. on the Law of Treaties, U.N. Doc. A/CN.4/156 and Add. 1-3, at 62–63, ¶¶ 1–4, 8–10 (1963) (discussing the typology of surveyed treaties with various exit, revision, termination, or renewal clauses); *id.* at 63 ¶ 1 (noting “the comparatively small number of cases where the treaty appears expressly on its face to contemplate that it shall remain in force ‘perpetually’ . . . either by expressly providing for the treaty to remain in force indefinitely without providing for any right to denounce or withdraw from it, or by expressly excluding any right of denunciation or withdrawal without fixing any term to the treaty.”).

⁷ Vienna Convention on the Law of Treaties, art. 56(1), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.”).

⁸ See Alberto Alvarez-Jimenez, *Boundary Agreements in the International Court of Justice's Case Law, 2000-2010*, 23 EUR. J. INT'L L. 495, 497 (2012); Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT'L L. 153, 179–80 (2012).

⁹ See Egon Schwelb, *Withdrawal from the United Nations: the Indonesian Intermezzo*, 61 AM. J. INT'L L. 661, 667–72 (1967); Dapo Akande, *Withdrawal from the United Nations: Would It Have Been Lawful for the Philippines?*, EJIL:TALK! (Sept. 19, 2016), <https://www.ejiltalk.org/can-the-philippines-withdraw-from-the-un/>.

¹⁰ Note that the Marrakesh Agreement Establishing the World Trade Organization contains provisions on amendments (Article X), accession (Article XII), acceptance, entry into force and deposit (Article XIV), and withdrawal (Article XV), but no provision on the termination of this agreement for all Members. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

International Criminal Court,¹¹ the Bretton Woods Agreements creating the International Monetary Fund and the World Bank,¹² among others.¹³ Arguably, there are treaties that might possibly be regarded as *de facto* more stable, semi-permanent, or long-term in nature, because they are altogether difficult to change or exit from due to copious legal requirements, such as the United Nations Convention on the Law of the Sea (UNCLOS)¹⁴ or the fundamental human rights treaties.¹⁵

Heightened Economic Treaty Exits and Changes

In the canonical universe of state-driven or state-centric international law-making,¹⁶ a state's decision to exit from, renegotiate, or revise existing trade and investment agreements would be perceived as part of its *domaine réservé*.¹⁷ This notion has less force in today's international law, where individuals are equal subjects of international law as states,¹⁸ where states in particular bear international human rights obligations towards the individuals,

¹¹ Similarly, the Rome Statute of the International Criminal Court does not contain a provision on expiration or termination of the Statute, but does contain provisions on amendments (Articles 121 & 122), signature, ratification, approval, accession (Article 125), entry into force (Article 126), and withdrawal (Article 127). Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

¹² Articles of Agreement of the International Bank for Reconstruction and Development does not contain a provision for the agreement's termination or expiration, but contains provisions on withdrawal from membership (Article VI), amendments (Article VIII), entry into force and signature (Article XI). See Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 2 U.N.T.S. 134.

¹³ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 700–01 (Brill 2008).

¹⁴ United Nations Convention on the Law of the Sea (UNCLOS) contains Articles 312–17 (provisions on amendment and denunciation) in Part XVII (Final Provisions). Note that UNCLOS does not have an expiration or termination provision. United Nations Convention on the Law of the Sea, arts. 312–17, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁵ See Yogesh Tyagi, *The Denunciation of Human Rights Treaties*, 79 BRIT. Y.B. INT'L L. 86, 155–82, 188 (2009) (discussing the limited practices of denunciation). However, there is an emerging trend of denunciation in recent years. Gino J. Naldi & Konstantinos D. Magliveras, *Human Rights and the Denunciation of Treaties and Withdrawal from International Organizations*, 33 POLISH Y.B. INT'L L. 95, 112 (2013).

¹⁶ While other subjects of international law—groups, international organizations, non-state actors, among others—have certainly expanded authorship of international law norms, states remain the primary drivers of international law-making. See Samantha Besson, *State Consent and Disagreement in International Law-Making: Dissolving the Paradox*, 29 LEIDEN J. INT'L L. 289, n.6 (2016); Arnold N. Pronto, *Some Thoughts on the Making of International Law*, 19 EUR. J. INT'L L. 601, 602 (2008).

¹⁷ See Katja S. Ziegler, *Domaine Réservé*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (2013) (defining the *domaine réservé* as “the areas of State activity that are internal or domestic affairs of a State and are therefore within its domestic jurisdiction or competence . . . the *domaine réservé* describes areas where States are free from international obligations. . .”).

¹⁸ See KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 343 (Cambridge Univ. Press 2011); Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L. J. 61, 65–74 (1984).

groups, and local communities that comprise their populations, and where the latter increasingly possess more avenues to access justice against states in the international sphere.¹⁹

However, a distinction can be observed from the current significantly rapid and simultaneous international economic treaty changes or exits around the world owing to pre- or post-2016 geopolitical developments.²⁰ While such treaty exits or changes should not appear unusual in the ordinary life span of treaties—today’s rapid, nearly simultaneous, and geographically-ubiquitous decisions to exit from or change trade and investment treaties around the world merits an intensified analysis. The haste and pace of today’s heightened economic treaty exits and changes threaten to obscure or neglect the real human costs of these decisions to exit or revise trade and investment treaties.²¹

A brief listing below of these geopolitical decisions to withdraw from, terminate, amend, or renegotiate existing trade and investment treaties should suffice to emphasize the extraordinary nature and scope of changes sweeping the international economic system today due to simultaneous, ubiquitous, and rapid decisions of political elites within states:

1. The “America First” foreign policy of the United States,²² manifested in renegotiations of the North American Free Trade Agreement (NAFTA)²³ and

¹⁹ See ANTONIO AUGUSTO CANCADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 17–18 (Oxford Univ. Press 2011).

²⁰ Many have commented on the rapid changes in the international system after the election of President Donald J. Trump in the United States, the Brexit decision in the United Kingdom, emerging Chinese leadership of the international system through economic expansion projects, and increasing diffusion of power among developed and developing states. See Bruce Jones, *The New Geopolitics*, BROOKINGS (Nov. 28, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/11/28/the-new-geopolitics/>; Syed Munir Khasru, *The Geopolitical Landscape of the Asia Pacific is Changing Dramatically. Here’s How*, WORLD ECON. FORUM (July 28, 2017) <https://www.weforum.org/agenda/2017/07/the-geopolitical-landscape-of-asia-pacific-is-changing-dramatically-here-s-how/>; Heike Krieger, *Trumping International Law? Implications of the 2016 US Presidential Election for the International Legal Order*, EJIL:TALK!, (Jan. 3, 2017), <https://www.ejiltalk.org/trumping-international-law-the-implications-of-the-2016-us-presidential-election-for-the-international-legal-order/>; Ingrid Wuerth, *International Law in the Age of Trump: A Post-Human Rights Agenda*, LAWFARE (Nov. 14, 2016), <https://www.lawfareblog.com/international-law-age-trump-post-human-rights-agenda>.

²¹ Initial ideas for this Essay were first published in Diane A. Desierto, *The Human Costs of Exiting Trade Agreements: The Right to Development in an Era of Policy Uncertainty*, EJIL:TALK! (Oct. 27, 2017), <https://www.ejiltalk.org/the-human-costs-of-exiting-trade-agreements-the-right-to-development-in-an-era-of-policy-uncertainty/comment-page-1/>.

²² See OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (last visited Mar. 29, 2018).

²³ See U.S. TRADE REPRESENTATIVE, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 2–3 (2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf> (last visited Mar. 29, 2018).

the Korea-United States Free Trade Agreement (KORUS);²⁴ the United States' withdrawal from the Trans-Pacific Partnership (TPP) and its articulated openness to a renegotiated version under the renamed Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP);²⁵ the United States' withdrawal from the Paris Agreement on Climate Change;²⁶ and the United States' threatened actions against the multilateral trade system under the World Trade Organization;²⁷

2. The United Kingdom's 2016 Brexit decision to leave the European Union, the ongoing renegotiation of approximately 759 treaties, and the corollary changes to EU governance arising from Brexit;²⁸

3. China's expenditure of over \$1 Trillion (USD) to create global infrastructure corridors for its interests through approximately sixty countries under China's One Belt, One Road (OBOR) initiative;²⁹ its spearheading of the sixteen-member Regional Comprehensive Economic Partnership (RCEP) (which spans the ten Member States of the Association of Southeast Asian Nations [ASEAN], plus ASEAN's external partners Australia, China, India,

²⁴ USTR Lighthizer Statement on the Conclusion of the Special Session of the US-Korea FTA Joint Committee, U.S. TRADE REPRESENTATIVE (Aug. 22, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-lighthizer-statement-conclusion>.

²⁵ *The United States Officially Withdraws from the Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE (Jan. 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>; Shawn Donnan & Demetri Sevastopulo, *Trump Opens Door to US Rejoining TPP*, FIN. TIMES (Jan. 25, 2018), <https://www.ft.com/content/3cb22bb8-0205-11e8-9650-9c0ad2d7c5b5>.

²⁶ Valerie Volcovici, *U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact*, REUTERS (Aug. 4, 2017), <https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM>.

²⁷ Gregory Shaffer et al., *Trump is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*, WASH. POST (Sept. 27, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.036839641c1c; Gregory Shaffer et al., *U.S. Threats to the WTO Appellate Body* (UC Irvine School of Law Legal Studies Research Paper No. 2017-63, 2017), https://papers.ssm.com/sol3/papers.cfm?abstract_id=3087524.

²⁸ *A Background Guide to Brexit from the European Union*, ECONOMIST (Feb. 24, 2016), <https://www.economist.com/blogs/graphicdetail/2016/02/graphics-britain-s-referendum-eu-membership>; Horst Eidenmuller, *Negotiating and Mediating Brexit*, 44 PEPP. L. REV. 39, 40-45 (2016); Ovidiu-Horia Maican, *Legal Aspects of Brexit*, 6 JURID. TRIB. 252, 252-54 (2016); Tim Oliver, *The EU and Brexit: Processes, Perspectives, and Prospects*, in BREXIT: SOCIOLOGICAL RESPONSES 128-32 (William Outhwaite ed., Anthem Press, 2017).

²⁹ Donald J. Lewis & Diana Moise, *One Belt One Road (OBOR) Roadmaps: The Legal and Policy Frameworks*, TRANSNAT'L DISP. MGMT. 1, 19 (2017); Zeng Lingjiang, *Conceptual Analysis of China's Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny*, 15 CHINESE J. INT'L L. 517, 518 (2016); Jane Perlez & Yufan Huang, *Behind China's \$1 Trillion Plan to Shake up the Economic Order*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/china-railway-one-belt-one-road-1-trillion-plan.html>.

Japan, Korea, and New Zealand);³⁰ its leadership of the Asian Infrastructure Investment Bank;³¹ and other Chinese-led trade agreement initiatives,³² among various signs of economic and geopolitical expansion presaged under Chinese President Xi Jinping's "Thought on Socialism with Chinese Characteristics for a New Era" that was added during the 2017 19th National Congress of the Communist Party of China,³³ and

4. Reconfiguring global economic alliances, such as through the renamed and revised eleven-member CPTPP led by Japan;³⁴ a new proposed alliance between the United States, Japan, India, and Australia as an infrastructure investment alternative to China's OBOR initiative;³⁵ after the Comprehensive EU-Canada Trade Agreement (CETA),³⁶ prospective new trade agreements of the European Union now being negotiated with countries such as Mexico and other countries in the Paris Agreement;³⁷ new proposals to establish a single market for the African continent under a Tripartite Free Trade Area (TFTA) that would link the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the East African Community (EAC);³⁸ as well as Latin America and South

³⁰ See Shawn Donnan & Andres Schipani, *China Pledges to Lead the Way on Global Trade*, FIN. TIMES (Nov. 19, 2016), <https://www.ft.com/content/ad63bc0e-ae88-11e6-a37c-f4a01f1b0fa1>; David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 63 (2016).

³¹ See Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255, 1256-57 (2016).

³² See *China FTA Network*, MINISTRY OF COM. CHINA, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited Mar. 29, 2018).

³³ *Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, XINHUA (Oct. 19, 2017), http://www.xinhuanet.com/english/2017-10/19/c_136689808.htm.

³⁴ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, NEW ZEALAND MINISTRY OF FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (last visited Mar. 29, 2018); *In America's Absence, Japan Takes the Lead on Asian Free Trade*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/02/22/in-americas-absence-japan-takes-the-lead-on-asian-free-trade/?utm_term=.d997f7ce7e85.

³⁵ Yen Nee Lee, *A Four-Nation Alliance May Be Rising to Counter China's Belt and Road*, CNBC (Feb. 18, 2018), <https://www.cnbc.com/2018/02/18/us-japan-india-australia-mull-alternative-to-chinas-belt-and-road.html>.

³⁶ Comprehensive Economic and Trade Agreement between Canada and the European Union, Can.-E.U., Oct. 30, 2016, 2017 OJ L11 23 (provisionally entered into force Sept. 21, 2017), <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

³⁷ See *EU, Mexico Say Progress Made After Trade Talks, Deal Not Yet Finalized*, REUTERS (Feb. 20, 2018), <https://www.reuters.com/article/us-eu-mexico-trade/eu-mexico-say-progress-made-after-trade-talks-deal-not-yet-finalized-idUSKCN1G42YE>; Jon Stone, *EU to Refuse to Sign Trade Deals with Countries That Don't Ratify Paris Climate Change Accord*, INDEPENDENT (Feb. 12, 2018), <http://www.independent.co.uk/news/world/europe/eu-trade-deal-paris-climate-change-accord-agreement-cecilia-malmstr-m-a8206806.html>.

³⁸ See Martha Belete Hailu, *Regional Economic Integration in Africa: Challenges and Prospects*, 8 MIZAN L. REV. 299, 327 (Dec. 2014); Shannon Manders, *Africa's Free Trade Agreement: A Step Too Far?*,

America's prospective vast trade deals with the European Union and partners other than the United States.³⁹

International Human Rights Law in Exiting From, Revising, or Renegotiating Economic Treaties

The global economic climate of rapid exits from, or changes to, trade and investment treaties, is also a significant opportunity for states to write the terms of the international economic system in a manner that deliberately respects and protects the fundamental human rights of communities, individuals, and groups that comprise states' populations—and who are the ultimate beneficiaries and principals of the global economic system.⁴⁰ States wield their diplomatic, foreign policy, and treaty-making powers only as elected or designated representatives or agents of the populations under social contract.⁴¹ Fulfilling international human rights commitments is arguably an intrinsic part of the state's social contract with its population. The United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, Professor Alfred de Zayas, implicitly acknowledges this precise point when he called for primacy of international human rights law in states' drafting, revision, and renegotiation of trade and investment agreements:

The international community has an interest in reaffirming a duty to protect and actively advance civil, economic, political, and social rights. Governments, parliaments, and courts have a responsibility to act in the public interest for economic stability, social development, environmental sustainability, food security, improvement of health and labour standards. . . . ***Those generic obligations of governance are the raison d'être of organized society.*** Rights holders of the responsibility to act are individuals and peoples, including indigenous peoples. Duty bearers are Governments, parliaments, and courts. . . . All potential States parties to the Trans-Pacific

GLOBAL TRADE REV. (May 16, 2017), <https://www.gtreview.com/news/africa/africas-free-trade-agreement-a-step-too-far/>.

³⁹ See Charlie Devereux et al., *Europe and South America Push for One of World's Largest Trade Deals*, BLOOMBERG (Nov. 29, 2017), <https://www.bloomberg.com/news/articles/2017-11-30/trade-talks-between-europe-and-south-america-at-crucial-stage>; Patrick Gillespie, *As Trump Threatens NAFTA, Mexico Looks to Latin America for Trade*, CNN MONEY (Sept. 21, 2017), <http://money.cnn.com/2017/09/21/news/economy/trump-latin-america-pacific-alliance/index.html>; Jonathan Stearns, *Europe Closes In on a Latin American Trade Deal Amid Trump Protectionism*, BLOOMBERG (Jan. 27, 2018), <https://www.bloomberg.com/news/articles/2018-01-28/europe-closes-in-on-fresh-trade-deal-as-trump-puts-up-barriers>.

⁴⁰ See DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT 380–87 (Oxford Univ. Press 2015).

⁴¹ See DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 37 (Columbia Univ. Press 2015).

Partnership Agreement, the Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement and Trade in Services Agreement are bound by the international human rights treaty regime and most are parties to universal and regional human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and the European Social Charter. **Pacta sunt servanda requires States to fulfil their human rights treaty obligations in good faith and prohibits them from entering into agreements that would delay, circumvent, undermine, or make impossible the fulfilment of their human rights treaty obligations.**⁴²

Since many states' authoritative decision-makers are now rapidly and ubiquitously taking decisions to reconfigure trade and investment treaty commitments,⁴³ there is greater urgency under international human rights law to consider the intergenerational consequences of these decisions on the interests and basic human rights of the actual constituencies of these states: individuals, groups, and local communities. It is important not only that these constituencies be heard in the decision-making process over international trade and investment decisions, but also that they be heard through meaningful participation and transparent access to the information that undergirds these global economic decisions.⁴⁴ It is equally imperative—particularly under international human rights law—that states ensure their international human rights law commitments to their constituencies to be ingrained and protected under the forthcoming rules on the international economic system.⁴⁵ As the United Nations General Assembly stressed in its Resolution 67/171 with respect to the protection of all human rights through the right to development, “the primary responsibility for the promotion and protection of all human rights lies with the State . . . [including] the primary responsibility of States to

⁴² Human Rights Council, Rep. of the Indep. Expert on the Promotion of a Democratic & Equitable Int'l Order, ¶¶ 14, 18, U.N. Doc. A/HRC/33/40 (2016), <https://business-humanrights.org/sites/default/files/documents/G1615119%281%29.pdf> (last visited Mar. 29, 2018) (emphasis added).

⁴³ See Paul McClean, *After Brexit: The UK Will Need to Renegotiate at Least 759 Treaties*, FIN. TIMES, (May 30, 2017), <https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e>; Paul McClean et al., *The Brexit Treaty Renegotiation Checklist*, FIN. TIMES (Aug. 20, 2017), <https://ig.ft.com/brexit-treaty-database/>.

⁴⁴ See Michelle Limenta, *Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*, 10 N. Z. Y.B. INT'L L. 73, 74–75 (2012); Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE, L., & DEV. 19, 22–23 (2012); Stephan W. Schill, *Editorial: Five Times Transparency in International Investment Law*, 15 J. WORLD INV. & TRADE 363, 363–64 (2014).

⁴⁵ See Olivier de Schutter, *The Role of Human Rights in Shaping International Regulatory Regimes*, 79 SOC. RES. 718, 810 (2012).

create national and international conditions favourable to realization of the right to development.”⁴⁶

Whether the states’ decisions are to exit from, to amend certain provisions of, or ultimately to wholly renegotiate trade and investment treaties, I argue that, at least where their international human rights commitments are concerned, states cannot shield themselves from international responsibility by seeking blanket refuge in orthodox domestic constitutional or legal doctrines, such as the “executive privilege in the treaty-making process,”⁴⁷ “national security considerations,”⁴⁸ or government prerogatives to ensure “efficiency in treaty-making”⁴⁹ to deny their individual, group, or local community constituencies any meaningful access to information or participation over these treaty exit, revision, or renegotiation decisions. In the first place, states cannot invoke provisions of their internal or domestic law to justify their failure to perform their existing international human rights treaty obligations.⁵⁰ Because trade and investment treaties stand to directly impact the long-term protection, enjoyment, and realization of the basic human rights of their populations,⁵¹ states must ensure that decisions to exit from, revise, amend, or otherwise

⁴⁶ G. A. Res. 67/171 The Right to Development U.N. Doc. A/res/67/171, at ¶¶ 17–18 (Mar. 22, 2013), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/171.

⁴⁷ See Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 4–7 (1974); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491–92 (2007); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 263–64 (2010).

⁴⁸ David Kravets, *Obama Administration Declares Proposed IP Treaty a ‘National Security’ Secret*, WIRED (Mar. 12, 2009), <https://www.wired.com/2009/03/obama-declares/>; see also DE WITT C. POOLE, *THE CONDUCT OF FOREIGN RELATIONS UNDER MODERN DEMOCRATIC CONDITIONS* 96 (Yale Univ. Press 1925) (“The consideration of public necessity which is sometimes deemed to run counter to the disposition of modern statesmen to be communicative is not to be treated lightly, for it relates to the fundamental right of self-preservation and takes on a moral color. European thought, while generally recognizing secret treaties as undemocratic and undesirable in themselves, is strongly influenced by the struggle for national existence and hesitates to forego any available means of self-defense.”).

⁴⁹ Michael Colaresi & Nathan Jensen, *Do Trade Negotiations Have to be Done in Secret? Here’s What Experts Think*, WASH. POST (Sept. 24, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/24/do-trade-negotiations-have-to-be-done-in-secret-heres-what-experts-think/?utm_term=.31c679d655ec (A Washington Post survey of trade experts found, among other things, that “secrecy makes ratification more likely because the lack of transparency made it harder for the opposition to mobilize against the deal by focusing criticism on an unpopular aspect of the agreement. Others thought that secrecy made it easier for special interests to capture benefits from the agreements at the public’s expense.”).

⁵⁰ Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

⁵¹ See Human Rights Council, Rep. of the Special Rapporteur on the Right to Food, Olivier de Schutter, ¶ 2, U.N. Doc. A/HRC/19/59/Add.5 (2011) (“Human rights treaty bodies and special procedures of the Human Rights Council have regularly called upon States to prepare human rights impact assessments of the trade and investment agreements that they conclude. Human rights impact assessments can be an important tool for States in negotiating trade and investment agreements, particularly to ensure that they will not make demands or concessions that will make it more difficult for them, or for the other party or parties, to comply with their human rights obligations . . .”).

renegotiate their trade and investment treaties do not jeopardize their ability and capacity to ensure continued protection, unimpeded enjoyment, and progressive realization of the fundamental economic, social, cultural, civil, and political rights of their populations.

Secondly, it can also be argued that states are obligated to allow meaningful access to information about, and meaningful participation in, their treaty exit, revision, or renegotiation decisions, according to a separately emerging norm of transparency under international law,⁵² the well-settled right of public participation in the conduct of public affairs in international human rights law,⁵³ and the increasingly accepted right to public information under international human rights law.⁵⁴ Collectively, the international law principle or norm of transparency, the right to public participation, and the right to

⁵² Note that the status of this norm has not been dominantly accepted yet as hard international law, although new treaties have emerged requiring such transparency. See U.N. Comm'n on Int'l Trade Law, United Nations Convention in Transparency in Treaty-Based Investor-State Arbitration art. 2 (2014), as adopted by G.A. Res. 68/109, U.N.Doc. A/68/462 (Dec. 16, 2013), <http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>; Organization of American States, Inter-American Convention on Transparency in Conventional Weapons Acquisitions arts. 3–4, June 7, 1999, http://www.oas.org/en/sla/dil/inter_american_treaties_A-64_transparency_conventional_weapons_acquisitions.asp; see also Anne Peters, *The Transparency Turn of International Law*, 1 Chinese J. Global Governance 3, 4–5 (2015); Ulrich K. Preuß, *Transparency in International Law*, 12 Int'l J. Const. L. 820, 823–24 (2014) (reviewing ANDREA BIANCHI & ANNE PETERS, *TRANSPARENCY IN INTERNATIONAL LAW* (2013)). See generally U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), *Transparency, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II*, U.N. Sales No. E.11.II.D.16 (2012).

⁵³ G.A. Res. 61/275, the Declaration on the Rights of Indigenous Peoples, arts. 5, 18 (Sept. 13, 2007); the Convention on the Rights of Persons with Disabilities, art. 4(3), 29, 33(3) 2515 U.N.T.S. 3 (Mar. 30, 2007); U.N. ESCOR, Report of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, U.N. Doc. A/CONF. 189/12, art. 22 (2001); G.A. Res. 53/144, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 8 (Dec. 9, 1998); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2(2), 97 RGDIP 500 (Dec. 18, 1992); the International Convention on the Protection of All Migrant Workers and Members of Their Families, arts. 41–42, U.N.J.Y. 1990:209 (Dec. 18, 1990); the Convention on the Rights of the Child, art. 15 A.T.S. 1991/4, C.T.S. 1992/3 (Nov. 20, 1989); G.A. Res. 41/128, the Declaration on the Rights to Development, art. 1.1, 2, 8.2 (Dec. 4, 1986); the African Charter on Human and Peoples' Rights, art. 13, 1520 U.N.T.S. 217 (June 27, 1981); the Convention on the Elimination of All Forms of Discrimination Against Women, arts. 7–8, 19 I.L.M. 33,34, 1249 U.N.T.S. 13, 15(E), 24(F) (Dec. 18, 1972); the American Convention on Human Rights, art. 23, KAV 2305 (Nov. 22, 1969); International Covenant on Economic, Social and Cultural Rights art. 8, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 25(a), 56 D.S.B. 111 (Dec. 15, 1966); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(c), 168 B.F.S.P. 542, 5 I.L.M. 352 (Dec. 21, 1965); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS9, art. 3 (Mar. 20, 1952); Universal Declaration of Human Rights, art. 21, 51 B.S.F.P. 605, 43 AJILs 127 (Dec. 10, 1948). See generally Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

⁵⁴ See generally Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RTS. L. REV. 25, 25, 49–50 (2013).

public information are critical for enabling states to fulfill their continuing duties to prevent violations of human rights owed to their populations,⁵⁵ especially when these states make long-term decisions impacting such human rights by exiting from, amending, revising, or otherwise renegotiating trade and investment treaties.

Individuals, groups, and local communities that comprise the populations of states cannot be deemed to be passive recipients or rule-takers of international concessions made in secret by their elected representatives during the international trade and investment treaty negotiation process. The transparency principle in international law⁵⁶—a corollary with the right to public information⁵⁷—ensures that individuals, groups, and local communities—and not just chambers of commerce, industry associations, or other private interest stakeholders of free trade and foreign investment who usually have more access to trade and investment treaty consultations⁵⁸—are aware of the exact trade and investment concessions made by their political representatives, enough for them to be able to reasonably assess how these concessions will impact their present and future enjoyment of economic, social, cultural, civil, and political rights, such as the rights to work and to fair conditions of labor, the right to an adequate standard of living including the right to health, which can be affected when decisions on trade and investment displace local businesses, and alters the terms of competition in favor of foreign business enterprises without subjecting them to the same environmental, labor, and social regulations as local enterprises.⁵⁹ The right to public participation in international human rights law anchors the right of

⁵⁵ See Human Rights Council, *The Role of Prevention in the Promotion and Protection of Human Rights*, U.N. Doc. A/HRC/30/20, 6–7 (July 15, 2015).

⁵⁶ See Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle of International Economic Law*, 27 MICH J INT'L L 579, 583–84 (2006).

⁵⁷ This right is arguably recognized with respect to the public's right to access information on environmental matters and natural resources. See INT'L LAW COMM'N (ILC), DRAFT ARTICLES ON PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES, art. 13 (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (“States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved, and the harm which might result and ascertain their views thereon.”).

⁵⁸ See Michael Strange, *Implications of TTIP for International Social Movements and International NGOs*, in THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD 81, 87–88 (Jean-Frederic Morin et al. eds., Routledge 2016).

⁵⁹ See INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., A TURN TO RESPONSIBLE CONTRACTING: HARNESSING HUMAN RIGHTS TO TRANSFORM INVESTMENT (2016), <http://www.ohchr.org/Documents/Issues/Globalization/E15-Investment-OHCHR.pdf>; Statement by Navanathem Pillay, United Nations High Commissioner for Human Rights, Geneva, September 2010, at <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10380&LangID=E>.

individuals, groups, or local communities to seek meaningful modalities or avenues of participation in the decisions being taken on their behalf by their political representatives in trade and investment negotiations—where there is no legal mechanism for demanding the public accountability of political representatives during this trade and investment treaty negotiation process (largely because these negotiations occur in a climate of secrecy, and political representatives do not routinely undertake broad, nondiscriminatory, and informed consultations with their all of their respective local constituencies), then, clearly, the essence of the right to public participation would be hollowed out and defeated.⁶⁰

Regardless of the claims of geopolitics or neo-imperial ambitions of any states' authoritative decision-makers in making decisions to exit or change their trade and investment treaties, states must, at the outset, internalize their international human rights law commitments when they set their normative priorities for such economic decisions. After all, individuals, groups, and local communities will experience first-hand the economic consequences,⁶¹ as well as feel social impacts (such as diminished public funds due to investor compensation awards or costly retaliations against a Member's domestic industries arising from non-compliance with trade decisions)⁶² whether it be through job contractions or losses from trade,⁶³ environmental hazards from irresponsible foreign investment,⁶⁴ unfair labor conditions or morally hazardous activities—such as corruption due to lack of oversight over multinational enterprises⁶⁵ or endemic corruption of political elites taking

⁶⁰ See, e.g., Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. UNIV. INT'L L. REV. 1321, 1322, 1324–26 (2000); Malgosia Fitzmaurice, *Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law*, 2 NON-STATE ACTORS & INT'L L. 1, 1–22 (2002).

⁶¹ See U.S. INT'L TRADE COMM'N (USITC), ECONOMIC IMPACT OF TRADE AGREEMENTS IMPLEMENTED UNDER TRADE AUTHORITIES PROCEDURES, 2016 REPORT (2016) (providing sector by sector estimates).

⁶² See JONATHAN BONNITCHA, ASSESSING THE IMPACTS OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD) REPORT 12 (2017).

⁶³ See, e.g., U.S. DEP'T OF LABOR, REPORT ON THE U.S. EMPLOYMENT IMPACT OF THE UNITED STATES-KOREA FREE TRADE AGREEMENT 33 (2011).

⁶⁴ See, e.g., ORG. FOR ECON. COOPERATION AND DEV., ENVIRONMENTAL IMPACTS OF FOREIGN DIRECT INVESTMENT IN THE MINING SECTOR IN SUB-SAHARAN AFRICA 1 (2002); George D. Applebaum, *Controlling the Environmental Hazards of International Development*, 5 ECOLOGY L. Q. 321, 321–22 (1976).

⁶⁵ See Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, 33 J. INT'L BUS. STUD. 291, 291, 293 (2002); Hilmar Raeschke-Kessler & Dorothee Gottwald, *Corruption in Foreign Investment – Contracts and Dispute Settlement between Investors, States, and Agents*, 9 J. WORLD INV. & TRADE 5, 5, 10–11 (2008); Galina Hale & Mingzhi Xu, *FDI Effects on the Labor Market of Host Countries* (Fed. Reserve Bank of S.F., Working Paper No. 2016-25), <https://www.frbsf.org/economic-research/files/wp2016-25.pdf> (last visited Mar. 29, 2018).

advantage of new economic expansion from trade and investment actors in order to engage in more rent-seeking behavior.⁶⁶ The conventional perception that trade and investment agreements are matters exclusively for states (and concomitantly, that states' internal political, economic, or other normative considerations for exiting from or otherwise changing trade and investment agreements are mere matters of *domaine réservé* and not for international law⁶⁷), is a state-centric fiction that can no longer be maintained in the face of international law treaty, custom, and *jus cogens* norms that now protect the rights of individuals, groups, and communities.⁶⁸ Any state's decision to exit from, revise, or renegotiate its existing trade and investment treaties impacts on the long-term livelihoods, consumer preferences, employability, health, and education of local communities—matters that all directly involve individual, group, and community enjoyment of their respective economic, social, cultural, civil, and political rights.⁶⁹

Ongoing treaty exit, revision, or renegotiation initiatives today variably consider, if at all, the crucial norms of transparency, right to public information, and right to public participation in international human rights law. Brexit negotiations have thus far not created a formal channel on the

⁶⁶ M. Shahid Alam, *Anatomy of Corruption: An Approach to a Political Economy of Underdevelopment*, 38 AM. J. ECON. & SOC., 441, 441 (1989); Jacqueline Coolidge & Susan Rose-Ackerman, *High-Level Rent Seeking and Corruption in African Regimes: Theory and Cases*, WORLD BANK <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/wps1780.pdf> (last visited Mar. 29, 2018).

⁶⁷ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 239, 243 (Gregory H. Fox & Brad R. Roth eds., Cambridge Univ. Press 2000) ("International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its 'invasion' of the sovereign's *domaine reserve*. The UN Charter replicates the 'domestic jurisdiction—international concern' dichotomy, but no serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any State' and hence insulated from international law."); Galina G. Shinkaretskaya, *Content and Limits of Domaine Reserve*, in INTERNATIONAL LAW AND MUNICIPAL LAW 123, 123–31 (Grigory I. Tunkin & Rüdiger Wolfrum eds., Duncker & Humblot GmbH, Berlin 1988).

⁶⁸ See Andrew Clapham, *The Role of the Individual in International Law*, 21 EURO. J. INT'L L. 25, 27–28 (2010); Morten Kjaerum, *From International Law to Local Communities: The Role of the United Nations in the Realization of Human Rights*, 53 U.N. CHRON. 34, 36–37 (2017); Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENV'T L. & POL'Y 179, 179–80 (1998).

⁶⁹ See Pepita Barlow et al., *The Health Impacts of Trade and Investment Agreements: A Quantitative Systematic Review and Network Co-citation Analysis*, 13 GLOBAL HEALTH 1, 1–2 (2017) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5343316/>; Michael H. Shuman, *GATTzilla v. Communities*, 27 CORNELL INT'L L. J. 527, 543 (1994).

participation of individuals, groups, or communities in the UK. Dr. Alan Renwick explains:

All sides agree that public opinion should continue to influence the process, but there are two views on what that should mean. One view is that the public spoke in the referendum and the task now is simply to implement that decision. The other view is that opinion is more complex and changeable and that evolving public views should also be considered. One way public opinion might be heard is through a referendum on the final deal. The form this would take, the effects it might have, and how it might come about are complex issues. The most like version would pit the negotiated deal against remaining in the EU. Circumstances leading to such a vote are imaginable, but its outcome is impossible to predict. The prevailing public mood will, in any case, influence MPs' and ministers' day-to-day decisions. Direct public intervention could also come in the form of a general election.⁷⁰

In a letter dated February 28, 2017,⁷¹ the EU Ombudsman urged the EU Commission to ensure transparency and consultation with all stakeholders in the Brexit negotiations to “assist in protecting EU citizens’ rights.” In response, the Commission has adopted a tailor-made policy of “maximum level of transparency” opening all negotiation documents on the Article 50 negotiations with the United Kingdom.⁷²

In contrast, the NAFTA renegotiations process has not built in formal channels for negotiation transparency,⁷³ public consultations with all stakeholders,⁷⁴ and public participation,⁷⁵ although the United States Trade Representative set up a limited public comment period on its NAFTA

⁷⁰ Alan Renwick, *The Process of Brexit: What Comes Next?*, 3 (UCL Working Paper, 2017), <https://www.ucl.ac.uk/european-institute/renwick-brexit-process.pdf>.

⁷¹ Letter from the Ombudsman to President Juncker Concerning Information for the Public on the Upcoming Negotiations Aimed at Reaching Agreement on the UK’s Withdrawal from the EU, EUR. OMBUDSMAN (Feb. 28, 2017), <https://www.ombudsman.europa.eu/cases/correspondence.faces/en/76528/html.bookmark>.

⁷² *Negotiating Documents on Article 50 Negotiations with the United Kingdom*, EURO. COMM’N, https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en (last visited Mar. 29, 2018).

⁷³ CTR. FOR INT’L ENV’L LAW, LITTLE TRANSPARENCY AFTER THREE ROUNDS OF NAFTA RENEGOTIATIONS (Oct. 2, 2017), <http://www.ciel.org/little-transparency-three-rounds-nafta-renegotiations/>.

⁷⁴ Jeremy Malcolm & Jyoti Panday, *Shrinking Transparency in NAFTA and RCEP Negotiations*, ELEC. FRONTIER FOUND. (Sept. 14, 2017), <https://www.eff.org/deeplinks/2017/09/shrinking-transparency-nafta-and-rcep-negotiations>.

⁷⁵ CTR. FOR INT’L ENV’L LAW, AS NAFTA NEGOTIATIONS OPEN, DOORS CLOSE ON TRANSPARENCY (Aug. 16, 2017), <http://www.ciel.org/news/nafta-negotiations-open-doors-close-transparency/>.

renegotiation objectives.⁷⁶ This flies in the face of the basic objective of ensuring public participation in development decisions under Article 8 of the Declaration on the Right to Development (“States should encourage popular participation in all spheres as an important factor in development and in the full realisation of human rights.”⁷⁷). Without access to information on the terms of the ongoing negotiations, individuals, groups, and local communities who are denied stakeholder participation will not be able to weigh in on the ultimate terms of the NAFTA renegotiation, contrary to business groups, chambers of commerce, producer groups, and other supply chain firms who have a greater wherewithal of resources to make their positions known to their respective governments conducting the NAFTA renegotiations.

Reckoning the Human Costs of States’ Exits, Revisions, and Renegotiations of Trade and Investment Treaties

Public access to any or some information on trade and investment treaty exits, revisions, or renegotiations is empty and meaningless if the individuals, groups, and local communities that comprise states’ populations are not empowered by their political representatives to determine the human impacts of these economic decisions.⁷⁸ A layperson can read hundreds or thousands of pages of a supposed draft of a new trade and investment agreement, but if states do not meaningfully communicate the human rights impacts of these agreements,⁷⁹ the sheer density and technicality of these trade and investment agreements will make any supposed access to information a Pyrrhic exercise.⁸⁰ It is thus not sufficient for states to simply release the outcome documents of trade and investment treaty negotiations, because this simply begs the question

⁷⁶ OFFICE OF THE U.S. TRADE REPRESENTATIVE, USTR EXTENDS PUBLIC COMMENT PERIOD FOR NAFTA RENEGOTIATION OBJECTIVES (June 14, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/ustr-extends-public-comment-period>.

⁷⁷ G.A. Res. 41/128, *supra* note 53, arts. 2(3), 8(2).

⁷⁸ See, e.g., James Harrison & Alessa Goller, *Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?*, 8 HUM. RTS. L. REV. 587, 610–11 (2008); Tarek F. Massarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT’L L. J. 135, 147, 150, 152 (2007).

⁷⁹ See Gauthier de Beco, *Human Rights Impact Assessments*, 27 NETH. Q. HUM. RTS. 139, 165 (2009).

⁸⁰ The full text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), for example (which should be read alongside nearly six thousand pages of the original Trans-Pacific Partnership text), was released in February 2018 by the Government of New Zealand, but without any annotation, analysis, or human rights impact assessment. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 34.

of moral hazards that can arise from the “private bargaining”⁸¹ of trade and investment concessions made without the full knowledge of the public.

Releasing the negotiated treaty text is an exercise in afterthought. It nowhere empowers members of the public to properly and carefully discern how trade and investment treaty concessions made by their political representatives affect their short and long term enjoyment of economic, social, cultural, civil, and political rights—while also privileging those parties (especially businesses and other market actors) who are otherwise heard and have seats at the negotiating table or in whatever direct stakeholder consultations conducted by trade and investment treaty negotiators or political representatives.⁸² This asymmetric practice ultimately reduces members of the public to being passive “rule-takers,” rather than equally active subjects in the making of international law through their possible inputs in trade and investment treaty negotiations.

Current decisions to exit from, amend, revise, or renegotiate existing trade and investment treaties reflect the ongoing information, participation, communication, and assessment deficit faced by individuals, groups, and local communities. In December 2016, the U.K. Parliament released its report on “The human rights implications of Brexit,” noting the Government of the United Kingdom “has not been able to set out any clear vision as to how it expects Brexit will impact the UK’s human rights framework.”⁸³ The Government of the United Kingdom “seemed unacceptably reluctant to discuss the issue of human rights after Brexit. The Minister of State responsible for human rights was either unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU.”⁸⁴ The ongoing omission to conduct ongoing human rights impact assessments for the United Kingdom’s departure from the European

⁸¹ Jorge G. Castañeda & Carlos Heredia, *How to Improve NAFTA*, PROJECT SYNDICATE (Sept. 26, 2017), <https://www.project-syndicate.org/commentary/renegotiate-nafta-wages-corruption-human-rights-by-jorge-g—casta-eda-and-carlos-heredia-2017-09?barrier=accessreg>; see Brian J. Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 104 (1995).

⁸² See STEPHEN CLARKSON, *DOES NORTH AMERICA EXIST? GOVERNING THE CONTINENT AFTER NAFTA AND 9/11*, 167–81 (Univ. of Toronto Press 2008) (discussing the “role of big business in negotiating free trade”).

⁸³ UNITED KINGDOM HOUSE OF LORDS AND HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, *THE HUMAN RIGHTS IMPLICATIONS OF BREXIT: FIFTH REPORT SESSION 2016-2017*, 2016 Cm. 695.

⁸⁴ *Id.* at 33.

Union continues to be criticized.⁸⁵ In contrast, the European Commission Directorate General for Trade has preexisting *Guidelines*⁸⁶ as well as settled practices on *sustainability impact assessments*,⁸⁷ although the Commission has not yet released any such impact assessment report in relation to the ongoing Brexit negotiations and supposed negotiation thereafter for a new U.K.-EU trade treaty.

The NAFTA renegotiations process does not provide for any such human rights impact assessments, especially since human rights have not figured much in public discussions of NAFTA “2.0.”⁸⁸ Neither has human rights impact assessments figured (dominantly or tangentially) in any of the other ongoing trade and investment exits, amendments, revision, or renegotiation of massive trade and investment treaty initiatives in the CPTPP, the Regional Comprehensive Economic Partnership (RCEP), and other cross-border regional projects launched under China’s OBOR, Japan’s Quality Infrastructure (QI), regional trade and investment agreements of ASEAN, as well as any other trade and investment treaty revision, renegotiation, exit, or change contemplated by other countries in the Asia-Pacific, Africa, or Latin America.⁸⁹ While the scarce use of human rights impact assessments for trade and investment agreements could be explained by the absence of a settled or uniform methodology in conducting such human rights impact assessments tailored to trade and investment treaty negotiations,⁹⁰ it is also plausible that this gap exists due to the disinterest of those who can be better represented in the current asymmetry of information and participation in trade and investment

⁸⁵ NICKI GEORGHIOU & ANGUS EVANS, BREXIT: THE IMPACT ON EQUALITIES AND HUMAN RIGHTS, SB 16-82, at 11 (2016); Michael Ford, *The Effect of Brexit on Worker’s Rights*, 27 KING’S L. J. 398, 399, 411 (2016).

⁸⁶ See generally Directorate-General of Trade, *Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives*, EURO. COMM’N (July 2, 2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf.

⁸⁷ *Sustainability Impact Assessments*, EURO. COMM’N, http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm (last visited Mar. 29, 2018).

⁸⁸ Castañeda & Heredia, *supra* note 81.

⁸⁹ Most of the references to human rights impact assessments of trade and investment agreements tend to involve the European Union and Canada (countries in the developed North America/European hemisphere rather than the Asia-Pacific). See, e.g., Elisabeth Bürgi Bonanomi, *Measuring Human Rights Impacts of Trade Agreements – Ideas for Improving the Methodology: Comparing the European Union’s Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology*, 9 J. HUM. RTS PRAC. 481, 481 (2017); James Rochlin, *A Golden Opportunity Lost: Canada’s Human Rights Impact Assessment and the Free Trade Agreement with Colombia*, 18 INT’L J. HUM. RTS. 545, 545 (2014); Isolda Agazzi, *Human Rights Impact Assessments in Free Trade Agreements*, UNCTAD (Mar. 27, 2012), http://unctad.org/meetings/en/SessionalDocuments/ditc_dir_2012d3_Agazzi.pdf.

⁹⁰ See BERNE DECLARATION, CANADIAN COUNCIL FOR INTERNATIONAL CO-OPERATION & MISEREOR, HUMAN RIGHTS IMPACT ASSESSMENT FOR TRADE AND INVESTMENT AGREEMENTS (2010).

treaty negotiations—such as politicians and political elites;⁹¹ market actors, like chambers of commerce and industry associations;⁹² as well as trade and investment treaty negotiators who are schooled more in the techniques of international trade and foreign investment (and less so on international human rights law) and who might punt international human rights law and impacts questions back to governments, authorities, and legislatures in their respective states.⁹³

Certainly, the right to development—as described in the U.N. Declaration on the Right to Development⁹⁴—does not expressly make it mandatory for states to use human rights impact assessments for all of their economic decisions. However, in the aftermath of global financial crises and upheavals in states' economic decision-making policies in the last decade, the U.N. Human Rights Council issued its Resolution on March 16, 2017, which requests the Independent Expert (on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights—particularly economic, social and cultural rights) to “develop guiding principles for human rights impact assessments for economic reform policies, in consultation with States, international financial institutions and other relevant stakeholders, and to organize expert consultations for the development

⁹¹ See Jeffrey Kucik & Krzysztof J. Pelc, *Secret Negotiations at the World Trade Organization Create a Big Problem*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/06/secret-in-international-trade-negotiations-is-a-good-thing-true-or-false/?utm_term=.c2df624bf7d7.

⁹² Mercedes Botto, *Think Tanks in External Trade Negotiations: Do They Advise, Mediate, or Legitimate Interests? A Comparative Analysis of the Southern Cone*, in RESEARCH AND INTERNATIONAL TRADE POLICY NEGOTIATIONS: KNOWLEDGE AND POWER IN LATIN AMERICA 48, 62–63 (Mercedes Botto ed., Routledge 2010) (“The private sector, essentially that represented by the business chambers, does not normally engage in research. It does take part in the process by advising negotiators of its positions and/or the sector’s demands on one or another negotiation or scenario, but its participation is defensive and it makes few proposals In recent years, some of the business chambers with noticeably offensive interests have become professionalized.”).

⁹³ See Stephen Joseph Powell & Trisha Low, *Beyond Labor Rights: Which Core Human Rights Must Regional Trade Agreements Protect?*, 12 RICH. J. GLOBAL L. & BUS. 91, 93 (2012) (“Captured within dozens of United Nations human rights treaties and a growing corpus of customary international norms, human rights law embraces literally hundreds of specific entitlements, each by U.N. guarantee indivisible, interdependent, and interrelated. This foreboding array of obligations, each ostensibly of equal rank, whose legal intricacies are sometimes beyond the experience and training of trade ministries, explains the reluctance of trade negotiators to undertake the responsibility for further integration of trade rules with human rights . . .”).

⁹⁴ See G.A. Res. 41/128, *supra* note 53, art. 2(3) (“States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development. . .”); *Id.* arts. 2(3), 8(2) (e.g., “States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.”).

of the guiding principles and a mapping of existing impact assessment tools.”⁹⁵ Likewise, the Committee on Economic, Social and Cultural Rights’ General Comment No. 24 now emphasizes the need for states to conduct human rights impact assessments before entering into trade and investment agreements: “The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development.”⁹⁶ In 2013, the World Bank together with the Nordic Trust Fund produced a useful *Study on Human Rights Impact Assessments (HRIAs)*, which identifies essential elements of HRIAs (e.g., normative human rights framework, public participation, equality and non-discrimination, transparency and access to information, accountability, inter-sectoral approach, and international policy coherence) as well as surveys of the spectrum of current methodologies used for HRIAs (e.g., methodological steps, quantitative and qualitative indicators, among others).⁹⁷ These are all promising developments that could assist states in devising human rights impact assessments as a routine and intrinsic part of their trade and investment negotiations processes.

Adjustments to Trade and Investment Impacts: Planning for Local Communities

Most importantly, apart from reckoning the human costs of state decisions to exit from, amend, revise, or renegotiate their trade and investment agreements, the state also has the heavy task of simultaneously planning policies and strategies to enable local communities to adjust to anticipated trade and investment impacts on employment, production, consumption, social security, and environmental protection, among others. States vary in their practices of providing trade adjustment assistance,⁹⁸ which often are a

⁹⁵ Human Rights Council, Mandate of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social, and Cultural Rights, U.N. Doc. A/HRC/34/L.3, at ¶13 (Mar. 16, 2017).

⁹⁶ Comm. on Econ., Soc. and Cultural Rights (CESCR), General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/GC/24, at ¶13 (Aug. 10, 2017).

⁹⁷ THE WORLD BANK & THE NORDIC TRUST FUND, HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS AND RELEVANCE FOR DEVELOPMENT 12–13 (Feb. 2013).

⁹⁸ See, e.g., David Hummels et al., *Offshoring, Transition, and Training: Evidence from Danish Matched Worker-Firm Data*, 102 AM. ECON. REV. 424, 424 (2012); Mary Anne Joseph, *Trade Adjustment Assistance: An Analysis*, 6 CONN. J. INT’L LAW 251, 255–61 (1990); Robert Z. Lawrence & Robert E. Litan, *Living with the Trade Deficit: Adjustment Strategies to Preserve Free Trade*, 4 BROOKINGS REV. 3–13 (1985);

combination of state-subsidized worker retraining programs, cash assistance, and other forms of social insurance programs to cushion against anticipated labor displacements or production impacts resulting from increased competition brought by free trade. The World Bank, the World Trade Organization, and the International Monetary Fund declared:

Trade has, however, negatively impacted groups of workers and some communities. Recent evidence on the effect of import competition on manufacturing jobs in certain locations in Europe and the United States demonstrates how harsh such impacts can be in the absence of accompanying policies. Dislocations depend not just on the size or abruptness of the trade shock, but on broader circumstances, such as the health of the economy, labor market rigidities, and other impediments to resource reallocation, as well as the adequacy of social protection policies. Moreover, policies that help to sustain strong economic and job growth can ease the costs of adjustments to trade. Understanding the various factors driving dislocations is critical to designing appropriate domestic policies to address them.

Domestic policies to address trade-related adjustments are critical. Easing worker mobility across firms, industries, and regions minimizes adjustment costs and promotes employment. Active labor market policies play an important role in supporting these initiatives. If well-designed and tailored to country circumstances, they can facilitate reemployment and augment worker skills; such policies include job search assistance, training programs, and, in some situations, wage insurance. Important social safety nets like unemployment insurance and other “passive” labor market policies can provide workers directly affected by import competition with an opportunity to retool on their own. While they have had a limited impact thus far, if well targeted and adequately financed trade adjustment assistance programs could take on a greater role.

Approaches beyond labor market policies are also needed. Education systems need to prepare workers for the changing demands of the modern labor market, and policies in areas such as housing, credit, and infrastructure need to facilitate mobility. Measures aimed at reviving hard-hit communities could also be considered. Dealing with dislocations early and comprehensively is critical since the impact may otherwise become entrenched in the

Greg Mastel, *Why We Should Expand Trade Adjustment Assistance*, 49 CHALLENGE 42, 42–57 (2006); Leslie Stein, *Trade Adjustment Assistance as a Means of Achieving Improved Resource Allocation through Freer Trade: An Analysis of Policies for Aiding the Import-Injured in the U.S., Canada, and Australia*, 41 AM. J. ECON. & SOC. 243, 243 (1982).

community, leading to outcomes that are harsher and longer-lasting. Measures that support competitiveness and productivity growth can also help to ensure that displaced workers find new opportunities.⁹⁹

It may seem premature to formulate trade adjustment strategies when negotiations on Brexit and the supposed new U.K.-EU treaty are in early stages, and NAFTA renegotiations are nowhere near reaching agreement on discrete points. However, the uncertain duration of existing or new global economic treaty rules makes it imperative for states that have focused on properly ensuring the right to development for their populations, to also adopt foresight in planning short-term and long-term trade adjustment strategies by forecasting worker displacements and shifts in demands for skilled and unskilled labor. This corresponds the needs of worker adaptability through continuing training and of education strategies that anticipate the diversification of needed skills and relevant expertise from those expected to join the job market after the new global economic treaty rules are concluded and enter into force. NAFTA took fourteen years to conclude in 1994,¹⁰⁰ from the time U.S. President Ronald Reagan first articulated a proposal for such an agreement in 1980. In that span of time, the United States has repeatedly been called upon to anticipate labor market changes and corresponding educational needs arising from changing labor markets adapting to NAFTA, such as in the U.S. General Accounting Office's 1997 Report on *NAFTA Impacts and Implementation*,¹⁰¹ a 2010 report filed with the National Bureau of Economic Research,¹⁰² and even a 2017 Congressional Research Service Report on NAFTA.¹⁰³ In 2016, the OECD G20 Employment Working Group issued its report, *Enhancing Employability*,¹⁰⁴ which emphasizes the need for continuing evaluation of the adaptability and fit of education policies and labor market strategies in the face of structural shifts from changes in global economic rules, the challenges of obsolescence arising from technological innovation and

⁹⁹ The International Monetary Fund (IMF), the World Bank (IBRD) & the World Trade Organization (WTO), *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment* 4–5, (2017), <https://www.imf.org/~media/Files/.../PP/041017joint-wto-wb-imf-trade-paper.ashx>.

¹⁰⁰ See Michael Wilson, *The North American Free Trade Agreement: Ronald Reagan's Vision Realized*, HERITAGE FOUND. (Nov. 23, 1993), <https://www.heritage.org/trade/report/the-north-american-free-trade-agreement-ronald-reagans-vision-realized>.

¹⁰¹ U.S. GEN. ACCT. OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: IMPACTS AND IMPLEMENTATION (1997), <https://www.gao.gov/assets/110/107055.pdf>.

¹⁰² See John McLaren & Shushanik Hakobyan, *Looking for Local Labor Market Effects of NAFTA*, (NBER Working Paper No. 16535, Nov. 2010), <http://www.nber.org/papers/w16535>.

¹⁰³ See generally M. ANGELES VILLAREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2017).

¹⁰⁴ OECD, ENHANCING EMPLOYABILITY 3–4 (2016).

automation—alongside the need for states to adopt policy coherence as they make economic decisions that stand to have lasting impacts on populations.

In this era of expected global economic rule changes, it is troubling that states are not holding counterpart discussions on devising long-term labor and education strategies to adapt to future competitiveness under the new economic rules. The World Bank's 2017 World Development Report just called the attention of states to an urgent learning crisis in global education, where learning outcomes and targets are misaligned with future job market needs.¹⁰⁵

Finally, during the period of rewriting economic rules through negotiations on Brexit and the supposed new U.K.-EU treaty, as well as the NAFTA renegotiations, it should also be emphasized that the states involved do not negotiate in a vacuum. There are dense international obligations taken on by all states involved which do not just refer to economic agreements, but more pertinently involve the rights owed under international human rights law to all individuals, groups, and local communities to be affected in the short term by the uncertainty of the regulatory environment, and in the long-term by the new rules arrived at by states' treaty negotiators. Especially since, as shown above, there are few direct opportunities for full participation by, and information exchange with, individuals, groups, and local communities in the NAFTA renegotiations process or the negotiations on Brexit and the new U.K.-EU treaty, it will be foreseeably harder for these constituencies of international human rights law and international environmental law to check their political representatives in real time during treaty negotiations. If the ultimate sources of sovereignty—which are precisely individuals, groups, communities, and populations—have to wait for a referendum to approve the new draft treaty texts; elections to replace or give another negotiating mandate to their current or future political agents; or even to seek recourse through domestic, regional, and/or international courts and tribunals (where possible), *before* they can vindicate their preexisting economic, social, cultural, and environmental rights as against infringing provisions of the new economic treaty rules, the exercise of sovereignty through exiting and concluding new trade agreements rings hollow.

The ends of trade and investment agreements, after all, are to realize the authentic meaning of development under the right to development, which is “the inalienable human right by virtue of which every human person and all

¹⁰⁵ See THE WORLD BANK, THE WORLD DEVELOPMENT REPORT 2018 3 (2018); The World Bank, *World Bank Warns of 'Learning Crisis' in Global Education* (Sept. 26, 2017), <http://www.worldbank.org/en/news/press-release/2017/09/26/world-bank-warns-of-learning-crisis-in-global-education>.

peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.”¹⁰⁶ This right is all the more crucial in these times, when politicians are obscurely rewriting the rules for all and are fueling the global economic policy and treaty uncertainty, without ensuring that individuals, citizens, groups, and communities actively take part¹⁰⁷ in drawing the terms of bargaining for the future global economic order.

¹⁰⁶ G.A. Res. 41/128, *supra* note 53, art. 1(1).

¹⁰⁷ See THE WORLD BANK, THE WORLD DEVELOPMENT DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW.