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The state of exception and the law of the global economy: a conceptual and empirico-legal inquiry

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ABSTRACT

Stimulated by Italian philosopher Giorgio Agamben's thought-provoking claim that the 'state of exception' is becoming the dominant paradigm of government, this article explores what role, if any, the exception plays in the law of the global economy. The article first develops the conceptual lens to examine the complex legal arrangements governing cross-border economic relations. It then examines two examples to assess the explanatory power of the state of exception paradigm in spatially defined sites for the production and export of manufactured goods, and in insulated contractual regimes governing the extraction of natural resources. The findings point to the relevance of debates about the exception to the structuring of transnational economic relations, but in configurations that significantly depart from Agamben's theories. The findings provide insights for reconceptualising the relationships between rule and exception, between the global and the national, and between territory and sovereignty.

KEYWORDS State of exception; Agamben; special economic zones; labour rights; stabilisation clauses

I. Introduction

There is renewed contestation over the political, economic, social, cultural and technological processes commonly referred to as globalisation. Discussions about the opportunities that a more integrated world can provide have been accompanied by concerns about democracy, inequality and exploitation.[1] As the legal instruments facilitating cross-border economic relations

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[1] For illustrative disparate takes on this vast, complex and multi-faceted debate, see, eg, Joseph E Stiglitz, *Globalization and Its Discontents* (WW Norton, 2002); Jagdish Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004); Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton, 2011); François Bourguignon, *The Globalization of Inequality*, trans Thomas Scott-Railton (Princeton University Press, 2015); Branko Milanovic, *Global Inequality: A New Approach for*

have expanded their reach, they have also triggered heated debates—as experienced, for example, in the recent negotiation of proposed trade and investment treaties.[2] At the same time, some of the liberal democracies that have historically championed globalisation face internal 'populist' movements and new security threats that can affect—directly, or via the policy responses adopted—the foundations of political ordering.

Amidst narratives of political, economic, security and humanitarian crisis, government responses to actual or perceived emergencies have fostered public reflection about the claim that the 'state of exception'—the suspension of ordinarily applicable law—is an increasingly resorted-to mechanism of government in contemporary politics. Most explicitly articulated by Italian philosopher Giorgio Agamben,[3] and taken up in a wide range of juristic and philosophical writings,[4] the state of exception thesis has provided a contested lens for interrogating some of the world's most difficult political challenges—from the plight of refugees to the exceptional regime applied to people detained in the 'war on terror'.[5] The resulting debates have raised complex theoretical and practical issues, but they have often focused on specific situations connected to the exercise of political authority in national polities. Open questions remain on the relevance, if any, of the state of exception paradigm to understanding the legal and institutional configurations that sustain the global economic order.[6]

the Age of Globalization (Harvard University Press, 2016); Anabel González, World Economic Forum, 'Why Globalization Is the Only Way Forward' (22 August 2016), online: <www.weforum.org/agenda/2016/08/why-globalization-is-the-only-way-forward> (accessed 15 July 2017); Deborah Hardoon, Oxfam, 'An Economy for the 99%: It's Time to Build a Human Economy That Benefits Everyone, Not Just the Privileged Few' (16 January 2017), online: <http://policy-practice.oxfam.org.uk/publications/an-economy-for-the-99-its-time-to-build-a-human-economy-that-benefits-everyone-620170> (accessed 15 July 2017).

[2] In Europe, a public petition on the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the proposed Transatlantic Trade and Investment Partnership (TTIP) reportedly marshalled over three million signatures. See Cécile Barbière, Euractiv, '"Stop TTIP" Petition Is Legitimate, Top EU Court Rules' (11 May 2017), online: <www.euractiv.com/section/economy-jobs/news/stop-ttip-petition-is-legitimate-top-eu-court-rules/> (accessed 15 July 2017).

[3] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* trans Daniel Heller-Roazen (Stanford University Press, 1998) 9 [*Homo Sacer*]; and Giorgio Agamben, *State of Exception*, trans Kevin Attell (University of Chicago Press, 2005) 2 [*State of Exception*].

[4] Among the many examples, see, eg, Fleur Johns, 'Guantànamo Bay and the Annihilation of the Exception' (2005) 16(4) *European Journal of International Law* 613; Stephen Humphreys, '*Legalizing Lawlessness: On Giorgio Agamben's* State of Exception' (2006) 17(3) *European Journal of International Law* 677; Gavin Sullivan and Marieke de Goede, 'Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise' (2013) 26(4) *Leiden Journal of International Law* 833; and Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (SUNY, 2013).

[5] See, eg, Patricia Owens, 'Reclaiming "Bare Life"?: Against Agamben on Refugees' (2009) 23(4) *International Relations* 567; Arne De Boever, The Philosophical Salon/Los Angeles Review of Books, *Bartleby, Refugee, Sovereignty* (23 November 2015), online: <http://thephilosophicalsalon.com/bartleby-refugee-sovereignty/> (accessed 1 September 2016); Kieryn Wurts, Religious Theory, 'NOTATIONS—Agamben's Homo Sacer, Refugees, and the Crisis of European Values' (3 March 2016), online: <http://jcrt.org/religioustheory/2016/03/03/notations-agambens-homo-sacer-refugees-and-the-crisis-of-european-values/> (accessed 1 September 2016).

[6] But see Kanishka Jayasuriya, *Reconstituting the Global Liberal Order: Legitimacy and Regulation* (Routledge, 2005) 6; Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Duke University Press, 2006), 5 [*Neoliberalism as Exception*].

This article explores the role of the exception in the sinews of the global economy. It focuses on the legal arrangements that underpin the mobilisation of labour for the production of low-cost manufactured goods, and of capital to finance the extraction of natural resources. The article first lays out the conceptual framework for the analysis, critically engaging with Agamben's thought and developing a lens to examine the complex legal processes governing cross-border economic relations (Section II). This conceptual part discusses some of the theoretical challenges involved in transposing the state of exception paradigm from the spheres of the national and the political to the structures of economic globalisation: while Agamben's exploration focuses on national political ordering and is primarily philosophical, this article discusses transnational economic arrangements in juristic terms. The conceptual part explores the issues at stake and draws them together into an analytical lens.

The article then examines two emblematic examples to assess the explanatory power of the state of exception paradigm in economic relations: the legal regime governing special economic zones (SEZs) for industrial development (Section III), and the use of consistency and stabilisation clauses in investor–state contracts for natural resource investments (Section IV). These two examples provide arenas for empirico-legal analysis investigating the exception in spatially defined sites for the production and export of manufactured goods, and in insulated contractual regimes governing the extraction of natural resources. The findings point to the relevance of contemporary debates about the exception to the structuring of economic relations, but in configurations that significantly depart from Agamben's theories. The conclusion (Section V) discusses the implications of these findings for reconceptualising the relationships between rule and exception, between the global and the national, and between territory and sovereignty.

II. Rule and exception: from Guantanamo to the law of the global economy

A. Giorgio Agamben and the state of exception

An ambitious body of work developed over a period of 20 years has made Giorgio Agamben a key theorist of the state of exception in contemporary politics, and a necessary philosophical interlocutor for conceptualising the state of exception in economic relations.[7] As some governments responding

[7] See particularly *Homo Sacer* and *State of Exception* (n 3). Agamben's thought is complex and wide-ranging, spanning politics, ethics, linguistics and aesthetics. This article only considers Agamben's political works that discuss the state of exception. Given the inter-relatedness of different areas of Agamben's thought, the inherent limitations of this approach must be acknowledged.

to terrorist threats embraced the language of war to justify practices that would be deemed unacceptable in ordinary times (including 'extraordinary rendition' and indefinite detention without trial),[8] Agamben's provocative argument that the state of exception is now 'the dominant paradigm of government'[9] has become a reference point for those scrutinising the practices of government in democratic societies.

Agamben's work connects the state of exception to the foundation of political authority, taking an approach that, while grounded in history, is conceptual rather than historiographic. Michel Foucault's concept of biopolitics provides a useful point of departure to discuss Agamben's ideas. For Foucault, biopolitics refers to the inscribing of human life—eg, the health of the population, its productive and reproductive capacity—within the realm of the political.[10] In Agamben's thought, the state of exception is the juridico-institutional arrangement for capturing human life in political ordering. While Foucault saw biopolitics as a distinctive feature of the modern state, Agamben reconfigures that notion and traces it to developments dating back to antiquity.

A concept featuring prominently in Agamben's work is that of *homo sacer*—a figure of archaic Roman law whereby those who committed certain crimes were banned from society and could be killed with impunity. Agamben argues that, in establishing an exception to the rules punishing homicide, the *sacratio* reduced a human being to a body deprived of legal rights—to 'bare life', in Agamben's words.[11] For Agamben, this situation differs from a 'state of nature' where no law exists: in the *sacratio*, the law is in force but does not apply, and a *homo sacer* is, in effect, *included* in political ordering by way of *exclusion*. Agamben sees parallels between this emblematic case of exceptional 'suspension of law' on the one hand, and a range of experiences throughout human history on the other, up to the Nazi concentration camps where millions of human beings were treated as bodies that could be killed and experimented upon with impunity.[12]

From these specific experiences, Agamben goes on to elaborate a more general theory on the role of the state of exception in (bio)political ordering. While Agamben discusses examples from different moments in human history, he is mainly concerned about the present—claiming that public authorities in contemporary liberal democracies increasingly invoke the state of

[8] On the use of 'war on terror' narratives and its implications for public action, see Frédéric Mégret, '"War"? Legal Semantics and the Move to Violence' (2002) 13(2) *European Journal of International Law* 361.
[9] Agamben, *State of Exception* (n 3) 2.
[10] See, eg, Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, trans Graham Bruchell (Palgrave Macmillan, 2008).
[11] Agamben, *Homo Sacer* (n 3) 71–90.
[12] Agamben, *Homo Sacer* (n 3) 166–80. See also Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans Daniel Heller-Roazen (Zone Books, 1999).

exception as a means to legitimise, expand and exercise government functions. As Agamben succinctly put it, 'the exception everywhere becomes the rule'.[13] This normalisation of the state of exception echoes ideas from Carl Schmitt, who tied the state of exception to the foundations of sovereignty,[14] and Walter Benjamin, who in the midst of World War II argued that 'the "state of emergency" in which we live is not the exception but the rule'.[15] Agamben builds on these insights to develop a philosophical account of political authority that places the state of exception at centre-stage. While seeking to expose what he sees as the fundamental, if 'hidden', codes of contemporary political ordering,[16] Agamben alludes—in vague and somewhat messianic terms—to the prospect of a 'new politics' that would free human beings from chains which, in his view, the institutions of liberal democracy can mask but ultimately not break.[17]

B. The state of exception: philosophical and juristic conceptions

Agamben's thought has stimulated extensive debate in philosophy, history, sociology and law, and has been subjected to extensive critique.[18] Accusations of political nihilism have been fairly common, and some commentators have taken issue with Agamben's apparent belief that waiting and exposing in the face of catastrophe might somehow pave the way to redemption.[19] Some found Agamben's writing style at times hyperbolic,[20] and his methods have been criticised for jumping too quickly from erudite dissections of a particular concept as used by ancient authors at a specific point in time, to generalised historical claims.[21] In fact, some of Agamben's historical accounts have been disputed, including his interpretation of the *sacratio* in Roman law.[22] From a sociological perspective, Agamben's failure to marshal any empirical evidence would seem to undermine his remarkable claim that the state of exception is the new prevailing paradigm of government,[23] although some have identified

[13] Agamben, *Homo Sacer* (n 3) 9.
[14] Schmitt (in)famously defined the sovereign as 'he who decides on the exception'—that is, he who has the authority to suspend the legal order. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans George Schwab (MIT Press, 1985) 5.
[15] Walter Benjamin, Simon Fraser University, *On the Concept of History* (1942), online: <www.sfu.ca/~andrewf/CONCEPT2.html> [VIII] (accessed 1 September 2016).
[16] Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans Lorenzo Chiesa (Stanford University Press, 2011) 50 [*The Kingdom and the Glory*].
[17] See Jessica Whyte (n 4) 7–15, 21–22.
[18] See, eg, Mika Ojakangas, 'Impossible Dialogue on Bio-power: Agamben and Foucault' (2005) 2 *Foucault Studies* 5; and Antonis Balasopoulos, 'The Discreet Charm of the "Anarchist Sublime": Sovereign Power and Bare Life Revisited' (2012) 3 *Occasion: Interdisciplinary Studies in the Humanities* 1.
[19] See the extensive discussion in Jessica Whyte (n 4), particularly at 7–15.
[20] Jessica Whyte (n 4) 3.
[21] Ernesto Laclau, 'Bare Life or Social Indeterminacy?' in Matthew Calarco and Steven Decaroli (eds), *On Agamben: Sovereignty and Life* (Stanford University Press, 2007), 11–22, at 12.
[22] Balasopoulos (n 18) 5–16.
[23] Humphreys (n 4) 681, 683.

in the 'legal black hole'[24] associated with indefinite detentions in the American base at Guantanamo Bay a disturbing reminder of Agamben's contemporary relevance.[25]

For lawyers, Agamben's work creates challenges due to the use of law-related terminology that appears to resonate with familiar legal concepts, contrasted with patterns of analysis that differ markedly from doctrinal approaches. These challenges create tensions between juristic and Agambian categories, requiring careful mediation in any attempts to draw on Agamben's thought to frame legal analysis. The notion of the state of exception is at the heart of these tensions. Lawyers would instinctively tend to associate that notion with emergency decrees that, in response to extraordinary situations, suspend the application of specific laws or rights in a particular place and time. They would also tend to point out that such 'states of emergency do not create a legal vacuum':[26] international humanitarian law protects human life and dignity in armed conflicts, and international human rights law applies even in emergencies.[27] Human rights treaties typically do allow states to temporarily derogate from certain provisions, but most treaties affirm core rights that cannot be suspended even in times of national emergency.[28] Under the contemporary international law, no life is ever bare.

In a sense, such juristic considerations would fly past Agamben's thesis, because Agamben claims to interrogate the state of exception from a philosophical rather than juridical perspective.[29] He frames the state of exception as the suspension of the legal order as a whole, rather than of specific laws or

[24] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) *International and Comparative Law Quarterly* 1.

[25] For a discussion, see Humphreys (n 4) 684. See also Agamben, *State of Exception* (n 3) 3–4.

[26] Tahmina Karimova, 'Derogation from Human Rights Treaties in Situations of Emergency', online: <www.adh-geneve.ch/RULAC/print.php?page=12> (accessed 1 September 2016).

[27] See, eg, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996 [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgement*, ICJ Reports 2005 [216].

[28] See Article 4(2) of the International Covenant on Civil and Political Rights (*International Covenant on Civil and Political Rights*, 16 December 1966, UNTS 999); and at the regional level, Article 27(2) of the American Convention on Human Rights (*American Convention on Human Rights*, 22 November 1969, UNTS 1144), and Article 15(2) of the European Convention on Human Rights (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, UNTS 213). While the African Charter on Human and Peoples' Rights (African Charter on Human and Peoples' Rights, 27 June 1981, UNTS 1520) does not contain a derogation clause, the jurisprudence of the African Commission on Human and Peoples' Rights has scrutinised government attempts to suspend rights in response to national emergencies; see Frederick Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR' (2013) 1(1) *Birkbeck Law Review* 135, at 153–62. On derogations under international human rights law, see also Emilie M Hafner-Burton, Laurence R Helfer and Christopher J Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 *International Organisation* 673; and UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency* (31 August 2001), online: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en> (accessed 1 September 2016).

[29] See also Humphreys (n 4) at 680, 684.

rights, thereby establishing a space where the authority of the sovereign is effectively unbridled. Conceived in these terms, the state of exception is 'unrelated to the juridical order':[30] it is 'the anomie that results from the suspension of law', whereby the law is in force but is deprived of its normativity.[31] For Agamben, a formally declared state of emergency merely provides a cloak of legality to situations where the law, in effect, 'withdraws'. Put differently, Agamben positions his arguments at a deeper level of analysis than the space where legal arguments about emergency decrees and treaty derogations would operate.

That said, Agamben leaves the precise contours of that deeper level remarkably undefined, and at times appears to talk about the state of exception in looser terms. For example, Agamben's 'empirical' claim about the growing pervasiveness of the state of exception in contemporary politics is sometimes related to situations that involve suspending specific laws or rights, increasing the discretionary power of the executive, by-passing legislative processes or establishing special courts—rather than a wholesale and somewhat abstract 'withdrawal' of the legal order.[32] Depending on the situation, these exceptional regimes may in fact involve the application of complex legislation, and they may be subject to contestation and evolution over time—for example, where courts scrutinised and ultimately reconfigured the exceptional regimes.[33] Even the emblematic case of Guantanamo Bay has been shown to entail extensive regulation, which evolved in response to decisions of the US Supreme Court.[34] The upshot is that, in many cases, discussing the empirical relevance of the state of exception paradigm has involved shifts from philosophical to juristic categories. In navigating the gulf between philosophical and juristic conceptions, this article takes an empirico-legal approach that locates the state of exception within the juridical rather than the philosophical realm.

C. Political and economic, national and transnational ordering

Agamben places political ordering at the centre of his analysis. He does discuss the economic sphere (*oikonomia*), depicting a space for managerial, technocratic decision making that correlates closely with his notion of the state of exception.[35] But this exploration falls short of fully investigating what role, if any, the state of exception plays in global economic ordering. Agamben talks of humanity in indistinct terms and devotes limited attention

[30] Agamben, *State of Exception* (n 3) 23.
[31] Agamben, *State of Exception* (n 3) 51. See also, eg, pages 36–40.
[32] See, eg, Agamben, *State of Exception* (n 3) 3–4, discussing US legal instruments enabling indefinite detention and trial by military commissions in the context of the 'war on terror'.
[33] Humphreys (n 4) 684. See also Sullivan and de Goede (n 4) 840–1.
[34] Johns (n 4).
[35] Agamben, *The Kingdom and the Glory* (n 16) 50.

to questions of labour and capital.[36] Other authors have placed greater emphasis on the socio-economic dimensions of the state of exception, and even traced them to what Agamben identifies as the conceptual roots of that notion: while Agamben connects *homo sacer* to the establishment of political authority,[37] others noted that the Roman *sacratio* was partly deployed to protect the plebeians from their patrician patrons, thereby rebalancing unequal socio-economic as well as political relations.[38] In more contemporary terms, some critical theorists see features of global capitalism as the main drivers of bare life in modern societies.[39] In this perspective, 'land grabbing', labour exploitation or poor living conditions in urban slums or deprived rural areas would represent the faces of bare life in the global economy.[40]

Shifting the lens from the political to the economic brings into focus a different set of legal issues. This is not only because human rights derogations linked to armed conflict or military occupation can be associated with disruption of economic activities.[41] Nor is it limited to situations where governments invoke extraordinary circumstances to justify departures from ordinary patterns of economic ordering—for example, to impose regressive law reforms in the name of economic necessity,[42] or to resist business claims for damages caused by measures taken in the context of dramatic economic reversals.[43] Beyond these crisis situations, the everyday operation of cross-border trade and investment flows raises questions about what role, if any, the exception plays in global economic ordering. Exceptional legal regimes for export-oriented activities in low- and middle-income countries—from natural resource extraction to low-cost manufacturing—provide fertile ground to explore these questions. Rather than on crisis narratives, these exceptional regimes are often premised on real or perceived economic

[36] Jessica Whyte (n 4), eg, 127–8.
[37] Agamben, *Homo Sacer* (n 3) 56, 64.
[38] Balasopoulos (n 18) 6–9.
[39] Michael Marder, 'Taming the Beast: The Other Tradition in Political Theory' (2006) 39(4) *Mosaic: A Journal for the Interdisciplinary Study of Literature* 47, at 55.
[40] For a discussion of *Homo Sacer* in relation to labour, see, eg, David Whyte, 'Naked Labour: Putting Agamben to Work' (2009) 31 *Australian Feminist Law Journal* 37.
[41] The International Court of Justice has assessed violations of international human rights and humanitarian law linked to the confiscation of agricultural land and the destruction of crops and other economic assets in the context of military occupation. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 27) [132–133, 137].
[42] See, eg, Alan Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35 (4) *Legal Studies* 594; Bernadette A Meyler, 'Economic Emergency and the Rule of Law' (2007) 56 *DePaul Law Review* 539. On the notion of 'economy of sacrifice', whereby sacrifices are imposed in the expectation of future gains, see Anne Orford, 'Trade, Human Rights and the Economy of Sacrifice' (NYU School of Law, 2004), especially at 19–24. For a critical theoretical perspective on economic states of emergency, see Slavoj Žižek, 'A Permanent Economic Emergency' (2010) 64 *New Left Review* 85.
[43] 'Necessity defences' were invoked, for example, in several investor–state arbitrations stemming from Argentina's economic crisis of 2001. See Elizabeth A Martinez, 'Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases' (2012) 23 *Duke Journal of Comparative and International Law* 149.

imperatives such as attracting foreign investment to promote national development.

Interrogating these arrangements would require fine-tuning the necessary conceptual categories. While in political ordering the nation-state remains the key unit of analysis and the state of exception is primarily conceptualised in relation to national systems, the local-to-global reality of contemporary economic relations transcends the confines of national polities—a circumstance that is reflected in applicable legal arrangements. Over the past few decades, extensive developments in the 'law of the global economy'[44] have reconfigured normative frameworks anchored to national, international and transnational processes—from international trade, tax and investment treaties, to national regulation in areas such as natural resources, labour and taxation, through to transnational contracts setting tailored terms for individual business ventures. Challenging the conventional boundaries of academic disciplines, these developments involve hybrids of public and private regulation, increasingly sophisticated channels for the diffusion of regulatory models and complex constellations of geographically dispersed sites of regulation at local to global levels.

Socio-legal scholarship has enriched public understanding of this interplay of both physical and legal spaces through notions of 'global legal pluralism',[45] 'law and globalisation',[46] 'global law',[47] and transnational law reinterpreted not just as a function of the material existence of cross-border legal relations,[48] but as a methodological prism to interrogate legal institutions in contexts where space is itself socially constructed rather than materially given.[49] Overall, these evolutions blur the traditional borderlines between the national and the international: national laws may be based on, or 'impregnated by', international norms, global codes of conduct and transnational channels for law diffusion—so that identifying

[44] Federico Ortino and Matteo Ortino, 'Law of the Global Economy: In Need of a New Methodological Approach?' in Collin B Picker, Isabella D Bunn and Douglas W. Warner (eds), *International Economic Law: The State and Future of the Discipline* (Hart Publishing, 2008) 89.

[45] Francis Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) 5(4) *European Law Journal* 334; Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155; William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative and International Law* 473; Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge, 2012) 15–21.

[46] Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law* 485; Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Traves (eds), *Law and Society Theory* (Hart Publishing, 2013), 287.

[47] Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014).

[48] Philip C Jessup, *Transnational Law* (Yale University Press, 1956).

[49] Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism' (2011) Osgoode CLPE Research Paper 21/2011; Philip Liste, 'Transnational Human Rights Litigation and Territorialised Knowledge: *Kiobel* and the "Politics of Space"' (2014) 5(1) *Transnational Legal Theory* 1. See also Gregory Shaffer, 'Transnational Legal Process and State Change: Opportunities and Constraints' (2010) University of Minnesota Law School Legal Studies Research Paper Series Research Paper No 10–28.

the formal sources of law does not fully capture the political origins, economic assumptions, normative content and social practices associated with these norms.[50]

D. The state of exception and the law of the global economy: towards an analytical lens

In highlighting some of the challenges involved in transposing Agamben's thought to transnational economic relations, the foregoing exploration has laid the ground for the more explicit statement of an analytical lens that, in departing from Agamben's ideas, enables investigating the role of the exception in global economic ordering. This lens rests on three elements. First, Agamben's thought informs and stimulates the framing, but the analysis is empirico-legal rather than philosophical. The empirico-legal approach involves using the conventional arsenal of juristic interpretation techniques to assess the explanatory power of the state of exception paradigm. Second, the focus is on economic rather than political ordering, and on 'everyday' integration into the global economy rather than major crises threatening the economic survival of the nation. Third, to consider the local-to-global dimensions the analysis mobilises a broad concept (the law of the global economy) that reflects the dynamic interplay between diverse legal frameworks embedded in national, international and transnational spaces.

A comprehensive exploration would require examining the diverse 'sites' of activity that underpin the global economy—from the workings of financial markets and the digital economy, to the commercial extraction of natural resources, through to the production and exportation of manufactured goods. Questions about the exception would be expected to arise in different ways in each site of economic activity, reflecting diverse socio-economic, political and legal realities. For example, manufacturing can involve important spatial dimensions linked to market- or policy-driven industrial clustering in specific geographic areas, raising questions about the role, if any, that exceptional legal arrangements play in integrating subnational territories into global value chains. 'Spatial development initiatives' such as growth poles and corridors—possibly underpinned by public–private partnerships and tailored legal frameworks—would also raise questions in eminently spatial terms.

On the other hand, many large-scale infrastructure or natural resource projects in low- and middle-income countries operate through contractual arrangements that create legal regimes tailored to the project. This set up raises questions about the relevance of the exception to legal enclaves that

[50] Francis Snyder, 'Economic Globalization and the Law in the 21st Century' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishers, 2004), 624.

are primarily defined by contractual rather than spatial parameters. Spatial and contractual dimensions can intersect—for example, where growth corridors involve interlinked systems of SEZs and large-scale investment projects, each governed by spatially or contractually defined regimes. Exceptional regimes, whether spatial or contractual, can affect different aspects of the integration of labour and/or capital into production processes, by acting on diverse sets of relations and at different locations in global supply chains, and by establishing variable configurations that link different kinds of business enterprises, public authorities at local to national levels, workers and their organisations, and people affected by the social and environmental impacts of commercial activities.

The remainder of this article examines two emblematic examples to investigate, with regard to export-oriented activities in low- and middle-income countries, the role of the exception: (i) in its spatial dimensions, focusing on SEZs for industrial development; and (ii) in its contractual dimensions, examining consistency and stabilisation clauses in natural resource contracts. By shedding light on the legal arrangements that mobilise labour for low-cost manufacturing, and that protect capital to finance natural resource extraction, these examples provide some initial insights on what role, if any, the exception plays in integrating productive activities into the global economy. The next two sections explore these spatial and contractual dimensions in turn.

III. The spatial dimensions of the exception: the case of SEZs

SEZs are 'demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory'.[51] With historical roots in the sixteenth century, modern antecedents in 1950s Ireland and a contemporary testing ground in 1980s China, SEZs have had considerable uptake in many low- and middle-income countries over the past three decades.[52] Broadly aimed at promoting investment to foster economic development, SEZs can have diverse specific objectives, sectoral focus and legal regimes—including export processing zones (EPZs), free trade zones, industrial zones and agribusiness parks. Depending on the situation and the perspective taken, the establishment of SEZs has raised hopes for new livelihood opportunities, but it has also raised concerns—for example, in relation to land acquisition for industrial

[51] Thomas Farole, World Bank, *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experiences* (2011), online: <https://openknowledge.worldbank.org/handle/10986/2268> (accessed 1 September 2016), 23.

[52] For an overview of issues concerning SEZs in low- and middle-income countries, see Thomas Farole and Gokhan Akinci (eds), World Bank, *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (2011), online: <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Exto00Box0361527B0PUBLIC0.pdf> (accessed 1 September 2016).

development,[53] and to applicable labour standards.[54] Legal regimes and institutional set-ups vary significantly. Depending on the circumstances, however, SEZs may involve excluding or modifying the application of parts of the national law in defined geographic areas. This feature provides fertile ground for interrogating the spatial aspects of the exception.

The legal regime governing SEZs can present important international dimensions. States have established special zones across national boundaries, creating arenas for supra-national instruments and jurisprudence.[55] In addition, tensions can arise between national SEZ regimes and international regulation, for example where export-related incentives conflict with international trade rules,[56] or where loopholes in SEZ regimes enable businesses to jump trade tariffs.[57] In some contexts, SEZs have provided the testing ground for the negotiation of international treaties, offering spaces to incubate policy choices ahead of the negotiation of treaties likely to require significant economic liberalisation.[58] But while such diverse connections can exist between international law and SEZs, SEZs tend to be primarily governed by national regulation, and they often involve tailored legislation—for example in India,[59] Myanmar,[60] and the Philippines.[61]

Space constraints prevent a comprehensive exploration of SEZ legislation, including its diversity in different national contexts and the multiple channels for 'horizontal' law diffusion across jurisdictions. Instead, what follows is a brief discussion of the law governing Bangladesh's EPZ programme. As

[53] See, eg, Michael Levien, 'The Land Question: Special Economic Zones and the Political Economy of Dispossession in India' (2012) 39(3–4) *Journal of Peasant Studies* 933; and Preeti Sampat, 'The "Goan Impasse": Land Rights and Resistance to SEZs in Goa, India' (2015) 42(3–4) *Journal of Peasant Studies* 765.

[54] See, eg, European Parliament, *European Parliament Resolution of 29 April 2015 on the Second Anniversary of the Rana Plaza Building Collapse and Progress of the Bangladesh Sustainability Compact (2015/2589 (RSP))*, online: <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0175&language=EN&ring=P8-RC-2015-0363> (accessed 1 September 2016) [*Sustainability Compact*]. The resolution raises concerns about the labour standards applicable in Bangladesh's EPZs (Sections L, P and 11).

[55] See, eg, the transnational growth triangles established in Southeast Asia from the 1980s, discussed by Ong, *Neoliberalism as Exception* (n 6) 88–92. See also *Free Zones of Upper Savoy and District of Gex (France v Switzerland)*, 1932 PCIJ (Series A/B) No 46 (7 June 1932).

[56] Depending on their design and implementation, for example, incentives tied to exports could be inconsistent with the WTO Agreement on Subsidies and Countervailing Measures, Annex 1A to the Agreement Establishing the World Trade Organization (Agreement on Subsidies and Countervailing Measures, 15 April 1994, 1869 UNTS 14).

[57] Naoko Koyama, World Bank, 'SEZs in the Context of Regional Integration: Creating Synergies for Trade and Investment' in Thomas Farole and Gokhan Akinci (eds), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (2011), online: <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Exto00Box0361527B0PUBLIC0.pdf> (accessed 1 September 2016), 127, at 128.

[58] On the role of the China (Shanghai) Pilot Free Trade Zone as a testing ground for China's negotiation of a pre-establishment bilateral investment treaty with the United States, see Jie Huang, 'Challenges and Solutions for the China–US BIT Negotiations: Insights from the Recent Development of FTZs in China' (2015) 18(2) *Journal of International Economic Law* 307, at 310–13.

[59] Special Economic Zones Act No 28 of June 2005 (India, Federal).

[60] Myanmar Special Economic Zones Law No 1 of 23 January 2014.

[61] Special Economic Zone Act No 7916 of 1995 (Philippines), as amended.

will be seen, this programme has been closely linked to the development of Bangladesh's garment industry, which in turn has been at the centre of debates about labour relations in developing country industrial development.[62] In this regard, Bangladesh's EPZ programme provides a relevant case study for interrogating the exception in its spatial dimensions—especially as the critical literature has linked Agamben's notion of *homo sacer* to labour relations in SEZs.[63] However, it is recognised that this case is not necessarily representative of wider trends, and there is no suggestion that Bangladesh's EPZ programme involves a greater, or lesser, degree of departure from the ordinarily applicable law compared to other SEZ experiences worldwide.

Having initially pursued an import-substitution development strategy, the government of Bangladesh adopted a policy to establish EPZs as part of wider reforms to attract foreign investment and promote exports as a route to economic development. The Bangladesh Export Processing Zones Authority (BEPZA) Act of 1980, as amended, provided the legal basis for the establishment of state-run EPZs,[64] while—in a powerful illustration of international to national legal cross-fertilisation—the Foreign Private Investment (Promotion & Protection) Act of 1980 established into national law internationally derived standards of investment protection including 'fair and equitable treatment', 'full protection and security' and conditions for the legality of expropriations.[65] Bangladesh has concluded 28 bilateral investment treaties, of which 24 appear to be in force,[66] as well as a number of double taxation treaties.

Despite these legal reforms, the EPZ programme had a slow take-off: the first EPZ was established in 1983, the second 10 years later and six more in subsequent years.[67] However, the phasing out in 2004 of the international Multi-Fibre Arrangement that imposed trade quotas on textile and clothing

[62] Among the many examples, see, eg, Sarah Labowitz and Dorothée Baumann-Pauly, NYU Stern Center for Business and Human Rights, *Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers* (2015), online: <http://people.stern.nyu.edu/twadhwa/bangladesh/downloads/beyond_the_tip_of_the_iceberg_report.pdf> (accessed 1 September 2016); Motoko Aizawa and Salil Tripathi, 'Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers' (2015) 1(1) *Business and Human Rights Journal* 145; Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders?: What We Can Learn from the Rana Plaza Factory Building Collapse' (2015) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 11.

[63] David Whyte (n 40) 67.

[64] Bangladesh Export Processing Zones Authority Act No XXXVI of 26 December 1980, as amended.

[65] Bangladesh Foreign Private Investment (Promotion & Protection) Act No XI of 1 April 1980. Many international investment treaties contain comparable investment protection standards.

[66] UNCTAD, *International Investment Agreements Navigator – Bangladesh*, online: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/16#iiaInnerMenu> (accessed 1 September 2016).

[67] Mustafizul Hye Shakir and Thomas Farole, World Bank, 'The Thin End of the Wedge: Unlocking Comparative Advantage Through EPZs in Bangladesh', in Thomas Farole and Gokhan Akinci (eds), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (2011), online: <https://openknowledge.worldbank.org/bitstream/handle/10986/2341/638440PUB0Exto00Box0361527B0PUBLIC0.pdf> (accessed 1 September 2016), 25, at 28.

from developing countries,[68] duty-free entry to the European Union's market under the 'Everything But Arms' scheme of trade preferences for least-developed countries,[69] and a global restructuring of the apparel industry involving downward pressures on international prices have fostered rapid growth in Bangladesh's garment sector, with the country becoming the world's second-largest garment exporter after China.[70] The garment industry accounts for two-thirds of the companies active in Bangladesh's EPZs, though the EPZs only account for 20% of national garment exports.[71] As of 2009, the EPZs hosted about 220,000 jobs,[72] while an estimated four million people work in Bangladesh's garment industry country-wide.[73]

With many companies moving in, land scarcity has become a problem for the EPZs, and there is reportedly little space left for new industrial units in the two major EPZs.[74] In addition, the government is seeking to diversify away from the garment industry, and to promote greater involvement of the private sector in the ownership and management of SEZs.[75] Therefore, while the BEPZA Act continues to regulate existing EPZs, new 'economic zones' are to be established under a new Bangladesh Economic Zones Act. This law created a separate authority (the Bangladesh Economic Zones Authority, BEZA) and a more flexible regime for a wider range of SEZ types and of economic activities, including operations not focused on export processing, and including privately initiated and operated economic zones.[76] Several economic zones are currently under development.

While the EPZs have been successful in fostering business activity, they have also come under scrutiny. Low wages were found to have been an important factor in the take-off of the EPZs,[77] although the government has more recently increased the minimum wage.[78] There have also been concerns about employment conditions in the garment industry, both inside and

[68] The transitional arrangement was provided by the WTO Agreement on Textiles and Clothing, Annex 1A to the Agreement Establishing the World Trade Organization (*Agreement on Textiles and Clothing*, 15 April 1994, 1868 UNTS, terminated 1 January 2005).

[69] The latest legal instrument governing this scheme is Regulation No 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No 732/2008, articles 1(2)(c) and 17–18.

[70] Haroon A Khan, *The Idea of Good Governance and the Politics of the Global South: An Analysis of Its Effects* (Routledge, 2016) 120.

[71] Shakir and Farole (n 67) 30–31. These statistics are a few years old.

[72] *Ibid*, 31.

[73] Aizawa and Tripathi (n 62) 146.

[74] According to Shakir and Farole (n 67) 35.

[75] The Bangladesh Private Export Processing Zones Act No 20 of 7 December 1996 has so far had limited application; Shakir and Farole (n 67) 42.

[76] Bangladesh Economic Zones Act No 42 of 1 August 2010. The article refers to SEZs to encompass both the EPZs and the economic zones governed by the BEZA Act.

[77] A World Bank survey found wages for low-skill garment workers in Bangladesh to be among the lowest in the world; cited in Shakir and Farole (n 67) 34.

[78] Eg, BEPZA, Circular of 24 December 2013 Regarding Re-fixation of Minimum Wages for the Workers of the Enterprises of EPZs-2013 (24 December 2013), online: <http://bepza.gov.bd/app/webroot/ckfinder/userfiles/files/Minimum%20Wages-2013.pdf> (accessed 1 September 2016).

outside the EPZs.[79] Advocacy groups have pointed to late payment of wages, workplace discrimination, unsanitary facilities and repression of trade unions and unionists.[80] Factory fires and building collapses over the years have taken the lives of hundreds of workers, including a major factory fire in November 2012 and a disastrous building collapse in April 2013.[81]

Against the backdrop of this socio-economic reality, legislation configures Bangladesh's SEZ system as an exception to the ordinarily applicable law. The BEPZA and BEZA Acts empower the government to exclude or modify the application of several national laws to the SEZs.[82] The BEZA Act also contains a general clause allowing the government to exclude or modify the application of 'any other Act', and purports to prevail over 'any other law' in case of conflict.[83] In addition, both the BEPZA Act and the BEZA Act contain a general 'removal of difficulties' clause to deal with situations where 'any difficulty arises in giving effect' to the legislation. The clause allows the government to 'do anything which appears to it to be necessary for the purpose of removing the difficulty'.[84] This self-judging formulation seems to grant authorities significant discretionary powers, although there is no publicly available, systematic evidence on the practical application, if any, of the 'removal of difficulties' clause. In addition to these general provisions, Bangladesh's SEZ legislation establishes more specific exceptions to ordinarily applicable rules. For example, the BEPZA and BEZA Acts empower the government to exempt or modify the application of tax legislation, and public authorities have established tax incentives over the years.[85]

The legal regime governing labour relations in the EPZs is particularly relevant to exploring the relation between the state of exception paradigm and the law of the global economy. Over the years, Bangladesh's labour legislation has formed the object of concern among advocates, businesses and authorities in export-market countries, resulting in incremental law reforms. The Labour Act of 2006 created a consolidated legal regime,[86] repealing multiple pre-existing legal instruments including some with roots in colonial legislation.[87]

[79] See, eg, European Parliament Resolution of 29 April 2015 (n 54).
[80] Human Rights Watch, *Whoever Raises Their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories* (2015), online: <www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment#91c5bc> (accessed 1 September 2016).
[81] *Ibid*; Aizawa and Tripathi (n 62) 145. This includes accidents outside the EPZs.
[82] Bangladesh Export Processing Zones Authority Act No XXXVI of 26 December 1980 (n 64) section 11A; Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) section 13.
[83] Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) sections 3 and 13(p).
[84] Bangladesh Export Processing Zones Authority Act No XXXVI (n 64), section 24. See also Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) section 40, which uses a somewhat different formulation.
[85] Bangladesh Export Processing Zones Authority Act No XXXVI (n 64) section 11A, and Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) section 13.
[86] Bangladesh Labour Act No XLII of 11 October 2006.
[87] Eg, the Workmen's Compensation Act No 8 of 5 March 1923 (India), amended in 1980 and 1987.

Major industrial accidents in 2012 and 2013 led to increased public advocacy and international pressure. In 2013, the United States suspended Bangladesh's trade benefits under the US Generalised System of Preferences;[88] while the European Union (EU)—a far more important market for garment produced in Bangladesh—developed a 'Sustainability Compact' with the government of Bangladesh that contains commitments by the latter to reform labour legislation, and by the EU to provide support.[89] Bangladesh adopted new labour legislation soon thereafter, in 2013.[90] These incremental reforms established important safeguards, including the affirmation of the right of workers to form or join trade unions,[91] followed by a considerable increase in labour unionisation.[92] Despite these advances, however, the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations (CEACR) found significant aspects of Bangladesh's reformed legislation not to comply with international conventions on freedom of association and collective bargaining.[93] The CEACR also noted complaints of discrimination towards trade union representatives.[94]

Bangladesh's laws restrict the application of this labour legislation to the SEZs, establishing instead a special regime that departs from ordinarily applicable law. Indeed, the BEPZA Act of 1980, as amended, empowers the government to exclude the application of labour laws to the EPZs,[95] and special legislation governs labour relations in the EPZs—lastly, the EPZ Workers' Welfare Association and Industrial Relations Act of 2010.[96] This special legal regime has been extended to BEZA economic zones.[97] The special regime is more restrictive than generally applicable labour law: trade unions are prohibited, though reforms enacted in the mid-2000s allowed workers to create 'workers associations' that are subject to significant BEPZA control powers.[98]

[88] Office of the United States Trade Representative, *Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh* (2013), online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/july/usg-statement-labor-rights-factory-safety> (accessed 1 September 2016).

[89] Directorate General for Trade, *Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh', Joint Statement* (2013), online: <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf> (accessed 1 September 2016). Reforming the labour law was a key commitment under the Sustainability Compact (point 1(a)).

[90] Bangladesh Labour (Amendment) Act No 30 of 22 July 2013.

[91] Bangladesh Labour Act No XLII of 11 October 2006 (n 86) section 176(a).

[92] Labowitz and Baumann-Pauly (n 62) 29, reporting that 323 of the 464 trade unions that existed in Bangladesh as of August 2015 had been established after 2013.

[93] International Labour Office, Committee of Experts on the Application of Conventions and Recommendations, *Application of International Labour Standards 2017 (I): Report of the Committee of Experts on the Application of Conventions and Recommendations* (2017), ILC.106/III(1A) 48-54.

[94] *Ibid*, 49, 53.

[95] Bangladesh Export Processing Zones Authority Act No XXXVI of 26 December 1980 (n 64) section 11A(e), (f), (o).

[96] Bangladesh EPZ Workers' Welfare Association and Industrial Relations Act No 43 of 1 August 2010.

[97] Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) sections 13(m) and 34.

[98] EPZ Workers' Welfare Association and Industrial Relations Act No 43 of 1 August 2010 (n 96), sections 5–32.

Strikes are also subject to regulations and restrictions.[99] Under the EU's Sustainability Compact, the government of Bangladesh committed itself to extending national labour law to the EPZs.[100] The government subsequently approved a draft EPZ Labour Act that would strengthen 'the rights to collective bargaining and formation of association'.[101] At the time of writing, however, parliament had yet to pass this draft bill, and while the content of the bill was not publicly known, its very existence would seem to point to a continued special regime for labour relations in SEZs. The CEACR found the draft bill not to comply with international conventions and invited the government of Bangladesh to extend to the SEZs generally applicable labour legislation, amended in light of the committee's recommendations.[102]

In addition to creating a special legal regime for labour relations in the SEZs, Bangladesh's legislation establishes separate administrative and judicial structures. Under the ordinary legislation, the Ministry of Labour is responsible for labour issues, including registration of trade unions and handling of industrial relations. However, labour issues in the EPZs and the economic zones are handled by the BEPZA and the BEPA, respectively.[103] Unlike the Ministry of Labour, the mission of the BEPZA and the BEZA is not primarily to handle labour matters but to promote the development of SEZs. Some commentators examining comparable administrative structures in other jurisdictions have raised concerns about possible conflicts of interest if trade-offs arise between labour rights and productivist concerns.[104] In addition, EPZ legislation takes industrial disputes out of ordinary labour courts, and vests jurisdiction over such disputes with a special tribunal (the EPZ Labour Tribunal).[105] Cumulatively, these legal and institutional arrangements establish a special regime where ordinary legislation does not apply, and ordinary courts have no jurisdiction, leading some critical commentators to talk of 'a country within a country'.[106]

This legal environment does not necessarily entail that, in practice, EPZ workers fare significantly worse than their counterparts outside the economic zones. Many of the public concerns raised about labour rights in Bangladesh's garment industry are not specific to the EPZs. In fact, some industry experts

[99] *Ibid*, sections 41, 42, 46, 58–60, 71–72 and 81(2).
[100] *Sustainability Compact* (n 54) section 1(d).
[101] BEPZA Bulletin, July–September 2014, online: <www.bepza.gov.bd/files/newsletter/file_1419326804.pdf> (accessed 15 July 2017), 8.
[102] Committee of Experts on the Application of Conventions and Recommendations (n 93) 51–52.
[103] See, eg, Bangladesh Economic Zones Act No 42 of 1 August 2010 (n 76) section 19(14).
[104] Jaivir Singh, Centre for the Study of Law and Governance, Jawaharlal Nehru University, *Labour Law and Special Economic Zones in India* (2009, reprint 2012), (Working Paper No CSLG/WP/08) online: <www.jnu.ac.in/cslg/workingPaper/08-Labour%20Economic(Jaivir%20Singh).pdf> (accessed 1 September 2016), 15.
[105] Bangladesh EPZ Workers' Welfare Association and Industrial Relations Act No 43 of 2010 (n 96), section 48.
[106] Jim Yardley, *The New York Times*, *Export Powerhouse Feels Pangs of Labor Strife* (23 August 2012), online: <www.nytimes.com/2012/08/24/world/asia/as-bangladesh-becomes-export-powerhouse-labor-strife-erupts.html?pagewanted=all&_r=2> (accessed 1 September 2016).

believe that extra-legal factors can exert upward pressures on labour conditions in the EPZs. These factors include the presence of foreign companies that apply standards higher than legal requirements. They may also be linked to more effective enforcement of applicable legislation, due to the highly visible and geographically delimited nature of the EPZs, and to the strong policy drive to maintain and deepen the integration of these zones into global markets.[107] Incorporation into global supply chains also facilitated the development of transnational arrangements in response to particularly pressing health and safety issues inside and outside the SEZs. Indeed, a major industrial accident in 2013 led international buyers concerned about reputational risks to launch two international initiatives aimed at improving factory safety: the Accord on Fire and Building Safety in Bangladesh—a legally binding agreement between companies and unions that establishes an independent inspection programme, factory-level health and safety committees, and remediation funds;[108] and the Alliance for Bangladesh Worker Safety—a group of businesses supporting initiatives to improve working conditions in garment factories.[109] In effect, these transnational initiatives are an attempt to bridge perceived gaps in Bangladesh's health and safety laws, both inside and outside the SEZs.

This brief discussion of SEZ legislation, drawing on the example of Bangladesh, provides insights on the relevance—or otherwise—of the state of exception paradigm in interrogating economic ordering. Bangladesh's SEZs are spatially defined legal enclaves that operate under special normative and institutional arrangements. In this exceptional legal regime, parts of the national law do not apply, special labour legislation establishes more restrictive rules and separate institutions oversee compliance and enforcement. Bangladesh's SEZ legal regime also seems to involve shifts in the regulatory powers of the legislature and the executive, with legislation appearing to create significant room for executive discretion. At one level, these findings point to the relevance of the exception to the legal arrangements that integrate into global economic ordering subnational spaces specialised in low-cost manufacturing for export. In effect, the exception appears to operate as a mechanism for constituting what sociologist Saskia Sassen called the 'assemblages of territory, authority and rights' upon which the global economy rests:[110] while these subnational spaces are physically located within the territory of one (or more) state(s), their incorporation into global supply chains is mediated by rules and institutions that depart from national regulation.

[107] Personal communication from a Bangladeshi lawyer practising in the garment sector, 23 June 2016.
[108] Accord on Fire and Building Safety in Bangladesh, first signed on 15 May 2013.
[109] See Aizawa and Tripathi (n 62) 146 and Backer (n 62) 27–34.
[110] Saskia Sassen, 'Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights' (2008) 1(1–2) *Ethics & Global Politics* 61.

However, the findings also call for caution in jumping too quickly to Agambian conclusions. First, the SEZ legal regime reviewed does not involve the production of 'bare life' stripped of all legal rights: some legal safeguards do apply, however limited they may be. And unlike Agamben's spaces of 'anomie' involving the wholesale 'withdrawal of law', SEZs appear to entail significant regulation aimed at establishing special rules and institutions. In these important respects, the configuration of the exception in actually observed legal enclaves differs from Agambian theorising. Second, challenges affecting labour rights in Bangladesh appear to occur both inside and outside the SEZs and to stem from the content of the legislation but also the quality of its implementation. In other words, the exception is part of a wider set of inter-related problems, rather than the overarching, foundational problem. As a result, reconsidering the legal enclaves alone may address important issues but would not ultimately provide a comprehensive solution.[111] Third, the case of the SEZs illustrates the dynamic and contested nature of the exception—an aspect arguably underexplored in Agamben's work. Legal enclaves are historically established, and their contours evolve in response to changing circumstances including pressures for reform. In Bangladesh, public advocacy and international pressures have sustained significant, albeit partial, national law reforms. Despite these evolving contours, however, the findings also point to the resilience of the exception in economic ordering: over 35 years since Bangladesh's SEZ programme was first established, its configuration as an exception is yet to be fundamentally reconsidered.

IV. Contractualising the exception: consistency and stabilisation clauses in natural resource contracts

Contractual arrangements between the investor and the state, or a state agency, are often a prominent part of the legal regimes governing large-scale natural resource investments in low- and middle-income countries. The political economy of commodity cycles, and the balance of negotiating power between transnational corporations and sovereign states, underpin patterns in these contractual arrangements. At one level, low- and middle-income country governments often have few options to develop natural resources other than attracting international capital and know-how. This perceived policy imperative to attract foreign investment has important implications for the design and implementation of relevant legal instruments,

[111] See also Benjamin Richardson, James Harrison and Liam Campling, Directorate-General for External Policies for the European Parliament, 'Labour Rights in Export Processing Zones with a Focus on GSP+ Beneficiary Countries' (2017), online: <www.europarl.europa.eu/RegData/etudes/STUD/2017/603839/EXPO_STU(2017)603839_EN.pdf> (accessed 15 July 2017), which examines the EPZ regimes of Mongolia, Pakistan, the Philippines and Sri Lanka, and highlighting the need to place exceptional regimes in their wider national legal context.

including investor–state contracts. It would also tend to put pressure on the negotiating power of states vis-à-vis prospective investors in the initial phase of the investor–state relationship, including the contract negotiation stage. Once the investment has been made, however, the investor cannot exit the project without incurring major losses, and becomes more vulnerable to adverse state action, including changes in law, that can undermine business prospects.[112]

From the investor's viewpoint, vulnerability to adverse state action raises pressing issues because natural resource investments tend to require high capital costs upfront, for example, to build a mine, an oil pipeline or an agro-processing facility, and they often take a long time to recover costs and make a profit. As a result, many investors seek contractual safeguards to insulate their investment from adverse changes in the national law over the duration of the contract. On the other hand, commodity price hikes have created frustration among governments eager to gain more from natural resource development within their jurisdiction, and in many cases, public scrutiny of commercial operations has increased pressures to tighten applicable social and environmental standards over project implementation. As a result, states may have an interest in contractual arrangements that allow them to review terms or reform laws over time. In this context, commodity price fluctuations and project implementation are often accompanied by renegotiations initiated by either side, by legislative changes and by investor–state disputes.[113]

Against this somewhat stylised backdrop, many investor–state contracts for large natural resource investments in low- and middle-income countries contain clauses to shelter investments from adverse changes in law that could undermine the investors' rights or returns, and to lock the parties into the deal negotiated in the early stage of the investment cycle. Contractual 'consistency' clauses condition the applicability of existing and/or future national law to it being consistent with the investor–state contract.[114] In effect, these clauses place the contract above national law, although some formulations exclude particularly fundamental parts of the national law, such as

[112] For a classic discussion of this 'obsolescing bargain' phenomenon, see Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of US Enterprises* (Basic Books, 1971). For a critique, see, eg, Nicolás M Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) *Journal of International Dispute Settlement*.

[113] See, eg, Thomas Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (2008) 1(1) *Journal of World Energy Law & Business* 55.

[114] Peter D Cameron, *International Energy Investment Law – The Pursuit of Stability* (Oxford University Press, 2010) 70–73. For example, the investor–state contract concerning the construction of an oil pipeline in Africa provides that individually identified laws relevant to the petroleum industry, as well as all ordinary national legislation, apply to the project only with respect to those 'provisions which are not contrary to or inconsistent with the provisions of this Convention'. The contract goes on to list 10 laws, decrees and ordinances that do not apply to the project. The contract was approved by parliament and enacted into national law.

the constitution, from their operation.[115] In addition, closely related 'stabilisation' clauses promote stability in the legal framework applicable to the investment.[116]

Beyond these broad characteristics, consistency and stabilisation clauses come in different shapes and forms. For example, stabilisation clauses may be formulated as 'freezing' or 'economic equilibrium' clauses, presenting different normative content and implications. Under freezing clauses, the applicable national law is the one in force at the time specified in the contract, to the exclusion of subsequent legislation.[117] On the other hand, economic equilibrium clauses link regulatory changes to the restoration of the contract's original economic equilibrium—for example, and depending on the formulation, via contract renegotiation or possibly payment of compensation.[118]

[115] For example, the contract for a rubber plantation in Africa states:

> … in the event of a conflict between this Agreement and any Law – except for the Constitution as in effect as of the First Amendment Effective Date – the rights, obligations and duties of a Party shall be deemed to be those set forth in this Agreement …

[116] There is a vast literature on stabilisation clauses. See, eg, Thomas Wälde and George N'Di, 'Stabilising International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31(2) *Texas International Law Journal* 215; Piero Bernardini, 'The Renegotiation of the Investment Contract' (1998) 13(2) *ICSID Review – Foreign Investment Law Journal* 411; Klaus P Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators' (2003) 36(3) *Vanderbilt Journal of Transnational Law* 1347–80; Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment' (2006) 9(3) *Journal of International Economic Law* 657; Lorenzo Cotula, 'Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses' (2008) 1(2) *Journal of World Energy Law & Business* 158–79; Cameron (n 114) 68–83; Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012) 337–55; Katja Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' (2014) NCCR Trade Regulation Working Paper No 2013/46, online: <www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp2/Stab_clauses_final_final.pdf> (accessed 1 September 2016); Sotonye Frank, 'Stabilisation Clauses and Foreign Direct Investment: Presumptions Versus Realities' (2015) 16(1) *Journal of World Investment & Trade* 88–121.

[117] For example, a mining contract from Africa contains a freezing clause that states:

> Any legislative or regulatory provisions which becomes [*sic*] effective after the date of this Agreement and which may result in restricting or reducing the rights of the Investor, [the local subsidiary], their Affiliated Companies or Sub-contractors, under this Agreement and the Current Legislation, or in increased obligations upon them, will not be applicable to them.

[118] For example, the investor–state contract for an oil palm plantation in Africa reads:

> If any Change of Law has the effect of impairing, conflicting or interfering with the implementation of Investor Activities, or limiting, abridging or adversely affecting the value of the Production Area or any of the rights, indemnifications or protections granted or arising under this Convention or any other Project Agreement, or of imposing (directly or indirectly) any Costs on any Interest Holder,

then the investor and the government must negotiate an amicable solution, and in default the government must 'take all actions available to it to reverse the effect of such Change of Law upon Investor Activities, the Value of the Production Area or the relevant rights, indemnifications or protections', and 'compensate Investor for the present and future Costs incurred by Investor as a result of the Change of Law'. Comparably, a petroleum-related production sharing agreement from Central Asia requires the parties to take action to restore the 'overall economic benefit' of

In effect, while freezing clauses purport to stabilise the legal framework, economic equilibrium clauses purport to stabilise the economic equilibrium of the contract, allowing changes in applicable law provided that the investor's economic position is preserved.[119]

In addition, 'hybrid' clauses exist that combine freezing and economic equilibrium elements.[120] Yet other contracts combine freezing and consistency elements in the same clause, emphasising the latter over the former—so that regulatory changes would in principle apply, but only if they are consistent with the contract, or (in the broader formulations) if they do not otherwise adversely affect the implementation of the project.[121] A survey of global contractual practice found that stabilisation clauses are commonly used for natural resource investments in low- and middle-income countries; and that while economic equilibrium clauses have gained currency due to their greater versatility, freezing clauses remain common in Africa and Asia.[122] This situation may be due to the higher perceived political risk in these geographic contexts, but also, arguably, to the often weaker negotiating power of low- and middle-income country governments vis-à-vis foreign investors.

Despite the considerable diversity of contractual practice, consistency and stabilisation clauses ultimately establish standards to determine whether the national law applies to a given investment, and/or they define the obligations of the parties if adverse changes of law are indeed applied. As such, consistency and stabilisation clauses (particularly those of the freezing kind) create special legal regimes that may be subtracted, at least in part, from the operation of generally applicable law. Unlike SEZ laws that create spatially based legal enclaves potentially covering multiple businesses, consistency and stabilisation clauses involve exceptional legal regimes tailored to individual projects.

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the contract should any change in applicable laws have 'a materially adverse effect' on the economic advantages accruing to the investor; while a forest-related investor–state contract from a South American country requires the government to 'take the appropriate or necessary action(s) to restore or remedy the rights or obligations of the Company' in the event of a change of law adversely affecting the venture.

[119] Cameron (n 114) 74–86; Berger (n 116) 1363–8.

[120] In line with the 'freezing' model, the contract for the exploration and development of oil fields in an African country requires the government not to apply, without the prior consent of the consortium, measures that have the effect of increasing the burden, directly or indirectly, of the obligations or costs imposed on the consortium, or of impairing its rights or economic advantages. However, the contract goes on to clarify that, if the measures are indeed applied to the project, the parties must negotiate to restore the economic equilibrium established by the contract (original in French).

[121] For example, the contract for an oil palm plantation in Africa states that the project is subject to national law 'as in effect from time to time' and that 'Investor shall be subject to any amendments, additions, revisions, modifications or other changes to any Law'; but only 'so long as such amendments, additions, revisions, modifications or other changes do not conflict with and are not inconsistent with the agreed provisions in this Agreement'.

[122] Andrea Shemberg, International Finance Corporation and UN Special Representative to the Secretary-General on Business and Human Rights, 'Stabilization Clauses and Human Rights' (2009), online: <www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> (accessed 1 September 2016), [64].

This contractual configuration can result in comparable ventures being subject to different regimes defined by diversely formulated project contracts or differently stabilised national law. Scope for differentiated regimes is greater where imbalances in negotiating power enable businesses to impose on the government their own contractual models, resulting in diverse contractual approaches being followed within the same jurisdiction. While these special legal regimes are circumscribed to the economic activities regulated by the relevant contract, depending on the circumstances, large-scale natural resource investments can represent substantial sections of the national economy, and they can involve major social, economic and environmental footprints—not only because individual investments can be very large, but also due to the cumulative impact of multiple 'stabilised' investments.

As pressures towards greater transparency in natural resource sectors bring a growing number of investor–state contracts into the public domain, it is possible to begin exploring these issues in more systematic terms. The West African state of Guinea is one of the few states to have posted all its mining contracts online.[123] The contracts disclosed by the Guinean authorities relate to 18 mining projects, for a total of 35 contractual instruments including 'conventions' and amendments. All the conventions contain some form of consistency and/or stabilisation (mostly freezing) clause, though many freezing clauses are limited to the fiscal regime or primarily focused on mining legislation, and several clauses allow the company to opt into new legislation that provides more favourable terms. At first sight, this widespread use of consistency and stabilisation clauses, which establishes exceptional legal regimes in relation to *all* of a country's mining operations for which contracts are publicly available, would appear to echo Agamben's claim that 'the exception […] becomes the rule'.[124]

It is worth pointing out that, contractual arrangements aside, notions of legal stability are also entrenched in the norms of international law that govern the admission and protection of foreign investment. These norms are primarily centred on bilateral or regional treaties, though some features (eg, similarly worded treaty clauses, common interpretive techniques) tend to promote a degree of multilateralisation.[125] Many investment treaties require states to pay compensation for direct and indirect expropriation, and to comply with specified standards of treatment including 'fair and equitable treatment'. Where a change of law entails 'substantial deprivation' of the investor's assets, it could amount to an indirect expropriation requiring payment of

[123] See the online repository at <www.contratsminiersguinee.org/about/projets.html> (accessed 4 December 2015). The repository purports to include all mining contracts signed since 1958, the year Guinea attained independence.
[124] Agamben, *Homo Sacer* (n 3) 9.
[125] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

compensation.[126] In addition, some international arbitral tribunals have interpreted fair and equitable treatment as requiring states to provide a degree of regulatory stability,[127] though other tribunals have emphasised that investors should expect legal frameworks to evolve over time.[128] The fair and equitable treatment standard has also been widely interpreted as protecting the 'legitimate expectations' that the investor had when making the investment,[129] so that a change of law frustrating these expectations could breach the investment treaty.

Depending on their formulation, contracts can take commitments to legal stability beyond these parameters. Compared to the doctrine of indirect expropriation, for example, stabilisation clauses tend to significantly lower the threshold beyond which a state may have to compensate investors.[130] Even requirements for states to provide a stable legal framework as part of the fair and equitable treatment standard have been found not to provide investors with degrees of legal stability comparable to those involved in contractual stabilisation clauses.[131] On the other hand, international investment treaties can compound exceptional regimes established through contractual commitments. For example, some investment treaties contain 'umbrella clauses' requiring states to observe any contractual commitments they may have entered into vis-à-vis investors from the other state(s). Depending on how they are interpreted and applied, these treaty clauses could make the breach of a contractual consistency or stabilisation clause a violation of the investment treaty, and support a treaty-based claim separate from the contractual claim.[132] The existence of a stabilisation commitment could also be deemed to create legitimate expectations for the purposes of the fair and equitable treatment standard.[133]

[126] The standard of substantial deprivation was developed in *Pope & Talbot Inc v The Government of Canada, Interim Award*, 40 ILM (UNCITRAL, 2000) [100] and [102], and applied in numerous subsequent awards.

[127] See, eg, *CMS Gas Transmission Company v The Argentine Republic, Award*, ICSID Case No ARB/01/8 (2005) [274].

[128] See, eg, *Parkerings-Compagniet AS v Republic of Lithuania, Award*, ICSID Case No ARB/05/8 (2007) [327]–[338].

[129] *International Thunderbird Gaming Corporation v The United Mexican States, Award*, IIC 136 (UNCITRAL, 2006) [147].

[130] While indirect expropriation would usually require a substantial deprivation of property, many economic equilibrium clauses would be triggered by lesser economic impacts. Even the standard of 'material impact', which is used in some economic equilibrium clauses, appears to be significantly lower than 'substantial deprivation'. See also Wälde and N'Di (n 116) 243; Leader (n 116) 673–4.

[131] *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary, Award*, ICSID Case No ARB/07/22 (2010) [9.3.27]–[9.3.35]. Other arbitral tribunals found that state conduct did not to violate fair and equitable treatment, and pointed to the more stringent discipline that stabilisation clauses can impose on the public action; see *Parkerings-Compagniet AS v Republic of Lithuania* (n 128) [332].

[132] However, arbitral jurisprudence is divided on the implications of umbrella clauses. See Jonathan B Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization' (2011) 51 *Virginia Journal of International Law* 1005.

[133] See *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary (n 131)*, where the arbitral tribunal considered the lack of a freezing clause when reaching the conclusion that the claimant did not have a legitimate expectation that regulation would not change [9.3.25]–[9.3.26].

Advocacy organisations have raised concerns that a mechanical application of consistency and stabilisation clauses could constrain the implementation of measures adopted to pursue deserving social, environmental or economic goals, including measures to realise human rights, if such measures adversely affect the investors' rights or increase their business costs.[134] These concerns present two interlinked dimensions. First, where public authorities introduce more stringent rules on community engagement, labour relations, health and safety, local content or environmental protection, to name but a few potentially relevant policy areas, depending on the wording of the stabilisation clause those authorities may have to exempt ongoing investments from the new rules, or—in economic equilibrium clauses—bear the costs by offsetting the investors' losses. Second, advocates have argued that, if governments must bear the costs of the public action, they may be discouraged from acting in the first place, particularly where public finances are already under strain.[135] The overall resulting concern is that, by virtue of exceptional contractual regimes, people affected by the social and environmental impacts of investment projects could remain subject to obsolete ('stabilised') rules over often long contract durations.

Public advocacy and debate over these concerns prompted the development of international guidance for contractual practice. The Guiding Principles on Business and Human Rights, which the United Nations Human Rights Council endorsed in 2011, call on states to 'maintain adequate domestic policy space to meet their human rights obligations' when negotiating investor–state contracts.[136] An annex to the Guiding Principles contains a set of 'Principles for Responsible Contracts' that provides more detailed guidance:

> Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's *bona fide* efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.[137]

The commentary to this principle clarifies that non-discriminatory changes of law that are in line with international social and environmental standards

[134] See, eg, Amnesty International UK, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project* (2003); Amnesty International UK, *Contracting out of Human Rights: The Chad-Cameroon Pipeline Project* (2005) 30. For a discussion of these issues, see also Kyla Tienhaara, 'Unilateral Commitments to Investment Protection: Does the Promise of Stability Restrict Environmental Policy Development?' (2007) 17 (1) *Yearbook of International Environmental Law* 139, at 161; and Shemberg (n 122) [116], [135].

[135] See, eg, Amnesty International UK, *Contracting out of Human Rights* (n 134) 28–30.

[136] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights' (2011), UN Doc A/HRC/17/31, Principle 9.

[137] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators' (2011), UN Doc A/HRC/17/31/Add.3, Principle 4.

should not involve 'economic or other penalties'.[138] The commentary also clarifies that

> stabilization clauses that 'freeze' laws applicable to the project or that create exemptions for investors with respect to future laws, are unlikely to satisfy the objectives of this Principle where they include areas such as labor, health, safety, the environment, or other legal measures that serve to meet the State's human rights obligations.[139]

The Principles for Responsible Contracts are premised on the notion that, where states agree to stabilisation clauses, technical solutions can help to mitigate the potential adverse implications of those clauses—for example, through more carefully circumscribing the scope of stabilisation clauses to exclude public goods such as environmental protection or the realisation of human rights.[140] And indeed, while the wording of some consistency and stabilisation clauses would appear to cover (or at least does not exclude) public action in social and environmental matters,[141] other clauses are framed in narrower terms (eg, limited to taxation) or they explicitly exclude social and environmental regulations from their scope.[142] These latter approaches seek to balance the need for businesses to protect their investments from opportunistic state action and the need for states to be able to act in the public interest. Even in these approaches, however, fluid boundaries between policy areas raise questions about the effectiveness of the narrower formulations. For example, a stabilisation clause restricted to the tax regime alone might still have reverberations for environmental regulation involving the use of tax incentives.

At a deeper level, the widespread use of consistency and stabilisation clauses points to the pervasive role of the exception in efforts to mobilise capital for natural resource projects in low- and middle-income countries. Significant areas of economic activity and associated social and environmental footprints may be exempted, at least in part, from the operation of ordinary law, producing patchworks of differentiated legal regimes within the same country. Similarly to developments concerning SEZs, this exception to the ordinarily applicable law is not premised on a narrative of crisis, but on a policy imperative to attract investment for economic development.[143] As with legal regimes for SEZs, the practical implications of this normative

[138] *Ibid*.
[139] *Ibid*.
[140] For doctrinal analysis elaborating on these aspects, see Leader (n 116) 675–7; Cotula (n 116) 172–5.
[141] Including several of the clauses cited above. Arguably, stabilisation clauses cannot extend to measures a state takes to uphold its international obligations, including on human rights (Leader (n 116) 675–7), but there is no publicly available arbitral jurisprudence on this point.
[142] For example, the economic equilibrium clause contained in the above-mentioned oil palm concession contract from Africa excludes a 'Change of Law' that 'reflects a change in standards generally applicable in relation to standards of environmental protection, safety, employment, training, social impact or security in the oil palm industry internationally'.
[143] For a critique of the empirical link between stabilisation clauses and investment promotion, see Frank (n 116).

fragmentation may be less straightforward than legal analysis alone would suggest: in many low- and middle-income countries, national law may itself fail to adequately address pressing social and environmental issues; companies may voluntarily adopt corporate policies that go beyond national legal requirements and lenders may require compliance with standards more stringent than national law. Nonetheless, contractualised normative differentiation raises systemic issues about equality of citizens, the integrity of the national legal order and its continued correlation with territory, population and political authority.

The central role of the executive branch of government in negotiating natural resource contracts raises additional questions relevant to the state of exception paradigm. By agreeing to consistency or stabilisation clauses, the government could affect the application of legislation voted by parliament, with repercussions for the distribution of regulatory power between the executive and the legislature. From a formal standpoint, parliamentary approval of resource contracts, as practised in some jurisdictions, goes some way towards addressing this issue. But in substantive terms, and depending on the context, this role of parliament may differ significantly from that applicable to ordinary legislative activities—for example, due to time pressures and the limited scope for parliament to require contract amendments at approval stage.[144] Further, some arbitral tribunals have deemed contracts to have an effect even in the absence of constitutionally required parliamentary approval, holding that states were estopped from challenging in the arbitration the validity of contracts they had until then treated as valid.[145]

Seen from the investor's perspective, consistency and stabilisation clauses have come to epitomise demands for an ideal of the 'rule of law' that is centred on the stability of legal frameworks.[146] However, the 'contracting out' of national law involved in these clauses seems to reflect the legal anatomy of an exception—because consistency and stabilisation clauses purport to qualify the application of ordinarily applicable legislation; and because these clauses can represent a shift from the legislature to the executive as the key actor in economic regulation.

V. Conclusion

It is often said that effective *rules* provide a necessary foundation for the global capitalist economy. This article has highlighted the role of the *exception* in

[144] For a discussion, see Dominic Ayine and others, International Institute for Environment and Development, 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development' (2005), online: <http://pubs.iied.org/16007IIED.html> (accessed 1 September 2016), 3.

[145] See, eg, *Bankswitch Ghana Ltd (Ghana) v The Republic of Ghana, Award on the Merits* (UNCITRAL, 2014) PCA Case No. 2010-7, particularly [11.71]-[11.97]. The case did not involve a dispute over a stabilisation clause.

[146] Wälde (n 113) 57.

structuring cross-border economic activities. Legal regimes based on SEZ legislation or investor–state contracts work to partly subtract spatially defined sites or contractually insulated investments from the application of the ordinarily applicable law. These exceptional legal regimes emerge as hinges for incorporating labour and capital into production processes, and for integrating into the global economy 'assemblages of territory, authority and rights' specialised in natural resource extraction or low-cost manufacturing.[147] The use of exceptional legal regimes appears to be particularly pervasive in low- and middle-income countries that have embraced SEZs as a route to economic development, and that seem more likely to agree to the more far-reaching forms of stabilisation clauses.

This interrogating the state of exception paradigm with regard to the law of the global economy enables drawing together patterns that run through seemingly disparate areas of economic regulation—such as SEZs and natural resource contracts. The findings highlight the relevance of contemporary debates about the exception to the realm of economic relations, and to the complex configurations of national, international and transnational legal processes associated with cross-border activities.[148] Justified in the name of a policy imperative to attract foreign investment and promote national development, these economic dimensions of the exception underpin the adverse integration of many into the global economy—as low-wage workers with limited labour rights, or as people exposed to the social and environmental impacts of natural resource extraction.

At the same time, the emerging configurations depart significantly from Agamben's theories. The exceptional legal regimes involve extensive regulation, rather than situations of Agambian 'anomie' created by the wholesale 'withdrawal of law'. Indeed, SEZ regimes can entail substantial normative activity to exclude, qualify or modify the application of ordinary norms. Similarly, freezing clauses purport to prevent the application of new legislation to natural resource projects, and consistency clauses seek to exclude the application of legislation inconsistent with the contract; but these exceptional regimes may be associated with extensive regulation established by the contract itself, while stabilised or consistent legislation does apply. In other words, both SEZs and natural resource contracts create highly regulated spaces, even though the contours of that regulation may depart from the generally applicable law. Further, in both SEZs and resource contracts, legally inscribed exceptions emerge as but one manifestation of a wider set of issues, rather than as the foundational problem. Features of the national legislation that the exceptional regimes seek to override, and the quality of implementation of that legislation, may also raise problems—for example,

[147] Sassen (n 110) 61, 62, 63, 69.
[148] See Jayasuriya (n 6) 6, who talks of 'a global state of exception'.

because ordinarily applicable law establishes weak safeguards for labour rights or environmental protection, or is poorly implemented.

This exploration raises complex questions about the evolving nature of state sovereignty. On the one hand, SEZ regimes can strengthen governmental powers, for example through more intrusive controls in workers' associational life. These patterns echo the expansion of public authority that Agamben sees when discussing the exception in the realm of political ordering. On the other hand, depending on their wording consistency and stabilisation clauses can reduce space for the exercise of regulatory authority in connection with the relevant investments, or they establish conditions for the lawful exercise of that authority. More generally, when applied to the transformations associated with economic globalisation, the exception displays convergence with (and in some respects constitutes a legal correlative of) analyses in sociology and political theory that point to the growing disaggregation of traditional conceptions of sovereignty. Contractual and spatial legal enclaves challenge the unitary character of the territorial state, and vest people—factory workers, residents affected by natural resource investments—with diverse geometries of legal rights. These processes of subnational normative fragmentation reflect 'state strategies that are not congruent with the national space itself, but are attuned to the workings of global markets'.[149] They produce 'graduated' sovereignty, whereby the scope for the exercise of sovereign powers varies depending on the geographic area or investment project.[150] They also fragment citizenship into differentiated bundles of rights (differentiated labour rights, for example) that depend on the position citizens occupy in relation to spatially or contractually defined exceptional regimes.

States play a central role in shaping legal enclaves within their jurisdiction. They enact the laws that create the special regimes applicable to SEZs. They negotiate the investor–state contracts that contain consistency and stabilisation clauses, and the international investment treaties that can entrench the effects of those clauses. As pointed out by an arbitral tribunal called upon to apply a stabilisation clause, agreement to such a clause constitutes a manifestation of state sovereignty.[151] This recognition of the role of the state echoes accounts of global economic ordering that cast public regulation as an important enabler and framer of private sector forces.[152] At the same

[149] Aihwa Ong, 'Graduated Sovereignty in South-East Asia' (2000) 17(4) *Theory, Culture & Society* 55 developed the concept of graduated sovereignty to describe the differentiated treatment of economic relations based on ethnic lines and in the context of national and cross-border SEZs.

[150] *Ibid*, 68.

[151] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic, Award* (1977), 53 ILR 389, [66]–[68].

[152] David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12. In more historical terms, see also Karl Polanyi's observation that '[t]he road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism'; Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001) 146.

time, interrogating the exception de-centres the role of the state conceived in isolation from wider economic and political forces. While Agamben's state of exception is firmly located within the national sphere, in both SEZs and resource contracts the exceptional legal regimes owe much to exogenous factors linked to a state's integration into the global economy: resource contracts reflect the balance of negotiating power between governments and businesses, while SEZ regimes embody public policy efforts for states to compete for internationally mobile foreign capital.

In addition, the exceptional legal regimes reflect hybridisation in the forms of regulation. Contractual regimes negotiated with private operators may prevail over (parts of) national law, effecting a shift from the public to the private as the means for regulating economic activity.[153] Legislation may be informed by international law,[154] and by the interplay of vested interests and diverse sources of pressure—as exemplified by the forces that promoted incremental reforms in Bangladesh's labour laws. So while states formally provide legal legitimacy to the extraordinary regimes, they may in fact act as 'rule-takers rather than rule-makers',[155] reflecting complexities in the exercise of sovereign powers that are likely to remain below the radar of purely legalistic analyses.

The central role of states in shaping the legal infrastructure of economic globalisation, and the varying porosity of state action to external influence, create opportunities for those working to promote a more just global economic order. Public pressures have sustained efforts to challenge exceptional regimes in the law of the global economy. Both SEZ regulations and stabilisation clauses exemplify this contested nature of the exception. Advocacy on the potential human rights implications of stabilisation clauses inscribed the issue on the agenda of the United Nations human rights system, resulting in the development of authoritative international guidance that, while not challenging the foundations of those exceptional legal regimes, provides important pointers on how to address the risks they can create for the realisation of human rights. Industrial disasters in Bangladesh's garment sector have fostered public advocacy and international pressures that ultimately paved the way both for labour law reforms and to transnational initiatives aimed at tackling the most tragic dimensions of labour relations. Other research has also shed light on the role of advocates in confronting extraordinary regimes.[156]

[153] A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003).
[154] As already noted, Bangladesh's investment legislation reproduces standards of treatment typically found in international investment treaties.
[155] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 3.
[156] See, eg, Ong, *Neoliberalism as Exception* (n 6) 217.

Bangladesh's labour law reforms remain incomplete, and there is little empirical evidence to assess the impacts, if any, that international guidance has had on contractual practice concerning stabilisation clauses. But however limited they may be, these advances—and the struggles that made them possible—point to the need to consider real-life exceptions in more contested terms than Agamben seems prepared to allow, and to interrogate the role, nature and most appropriate sites of agency in questioning the exception and bringing about change. The examples discussed in this article outlined the agency of international non-governmental organisations, export-market governments, multilateral institutions and trade union leaders operating in difficult environments. Wider research has also documented the agency of poor, marginalised groups in challenging their own exclusion or adverse incorporation, and opening up new spaces of emancipatory potential.[157] Some may be tempted to dismiss incremental change as a smokescreen that masks continued oppression. However, the alternative of merely seeking to expose the hidden codes of exploitation, and fatalistically waiting for messianic redemption in the face of catastrophe,[158] is not a viable option when human lives are at stake. The present conditions require activating actually existing channels for change, and 'conceptualizing the fight for reforms as co-extensive with a revolutionary position'.[159] The most effective antidote to Agamben's bare life lies in the rediscovery of politics to advocate for a fairer and more sustainable world.

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[157] Jessica Whyte (n 4) 37–38, 41. In relation to 'land grabbing', for example, see Emily Polack, Lorenzo Cotula and Muriel Côte, International Institute for Environment and Development/International Development Research Centre, *Accountability in Africa's Land Rush: What Role for Legal Empowerment?* (2013), online: <http://pubs.iied.org/pdfs/12572IIED.pdf> (accessed 1 September 2016); and Ruth Hall and others, 'Resistance, Acquiescence or Incorporation? An Introduction to Land Grabbing and Political Reactions "from Below"' (2015) 42(3–4) *Journal of Peasant Studies* 467.

[158] Jessica Whyte (n 4).

[159] Jessica Whyte (n 4) 15.