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Introduction to the Inaugural Issue of

The African Journal of International Economic Law (AfJIEL)

by James Thuo GATHII & Olabisi D. AKINKUGBE

Introduction to the Inaugural Issue of the African Journal of International Economic Law

James Thuo Gathii and Olabisi D. Akinkugbe
Co-Editors in Chief

Welcome to the inaugural issue of the African Journal of International Economic Law(AfJIEL). Our goal is to fill a gap in journals covering international economic law relating to Africa and the Global South. This first issue fulfills our promise to launch the AfJIEL as announced at the 2019 African International Economic Law Network conference in Nairobi.

We thank our terrific group of authors who worked over the year and a half on the articles in this inaugural issue. Thanks too to the Editorial Board and the Advisory Board members for their support. We have put together the AfJIEL while continuing to nurture the burgeoning Afronomicslaw.org blog. The fact that contributors to Afronomics law provided a continuous flow of excellent content on international economic law in Africa and the Global South was a major inspiration for this new journal.

The AfJIEL will be freely available. This is made possible by the support of Sheria Publishing House – a publishing house committed to providing high quality, affordable and accessible materials on African and Third World scholarship and practice. Our goal in making the AfJIEL free and open access is at least twofold. First, to demonstrate that the voluntary efforts of a team of editors can produce a journal that fills a major gap in the production and publication of important scholarly and policy materials. Second, to inspire and engage with our audience particularly in under-resourced academic and policy environments in the geographical Third World in general, and in Africa in particular. Without this kind of a journal, a lot of the content that our authors have put together could very well be behind a publisher's paywall. The AfJIEL is one small effort in trying to break down such paywalls that limit access to the kind of contextually relevant scholarship and policy analysis this Journal is committed to publishing.

The articles in this issue cover a broad range of International Economic Law, (IEL) subjects. These include competition law in Africa and the Caribbean; tax law and justice; the gendered nature of trade regimes;making intellectual property law

and policy relevant for Africa; international investment law and efforts to reform it in Africa and beyond,and how best to think about African trade law regimes against a backdrop of development. The journal also has a section on the Contemporary Practice of African International Economic Law and, a detailed case review of the jurisprudence of the East African Court of Justice, (EACJ), and the OHADA Common Court of Justice and Arbitration in international economic law cases.

The first article co-authored by Clair Gammage and Mariam Momodu is titled, "The Economic Empowerment of Women in Africa: Regional Approaches to Gender Sensitive Trade Policies." Clair and Mariam examine the gendered and gendering nature of trade law and policy in Africa's regional trade regimes. By centering women in their inquiry, they comprehensively probe the legal texts of Africa's trade regimes as well as the policy commitments made within these regimes. While acknowledging the data gaps and invisibility of women in trade and policy, they note the silence surrounding women informal cross-border traders in these regimes. Yet they also uncover what they call progressive gender-sensitive trade strategies such as the East African Community's Simplified Trade Regime and the Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanismin the Tripartite Free Trade Agreement between the Common Market for Eastern and Southern Africa, (COMESA), the East African Community, (EAC), and the Southern African Development Community, (SADC). They advocate for intersectional and multidimensional understandings about how women's experiences may converge and diverge in the context of trade policy. They propose that legally binding commitments and 'soft' law approaches ought to be adopted at the pan-African level to build on the progress made by some of the regional economic communities. They also see value in Africa following innovations to center women in trade from the global level.

The second article co-authored by Tim Büthe and Vellah Kedogo Kigwiru is titled, "The Spread of Competition Law and Policy in Africa." In this original and important article, Tim and Vellah explore the extent to which competition law has fulfilled its promises of ensuring that the benefits of a market economy are widely shared; how it encourages and safeguards market competition by making anti-competitive agreements and conduct illegal; and how it constrains economic power by punishing its abuse and regulating mergers and acquisitions to reduce the risk of monopoly and oligopoly. Complete with meticulously gathered evidence, including compelling graphics, Tim and Vellah take stock of the status of competition

laws and agencies in Africa at the national and regional level. The article not only brings the reader up to date on the status on competition law and institutions in Africa, but also reviews the literature in the field. That is not all. This article alsovery helpfully sets out a research agenda for better understanding the reality, promise and limitations of competition law in Africa. This research agenda, they argue, would best incorporate political analysis along with legal and economic analysis.

The third article in the volume by Taimoon Stewart, is titled "Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison." Taimoon's compelling analysis compares and contrasts competition regimes in Africa and the Caribbean Community. It does so with a view to persuading the reader not to take the existing market structures in both regions as a given. To make this case, she uses a historical and political-economy approach to show how today's market failures that competition law seeks to address were created under colonial rule. For Taimoon, diversifying and transforming these economies to accord to the promises of competition law means having to confront the continuing legacy of European expansion and imperialism that defined the markets in both regions. In her view, forging transformational competition strategies and regimes in these regimes must therefore address rather than ignore these legacies.

The fourth article in the volume by Fernando C. Saldivar, SJ, is titled "Africa in the Economy of Francesco: Rethinking the Ethics of the International Financial Order at the Intersection of Tax Justice and Catholic Social Teaching." Foregrounding Pope Francis' framework for radically rethinking the ethics of the international financial order, otherwise known as the Economy of Francesco, Fernando explores the intersection of tax justice and Catholic social teaching. From this vantage point of the legal and ethical principles upon which the Economy of Francesco is based, he proposes strategies for policy and advocacy to reduce tax avoidance strategies used by multinational corporations in haven jurisdictions. This interdisciplinary approach, he argues, is consistent with the efforts of those working to eliminate poverty in Africa. Fernando's innovative and compelling article shows how progressive conversations in IEL can be broadened and enriched through an interdisciplinary approach that leverages ethics and Catholic social teaching.

The fifth article titled, "Investment Law and Treaty Reform in Africa: Fragments and Fragmentation,"Ndanga Kamau reviews how African states have proceeded with foreign investment law and treaty reform since at least 2016. Kamau does so

by highlighting examples of reforms at the domestic, sub-regional, regional and global levels. She argues these reforms do not cohere around one approach and as such there is no distinctly African approach exemplified in these fragmented efforts. She notes that this may be because of the diversity of interests within, and between African states. Ndanga's essay discusses the reform efforts occurring at different levels – domestic, sub-regional and regional while also noting those in other regions and at the international level. Her article includes a brief review of the Pan African Investment Code, (PAIC), that may very well form the basis of the African Continental Free Trade Agreement negotiations on investment. Ndanga welcomes the increased participation of African states in investment law reform but argues that African states can best advance their collective pan-African interest in harmony rather than disunity.

The sixth article by Titilayo Adebola is titled, "Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property, (IP), Protocol."In this article, Titilayo comprehensively maps and analyses the fragmented intellectual property (IP) architecture in Africa in light of the pending AfCFTA IP Protocol. Titilayo argues that the AfCFTA IP Protocol presents a timely, albeit arduous, opportunity for Africa to reconstruct its broken IP architecture by aligning the conflicting sub-regional IP regimes with the development-oriented aspirations that animate the African Union's IP agenda. She argues Africa needs IP systems suited to its contexts, conditions and that pursues its collective interests. As such, she argues that given the significance of Africa's agricultural resources, traditional knowledge and cultural legacies, the AfCFTA IP Protocol negotiators ought to prioritise geographical indications, plant variety protection, traditional knowledge and traditional cultural expressions, which embody Africa's innovative and creative strengths. She argues that while the African Union (AU) has policy frameworks on these subjects, there are variations in the sub-regional organisations' uptake patterns. She shows that while sub-regional organisations are increasingly embracing the Continental Strategy for Geographical Indications in Africa, no sub-regional organisation has introduced a plant variety protection system styled on the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000. Moreover, the sub-regional regimes adopt distinct governance structures. The Organisation Africaine de la Propriété Intellectuelle (OAPI) operates a uniform system, whereas the African Regional Intellectual Property Organisation (ARIPO) operates a flexible system. The AU's ambitious attempt to resolve the policy incoherence and inconsistency through the Pan African Intellectual Property

Organisation (PAIPO) - a single Pan-African IP organisation to harmonise IP and stimulate social and economic development in Africa - is therefore inchoate. Ultimately, she suggests that the AfCFTA IP Protocol negotiators must construct homegrown African centred IP systems that radically reimagine the normative configurations of IP.

The seventh article by Olabisi D. Akinkugbe, "Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)," seeks to close the gap between law and development scholarship, on the one hand, and that on developmental regionalism, on the other. First, he argues that developmental regionalism as it applies to Africa has theoretical and conceptual limitations and that it does not pay sufficient attention to law. For this reason, Olabisi argues that developmental regionalism has to be retooled to address these shortcomings so that it can be more responsive to the multidimensional character of African RTAs. While making the case for cross-pollination between this more robust notion of developmental regionalism and law and development, Olabisi argues that one advantage would be to overcome dominant theoretical frameworks that privilege globalizing legal analysis that dominate analysis of trade agreements. For Olabisi, therefore, African RTAs are 'flexible legal regimes' that promote the selective implementation of priorities.

The eighth item in this first issue of AfJIEL is what we hope will be a regular feature – African Practice in International Economic Law 2017-2019. Written by AfJIEL editors Amaka Vanni and Tsotang Tsietsi, this section provides updates on some of the most significant developments in Africa's IEL. This section includes analysis of the AfCFTA, the China-Mauritius FTA, the Kenya-US FTA negotiations and considerations related to Nigeria's recent border closure, among other developments.

The last item in this issue is yet another contribution that we hope will become a regular feature of the AfJIEL – a case note. This issue's case note was written by Harrison Otieno Mbori on international economic law disputes before Africa's international courts. Making the case for a 'thick description' analysis, Harrison engages in an extended and very welcome analysis of two very important cases. The first is the East African Court of Justice's First Instance Division 2019 decision, British American Tobacco (BAT) v Attorney General of Uganda, (hereinafter the BAT case). The second is the OHADA Common Court of Justice and Arbitration, (CCJA) case, GETMA International v The Republic of Guinea. Harrison's indepth analysis of these cases shows the importance of going beyond doctrinal analysis. He does that by showing the significance of these cases in a broader context. For example,

the BAT case is the first purely international trade and commercial case in the EACJ's docket since its first decision in 2006. Yet, as a case involving tobacco, it is hardly the first case brought by tobacco companies seeking to eliminate national tobacco regulations. Harrison's analysis guides the reader on this journey that connects many seemingly distinctive but ultimately inter-connected threads. For example, the BAT case before the EACJ is part of a broader tobacco company litigation strategy in several other cases at the national level in the East African Community, but also beyond. With regard to the GETMA case, Harrison connects it to related cases involving the same parties in the International Center for the Settlement of Investment Disputes, (ICSID), as well as to enforcement proceedings in the United States Federal courts.

We hope the readers agree that the authors of these articles offer a tremendously rich analysis. We could not have asked for a better set of inaugural articles. We promise to work harder to make the AfJIEL even better in future issues. We hope you will also support the future editions of the AfJIEL by submitting high quality and original articles. In the meantime, kindly help us disseminate this inaugural issue as widely as possible.

The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies

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Empowering women through trade has been an objective of African regional economic communities since their creation. Yet, women across Africa are disproportionately more likely than men to feel the negative effects of trade liberalisation. This article offers a critical intervention into the debate on women and trade and examines the gendered and gendering nature of trade law and policy in historical and contemporary contexts. Women are situated as the central subject of inquiry and a comprehensive mapping of gender clauses in the constitutional legal texts of the RECs is presented to illustrate synergies and divergences in African gender-sensitive trade policies. A significant challenge facing Africa's future development strategies relates to the data gaps of women in their diverse roles, and especially as informal cross-border traders, and how these gaps contribute to the ongoing invisibility of women in trade policy. However, there are examples of progressive gender-sensitive trade strategies in Africa, including the East African Community's Simplified Trade Regime and the Tripartite Free Trade Agreement's Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism, that demonstrate how pragmatic responses to gender inequality can be formulated at the regional level. It is argued that an intersectional and multidimensional understanding of how women's experiences may converge and diverge in the context of trade policy is key to our understanding of how gender-sensitive trade can and should be framed. To conclude, this article submits that inclusive trade policies, which should incorporate both legally binding commitments and 'soft law' instruments, at the pan-African level must build on the progressive steps taken by some of the RECS and follow other innovations that are emergent at the multilateral level.

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Introduction

This article offers a critical intervention into the debate on trade and gender and examines the extent to which African regional economic communities (RECs) promote the economic empowerment of women in the formal and informal economies through gender-sensitive trade policies. Across Africa, the trade-gender linkage has long been recognised as a significant driver of sustainable and inclusive societies. While different approaches to gender and trade are taken through the RECS, some regional development strategies reinforce women's rights set out under international agreements, including the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and explicitly provide for non-discrimination and gender equality. Indeed, some RECs, like the East African Community (EAC), have gone further than any other regional configuration in placing women and gender at the heart of their trade and development policies.

For example, the EAC's Simplified Trade Regime,[1] has eased the cross-border flow of trade which is especially beneficial for women informal traders. The merits of a simplified trade regime for Southern Africa is also under consideration.[2] Another example of innovation is the Non-Tariff Barrier Monitoring and Reporting Mechanism, which has been implemented by three RECs and now forms part of the African Continental Free Trade Agreement (AfCFTA). This mechanism operates to improve transparency by enabling importers, exporters and traders to report and monitor non-tariff barriers to trade through an online platform. This, again, has positive effects for the economic empowerment of women informal cross-border traders. We examine these innovative examples later in this article.

1 *See* Taku Fundira, *A Look at the Simplified Trade Regimes in East and Southern Africa*, 7 Bridges Africa (June 5, 2018), https://ictsd.iisd.org/bridges-news/bridges-africa/news/a-look-at-the-simplified-trade-regimes-in-east-and-southern-africa. All links in this article are correct as of August 6, 2020.

2 Joseph Ngwawi, *SADC Moves Toward a Simplified Trade Regime*, TRALAC (May 9, 2017), https://www.tralac.org/news/article/11594-sadc-moves-towards-a-simplified-trade-regime.html; Migration, Cross-Border Trade and Development in Africa: Exploring the Role of Non-State Actors in the SADC Region (Christopher C. Nshimbi & Innocent Moyo eds, 2017).

In the recent past, trade and gender – and the associated issue linkage of women's participation in the (formal and informal) labour markets – have become a focal point for *sustainable* economic transformations following the launch of the African Union's 2063 Agenda[3] in 2013 and the United Nations 2030 Agenda for Sustainable Development in 2015.[4] Gender equality is central to Africa's future development strategies and Aspiration 6 of Agenda 2063 calls for 'An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children.' At the international level, the 2030 Agenda situates women at the heart of the Sustainable Development Goals (SDGs) and envisages the economic empowerment of women as pivotal for the attainment of just and inclusive societies.[5] The SDGs are integrative and interdependent and while there is no hierarchy between them, they interconnect in diverse ways.[6] Gender is, therefore, an issue that cuts across the SDGs and the Agenda 2063.

Promoting the economic empowerment of women in trade is also a priority for the World Trade Organisation (WTO)[7] and gender-sensitive trade policies are increasingly being embedded into regional trade agreements (RTAs).[8] However, this article will show that the inclusion of gender clauses in RTAs is not a new phenomenon. On the contrary, gender-sensitive trade policy has, rhetorically at least, been a distinct feature of African regionalisms, such as the creation of RECs under the Lagos Plan of Action

3 Agenda 2063: The Africa We Want (African Union, 2015).

4 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015) [hereinafter 2030 Agenda].

5 *Id.* Goal 5 aims to "achieve gender equality and empower all women and girls" while Goal 8 sets targets for the international community to "achieve full and productive employment and decent work for all women and men" (Goal 8.5) and to "protect the labour rights. . . for all workers, including migrant workers, in particular women migrants" (Goal 8.8). Goal 1.4 reiterates the need to ensure "equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance."

6 Legal Perspectives on Sustainability (Margherita Pieraccini & Tonia Novitz eds., 2020).

7 Under the 2030 Agenda, the World Trade Organisation has been tasked with promoting "a universal, rules-based, open, non-discriminatory and equitable multilateral trading system" under Goal 17.10. The SDGs are integrative and non-hierarchical, and this goal is intended to dovetail with the other SDGs, including those directly addressing women. 124 Members have also adopted the Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 [hereinafter *The Buenos Aires Declaration*]. The WTO has appointed a Trade and Gender Focal Point and implemented a Trade and Gender Action Plan (2018–19).

8 For a comprehensive account of the heterogeneous nature of clauses, see José-Antonio Monteiro, *Gender Related Provisions in Regional Trade Agreements* (WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2018-15, 2018), *available at* https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

(1980)[9] and the Abuja Treaty (1991).[10] Nevertheless, gender *inequalities* in the social, economic and cultural realms remain pronounced.

This article provides a comprehensive mapping of gender clauses contained in the constitutional legal texts of the RECs and identifies synergies and divergences in their approaches. We explore whether and how the conflicting approaches to gender-sensitive trade expressed in the RECs can be reconciled through the AfCFTA in its phase II negotiations.

To adopt a gender-sensitive approach to trade policy requires an examination of the complex ways in which trade liberalisation and trade policies affect women's and men's agency and participation in their economic, cultural, social and geographic contexts. With the majority of women in African countries working in the informal or *grey* economy it is important to assess how trade can be utilised to promote equality, non-discrimination and improve standards of living for women. We examine the scope of protection of women's rights afforded under the RECs, identify how these may reinforce or overcome the *feminisation of trade* and its associated issue linkages, and explore whether the AfCFTA presents an opportunity to reconceive gender-sensitive trade policy on a pan-African scale.

As a preliminary note, the expression 'African women' is used with full acknowledgment that African women and their experiences are not homogenous and their historical and present experiences differ from one community to another. An intersectional[11] and multidimensional[12] understanding of how those experiences may

9 Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980–2000, art. 296 (1980) [hereinafter LPA].

10 Organization of African Unity, Treaty Establishing the African Economic Community, art. 75(2) (June 3, 1991) [hereinafter Abuja Treaty]. For an overview of these initiatives, see Ernest Toochi Aniche, *From Pan-Africanism to African Regionalism: A Chronicle*, 79 African Studies 70–87 (2020); Karin Bachinger & Johan Hough, *New Regionalism in Africa: Waves of Integration,* 39 Africa Insight 43–59 (2009); Richard S. Mukisa & Bankole Thompson, *Prerequisites for Economic Integration in Africa: An Analysis of the Abuja Treaty,* 42 Afr.Today 56–80 (1995); Jane L. Parpet, *Women's Rights and the Lagos Plan of Action*, 8 Hum. Rts. Q. 180 (1986).

11 The concept of intersectionality was coined by Kimberlé Crenshaw Williams in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chicago Legal F. 139–67 (1989*). See also* Adrien Wing, Global Critical Race Feminism: An International Reader (Adrien Wing ed., 2000); Jennifer Nash, *Re-Thinking Intersectionality*, 89 Feminist Rev. 1–15 (2008); Stéphanie Garneau, *Intersectionality beyond feminism? Some methodological and epistemological considerations for research*, Int'l Rev. Soc. 321–35 (2017); Chimamanda Ngozi Adichie, We Should All Be Feminists (2014); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. Ill. L. Rev. 893 (1995).

12 James Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. Rev. (2020).

converge and diverge in the context of trade policy is key to our understanding of how we might strengthen existing commitments to gender-sensitive trade.

This article is divided into five sections. In section one, we start by establishing the relationship between women's empowerment and trade, in light of the SDGs. In section two, we invert the dominant understanding that trade liberalisation is gender neutral and we draw on feminist scholarship and Africa-focused historical evidence to unearth the impact of 'neutral' trade policy on women in Africa. In the third section, the diverse ways in which gender and women have featured as part of Africa's continental and regional development policy are presented. The fourth section provides the legal mapping of gender commitments in the RECs and highlights diverging approaches to gender-sensitive trade policy. The fifth section assesses whether, and to what extent, the AfCFTA can serve as a transformative tool for the advancement of gender-sensitive trade policy at the African continental, regional, and domestic levels, with specific emphasis on underlying characteristics of African women, which need to be centre-stage in the design of future trade policy. To conclude, we acknowledge that women's economic, social and cultural agency can be empowered through trade but argue that existing frameworks do not go far enough to promote gender equality and eliminate discrimination against women.

I. TRADE AND GENDER AS A DEVELOPMENT STRATEGY

The relationship between trade and gender is an international, regional and domestic policy concern. Improving the status of women in society through 'just and equitable growth' while enabling them to contribute effectively to development has been recognised for decades. Since the late 1970s, policy-making at international and domestic institutions has been shaped and informed by the *feminisation of poverty* –a concept widely used in development studies to identify and address gender inequalities in poverty alleviation strategies.[13] *Feminisation* refers to the complex ways in which women experience aspects of social, economic and cultural life differently to men. It refers to gender inequalities that arise in both formal and informal settings and as a result of both formal and informal social, economic, legal and cultural structural norms.

13 The term 'feminisation' was first used by Diane Pearce in 1978 in her analysis of the labour markets in the USA and Canada. Nilüfer Catagay identified three meanings for the feminisation of poverty: a) women compared to men have a higher incidence of poverty; b) women's poverty is more severe than men's; c) over time, the incidence of poverty among women is increasing compared to men. *See* Nilüfer Catagay, *Social Development and Poverty Elimination Division WP5: Gender and Poverty*, UN Development Programme (May 1998).

The feminisation of poverty concept informed the key policy goals of the Bzeijing Platform for Action of the Fourth Conference on Women[14] and this international conference served as the impetus behind changing approaches to gender across Africa. However, an analysis of women and trade, and an assessment of the *feminisation of trade*, reinforces the need for a nuanced approach to the issue linkages that intersect with women's participation in the formal and informal economies.

Achieving gender equality and the economic empowerment of women has been a concern for global governance since the mid 1970s.[15] As far back as 1985, the international community was recognising the need to find 'alternative sources of finance and new markets… to maintain and increase women's participation in [trade and commerce].'[16] The Nairobi Report advocated for 'efforts to be made to encourage enterprises to train women in economic sectors that have traditionally been closed to them, to promote diversification of women's employment and to eliminate gender bias from labour markets.'[17] In short, the contemporary issues we see in modern political economy in relation to women empowerment are not new.[18]

The Fourth Conference on Women in Beijing (1995) brought the Women's Decade to a close but set forth political agreements to ensure that women were not left behind in future trade and development policies at the national, regional and international levels. The Beijing Declaration and Platform for Action (1995) was adopted unanimously by 189 countries and is still considered to be the 'key global policy document on gender equality.'[19] It advanced twelve areas for concern for women,[20] including women and the economy, and set strategic objectives for the empowerment

14 United Nations Beijing Declaration and Platform for Women (Sept. 15, 1995).

15 The Decade for Women (1975-1985) launched at the 1975 World Conference of the International Women's Year (Mexico) to raise "the level of consciousness of the world community concerning the inequalities existing between men and women, and the need for women's full participation and integration within all sectors of national life in order to accelerate development."

16 World Conference on Women, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, para. 197, U.N. Doc. A/CONF.116/28/Rev.1 (July 15-26, 1985) [hereinafter *Nairobi Report 1985*].

17 *Nairobi Report 1985*, para. 199.

18 Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries*, (2000) 41 HARV. INT'L. L.J 381.

19 World Conference on Women, *Beijing Declaration and Platform for Action* (Sept. 4-15, 1995). For a summary of the United Nations World Conferences on Women, see *World Conferences on Women*, Un Women, https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women.

20 The twelve areas of concern include: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanism for the advancement of

of women. The Beijing Declaration and Platform for Action has played a defining role in shaping and informing gender policy across Africa, most notably in the Southern African Development Community (SADC) and the East African Community (EAC).

At the international level, African nations have shown a commitment to gender equality through different human rights frameworks. A formal expression of the commitment to gender equality has been shown by most African countries through the signature and/or ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.[21] Ratification of this international human rights instrument does not however guarantee gender equality and non-discrimination[22] of women. Indeed, where national laws have close connections to religious codes of practice[23] or traditional patriarchal cultural systems, the social impact of these national laws will often contradict CEDAW. This contradiction is true for many countries across the world, including African countries.[24]

In recent years, there has been a renewed interest in developing ways to promote the economic empowerment of women through global governance regimes and embed gender-sensitive norms in international regulatory frameworks. International institutions like the United Nations, the WTO and the International Trade Centre (ITC) – a joint agency of the UN and WTO – are working together to empower women through trade policy. The 2030 Agenda for Sustainable Development[25] states that the achievement

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women; human rights of women; women and the media; women and the environment; the girl child.

21 Eswatini (formerly Swaziland), Sudan, and Somalia have not signed or ratified CEDAW. The following African countries have signed, but have not yet ratified the Convention: Burundi, Chad, Congo, Liberia, Madagascar, Malawi, Sierra Leone, Zambia.

22 Article 1 CEDAW defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

23 For an interesting account of the intersection between Sharia law and CEDAW, see Ekaterina Yahyaoui Krivenko, Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women (2008).

24 For an excellent overview of these issues, see Chinyere Ukpokolo, Being and Becoming: Gender, Culture and Shifting Identity in Sub-Saharan Africa (2016); J. Oloka-Onyango & Sylvia Tamale, *'The Personal is Political' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism*, 17 Hum. Rts. Q. 691 (1995); Celestine Nyamu-Musembi, *Ruling Out Gender Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa*, 27 Third World Q. 1193–1207 (2006).

25 2030 Agenda makes thirty-two references to the word 'women' and seventeen references to the word 'gender'.

of gender equality and the empowerment of women and girls globally will make a 'critical contribution' to the attainment of sustainable development.[26] The 2030 Agenda specifically recognises international trade as 'an engine for inclusive economic growth and poverty reduction, and a tool for the promotion of sustainable development.' It further expresses a desire for parties to 'promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system.'[27]

While the 2030 Agenda does not explicitly address the hurdles which prevent women from utilizing trade as a means for achieving socio-economic empowerment, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development 2015 (Addis Ababa Action Agenda), which is an integral part of the 2030 Agenda,[28] specifically recognises the barriers for women's participation in international trade. While affirming the use of international trade to facilitate the SDGs, the Addis Ababa Action Agenda explicitly recognises that women encounter challenges while being involved in trade and are marginalised in domestic, regional and international trade.[29] Furthermore, Aspiration 6 of the AU's Agenda 2063 is complemented by the AU's Gender Equality and Women's Empowerment (GEWE) strategy,[30] both of which reinforce the principles set out in the AU's Solemn Declaration on Gender Equality in Africa[31] and the rights protected in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.[32] Collectively, these instruments embed the principles of gender equality and non-discrimination at the domestic, regional and pan-African levels.

There is significant promise in using trade and gender as a development strategy for women globally. Where trade policies contemplate women, there is an opportunity to improve the welfare of not only women but their children and immediate family.

26 2030 Agenda, para. 20.

27 2030 Agenda, para. 62.

28 2030 Agenda, para. 40 (recognizing the Addis Ababa Action Agenda as an integral part of the 2030 Agenda).

29 G.A. Res. 69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, para. 90 (July 27, 2015) ("Recognizing the critical role of women as producers and traders, we will address their specific challenges in order to facilitate women's equal and active participation in domestic, regional and international trade.").

30 African Union, AU Strategy for Gender Equality and Women's Empowerment 2018–2028, *available at* https://au.int/sites/default/files/documents/36195-doc-au_strategy_for_gender_equality_womens_empowerment_2018-2028_report.pdf.

31 Assembly/AU/Dec.12 (III) Rev.1, Solemn Declaration on Gender Equality in Africa (2004).

32 Adopted by the 2nd Ordinary Session of the African Union on July 11, 2003 and entered into force on November 25, 2005.

Increasing the economic power of women has the potential to induce a 'snowball effect' by further increasing the standard of living of those around them.[33] Evidence shows that women are likely to invest approximately 90% of their income in the education and health of their families and communities. [34] While the potential of using international trade as a development and economic empowerment engine for women is clear, until recently[35] there has been little by way of direction on how policies can be designed to help women reap maximum benefits from international trade.[36]

II. CONFRONTING GENDER-NEUTRAL ASSUMPTIONS IN INTERNATIONAL TRADE

Until recently, issue linkages between gender equality, women's rights and international trade have been weak. In this section, we argue that the diminutive acknowledgement of the gender issues in trade is congruent with assumptions of gender neutrality in international trade law and architecture. The neoliberal market-based assumptions which scaffold the architecture of the multilateral trading system, underpinned by Ricardo's theory of comparative advantage and its attendant aim of attaining economic efficiency though specialisation, are influential pillars upon which our modern international trade framework operates.[37] These twin pillars of economic efficiency and market forces tend to prioritise 'growing the economic pie' in line with the neoliberal consensus[38] and are less concerned with the distribution of the pie amongst marginalised groups, including women. However, increasing the size of the economic pie has become increasingly difficult to justify as the principal purpose of international trade,[39] thereby feeding growing disquiet about the neoliberal focus on overall economic gains to the determent of marginalized populations. The notion that trade liberalisation will benefit everyone equally is itself an assumption of gender-neutrality. Feminist scholars and activists have long challenged the assumption that

33 World Trade Organization, Gender Aware Trade Policy*:* A Springboard for Women's Economic Empowerment 4 (2017), https://www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf.

34 *Id.*

35 Specifically, the ITC continues to provide policy direction and support for women traders, particularly through the *She Trades* initiative, which seeks to connect 3 million women to the global market by 2021.

36 Trade Experettes was founded in 2018 to promote the role of women trade experts around the globe. *See* https://www.tradeexperettes.org/what-we-do.

37 David Ricardo, On the Principles of Political Economy and Taxation (1817).

38 Harlan Grant Cohen, *What Is International Trade Law For?*, 113 Am. J. Int'l L. 326–46 (2019).

39 *Id.* at 329.

law is inherently gender neutral. Legal scholarship which deploys gendered lenses has prompted questions on the effects of seemingly neutral law and policies on women.[40] International economic law broadly and international trade law specifically have also benefitted from this feminist critique,[41] albeit in a less comprehensive way than other areas of law.

While international trade has indeed increased the size of the 'economic pie' on the average,[42] the equitable distribution of the gains of trade has remained elusive for many. Indeed, many women (particularly but not exclusively those in developing countries) are left with the crust of the pie, as they operate on the peripheries of the formal economy which is regulated by international trade norms.[43] The problem with traditional approaches to international trade is that issues like gender equality are rarely addressed on the centre stage; instead, they are relegated to the realm of domestic concerns.[44] However, many studies have shown that trade policies can and do affect women and men differently.[45]

The gendered implications of trade policies have manifested for African women prior to the creation of the formal international trade architecture in existence today. In colonial West-Africa, trade policies introduced on one of the most prized export commodities – cocoa – created a ripple effect on the fortunes of West-African women. An analysis (below) of the cocoa exporting eco-system in Nigeria and Ghana illustrates

40 Uche U. Ewelukwa, *Women and International Economic Law: An Annotated Bibliography*, 8 L. & Bus. Rev. Am. 603–32, 605 (2002).

41 Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade,* 15 Wm. & Mary J. Women & L. 113–60 (2008); Sundhya Pahuja, *Trading Spaces: Locating Sites for Challenge Within International Trade Law*, 14 Australian Feminist L. J. 38–54 (2000); Adrien Wing, *International Law and Feminism, in* Research Handbook on Feminist Jurisprudence 468–84 (Robin West & Cynthia Bowman eds., 2019), *available at* https://www.elgaronline.com/view/edcoll/9781786439680/9781786439680.xml; Ewelukwa, *supra* note 28.

42 Glick and Moreno's study highlights that several factors including the "catch-up effect" as well as government intervention, investment and education, all played a role in the rapid growth experienced by the Asian countries. However, the study identifies openness to trade as a significant contributing factor as well. Glick and Moreno note that "...an outward-looking development strategy, particularly a dynamic export sector is conducive to growth." Reuven Glick & Ramon Moreno, *The East Asian Miracle: Growth Because of Government Intervention and Protectionism or in Spite of It,?* 32 Bus. Econ. 20–25 (1997); Jeffrey Frankel, David Romer & Teresa Cyrus, *Trade and Growth in East Asian Countries: Cause and Effect?* (National Bureau of Economic Research, Working Paper 5732, 1996), http://www.nber.org/papers/w5732.pdf.

43 Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 Am. U. Int'l L. Rev. 861–88, 861 (1995).

44 Pahuja, *supra* note 42.

45 Choudhury, *supra* note 42, at 113; Wright, *supra* note 44.

that trade policy – whether identified as such or not – directly influenced the outcomes of women.

In colonial Nigeria, the government provided price support and agricultural advice – what would today qualify as a subsidy – to cocoa growers, who were predominantly men. On the other hand, traders of exquisite handmade indigo-dyed cloth (*Àdìrẹ*)[46] who were mostly women[47] did not benefit from such policies, as *Àdìrẹ* clothes were not an export interest.[48] These *Àdìrẹ* producers also had to navigate increased competition from outside their country, as imported cotton and imported indigo competed with locally produced traditional cotton and dyes.[49] While not *de jure* identified as gendered trade policy, the introduction of support to cocoa growers in colonial Nigeria had a *de facto* effect of excluding women from the benefit of the subsidy while also labelling the *Àdìrẹ* trading ecosystem as inconsequential.[50]

On the other hand, an analysis of early colonial Asante in Ghana shows that in the early 1920s, the increase and establishment of cocoa farming and exporting directly led to an evolution of women's roles in the economy.[51] While initially Asante women worked on their husband's cocoa farms, as cocoa became an established cash crop, some women were later able to exercise property rights and owned cocoa farms, thereby directly benefiting from international trade in cocoa.[52] With their increased income, Asante women also experienced increased marital independence as they had the financial capacity to leave marriages where they were uncared for.[53] Other women

46 Catherine Coquery-Vidrovitch, African Women: A Modern History 31 (1997).

47 Judith A. Byfield, The Bluest Hands: A Social and Economic History of Women Dyers in Abeokuta (Nigeria), 1890-1940 (2002).

48 *Id.*; Elisha P. Renne, *Book Review: The Bluest Hands: A Social and Economic History of Women Dyers in Abeokuta (Nigeria), 1890-1940*, 35 Int'l J. Afr. Hist. Stud. 612–14 (2002); Malika Kraamer, *Judith A. Byfield, The Bluest Hands: A Social and Economic History of Women Dyers in Abeokuta (Nigeria), 1890–1940*, 74 Afr. 478–79 (2004).

49 Byfield, *supra* note 48; Renne, *supra* note 49; Kraamer, *supra* note 49.

50 The imposition of taxes on women also affected their ability to benefit fully from international trade. In 1929, Igbo women in the South-Eastern part of Nigeria organized a riot, popularly known as the Aba Women's Riot. The women protested a proposed female tax imposed by the colonial government though indirect rule, using warrant chiefs. However, forces of globalisation and international trade underpinned this struggle, particularly the "steady decline in the price of palm oil and palm kernel in the world market." Uche U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the New International Trade Regime*, 20 Berkeley J. Gender L. & Just. 75–149 (2005).

51 Victoria B. Tashjian & Jean Allman, *Marrying and Marriage on a Shifting Terrain: Reconfigurations of Power and Authority in Early Colonial Asante*, *in* Women in African Colonial Histories 237–59, 252 (Jean Marie Allman, Susan Geiger & Nakanyike Musisi eds., 2002).

52 *Id.*

53 *Id.*

were emboldened to challenge matrilineal inheritance in the customary court by "demanding portions of a divorced or deceased husband's cocoa farm in recognition of labor invested."[54] International trade in cocoa expanded the options of Asante women who were given the opportunity to participate directly in cocoa trade.

The trade policies introduced in colonial Ghana and Nigeria produced 'winners' and 'losers' and even if these policies were *de jure* gender neutral, they had *de facto* gendered implications. Whether the gender implications were recognised or not, or whether they were unintended, did not diminish the reality of their effect. Furthermore, growth in cash-crop exports like cocoa often relied on female labour even though the industries were mostly gendered male, leaving many women, except examples like the Asante women, with benefits that were not commensurate to their labour.[55]

In response to the tension between international trade's traditional objectives of economic efficiency and women's empowerment though trade, deliberate attempts to make international trade work for women and men are being explored. Gender is now being introduced into trade policy through instruments such as 'trade liberalisation agreements, reduction of tariffs on sectors with high female employment, tax incentives that encourage exports from women-owned enterprises and multilateral development assistance frameworks.'[56] With stated objectives of the SDGs to promote sustained, inclusive and sustainable economic growth,[57] ensure full and productive employment and decent work for all,[58] as well as ensuring gender equality,[59] the effect of trade on women and their access to decent work and equality cannot be a side issue.[60] Gender-sensitive trade policy must be a priority for all countries, irrespective of their geographic, economic, or social locality.

54 *Id.*

55 Emmanuel Akyeampong & Hippolyte Fofack, *The Contribution of African Women to Economic Growth and Development in the Pre-Colonial and Colonial Periods: Historical Perspectives and Policy Implications*, 29 Econ. Hist. Developing Regions 42–73 (2014).

56 OECD & Sahel and West Africa Club, Women and Trade Networks in West Africa 40 (2019), https://www.oecd-ilibrary.org/development/women-and-trade-networks-in-west-africa_7d67b61d-en.

57 2030 Agenda, Goal 8.

58 2030 Agenda, Goal 8.

59 2030 Agenda, Goal 5.

60 Choudhury, *supra* note 29, at 113.

III. GENDER AS AN AFRICAN DEVELOPMENT CONCERN: REGIONAL ECONOMIC COMMUNITIES AS THE VEHICLE?

As evidenced by African regional trade agreements, most African countries and regions have demonstrated an awareness – rhetorically, at least – of the issue linkages between gender and trade. However, there are important aspects of regionalism unique to the African context that require explanation in order to ground the analysis on gender-sensitive trade policy in African regionalisms. To understand regionalism in Africa, we must begin by examining the imprints of colonialism on Africa.

Colonialism disrupted traditionally constructed patterns of governance across African countries. Contemporary Africa is an evolving construct of its pre- and post-colonial past; its cartography carved out to advance European materialism without regard for the cultural, social and linguistic commonalities that had existed among and between African people for many centuries.[61] Regionalism has offered a means to reconnect and rearticulate shared norms, values and identities across the African continent. Promoting economic development through regionalism, or 'flexible legal regimes,'[62] was a mechanism used to push back against the colonial imaginaries of the African cartography.[63] Even though many of the 'favourable background conditions'[64] associated with neo-functional integration were absent, regionalism presented an opportunity to reconstruct Africa on its own terms.

The African approach to economic integration is somewhat unique, as it has simultaneously pursued both continentalism and functionalism. Continentalism or 'pan-Africanism' is a philosophy of unification; a vision to unite all African states.[65] A

61 Clair Gammage, North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement 184 (Cheltenham, Edward Elgar, 2017).

62 James Thuo Gathii, African Regional Trade Agreements as Legal Regimes (Cambridge Univ. Press 2011). For an overview of the historical origins of African regionalisms, see Clair Gammage, North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement, Chapter 6 (Cheltenham, Edward Elgar, 2017).

63 F.N. Ikome, *From the Lagos Plan of Action to the New Partnership for Africa's Development – The Political Economy of African Regional Initiatives* 33 (Midrand South Africa: Institute for Global Dialogue, 2007).

64 The original hypothesis of 'background conditions' for integration was set out by Ernst Haas and Philippe Schmitter in 1964. *See* Ernst B. Haas & Philippe C. Schmitter, *Economics and Differential Patterns of Political Integration: Projections about Unity in Latin America*, 18 Int'l Org. 705–37 (1964); Mario Barrera & Ernst B. Haas, *The Operationalization of Some Variables Related to Regional Integration: A Research Note*, 23 Int'l Org. 150–60 (1969).

65 Luwam Dirar, *Norms of Solidarity and Regionalism: Theorizing State Behavior Among Southern African States*, 24 Mich. State Int'l L. Rev. 667–723 (2015).

borderless African continent will be achieved through the abandonment of artificial constructs, like the concept of 'sub-Saharan Africa,' which have come to define epistemological and methodological approaches to the study of social, cultural, political and economic phenomena in Africa. To provide an extensive overview of the origins and evolution of African regionalisms is beyond the scope of this article.

Regionalism has played a central part in Africa's development strategy and it was originally seen as a vehicle to further the pursuit of pan-Africanism in the early days of post-colonialism. (Neo)liberalism has perceived to be one of the most significant threats to African ideologies and the project of pan-Africanism. Speaking in 1961, Kwame Nkrumah urged other African leaders to protect the African way(s) of being:

> 'We have our own way of life, a socialist way based on sound cultural foundation and an African background. Those who wish to understand our actions must first begin to study and appreciate this background. They should not judge us from ignorance, and they should not expect us to become mere copy-types of their past or present, however good these may be to themselves.'[66]

Nkrumah's vision of a pan-African continent endured and together, the Lagos Plan of Action 1980 and the Treaty Establishing the African Economic Community (the 'Abuja Treaty') 1991 served as the original building blocks for pan-African cooperation through regional groupings. A reading of both treaties situates the constitutional frameworks of the RECs in their normative context. The rationale behind the creation of RECs was to stimulate economic growth within African regional communities, to encourage intra-African trading patterns to relieve path-dependencies on former colonial partners and to serve as a steppingstone *towards* pan-African economic integration. Eight RECs are recognised by the African Union, which continue to exist today albeit their efficiency and coherence varies from one bloc to another: Arab Maghreb Union (AMU); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD)[67]; and the Southern African Development Community (SADC).

66 Kwame Nkrumah, The Voice of Africa: Speech on the Opening of the Ghana External Broadcasting Service (1961).

67 The IGAD is an organisation focused on regional cooperation in the following priority areas: food security and environmental protection, economic cooperation, regional integration and social development peace and security.

Recent statistics show that trade flows between the African RECs accounts for approximately 80 percent of all intra-African trade in 2015. In terms of trade volumes, just five African countries – Algeria, Côte d'Ivoire, Egypt, Nigeria and South Africa – were responsible for 67 percent of total intra-African traded volumes.[68] The RECs are, therefore, a vital source of trade for the continent and 'trading it with itself' is projected to be 'Africa's greatest economic opportunity.'[69] With that in mind, the remainder of this article explores the extent to which the RECs can serve as vehicles to promote the economic empowerment of women.

Gender equality and the non-discrimination of women are core features of African development strategies. Gender policy is included in the RECs as part of their 'development' policies rather than as independent chapters or clauses. The special place of women in society and the economy was recognised by the LPA which cautioned that the 'steps to be taken to solve the problems of African women should not be marginal and separate from the question of over-all development.' Chapter XII of the LPA, dedicated to 'Women and Development' consists of thirty provisions relating to women's participation in the economic, social and environmental dimensions of sustainable development. The LPA called for strategies to address the marginalisation of women in the rural economy and especially those involved in agri-processing,[70] to improve labour laws and union representation,[71] to ensure the entitlement to maternity benefits,[72] and to provide credit facilities for women to support their transition toward self-employment and to support entrepreneurial endeavours.[73] To integrate women into the economy, the LPA encouraged states to improve healthcare systems,[74] to provide educational and skills-training to women,[75] and to adopt measures that will enable women to participate in decision-making institutional settings.[76]

68 U.N. Conference on Trade and Development, From Regional Economic Communities to a Continental Free Trade Area, UNCTAD/WEB/DITC/2017/1, page vi (2018).

69 Kingsley Makhubela, *Africa's Greatest Economic Opportunity: Trading with Itself*, World Economic Forum (Jan. 16, 2018), https://www.weforum.org/agenda/2018/01/why-africas-best-trading-partner-is-itself/.

70 LPA, arts. 315–17.

71 LPA, art. 318(f).

72 LPA, art. 318(d).

73 LPA, art. 318(b).

74 LPA, art. 321.

75 LPA, arts. 308–14. In addition, Article 140 of the LPA stipulates that "Adult skill and literacy campaigns in science and technology should be mounted, using the national languages, where possible, with the primary object of getting rural women to participate more effectively in agricultural and rural technology programmes and projects…"

76 LPA, art. 300.

Overall, the LPA approached gender and development from a broad perspective and sought to address existing inequalities across all dimensions of social, economic, political and cultural life. However, the LPA was not a perfect legal exemplar for upholding gender equality and non-discrimination. Notwithstanding the call for strategies to promote the social, cultural and economic empowerment of women set out in Article 325 LPA (entitled 'Legislative and Administrative Matters'), some provisions of the LPA simply reinforced structural systems of patriarchy that embedded the oppression and subjugation of women within legal, cultural and social practices. For example, Article 325(f) LPA, which related to marriage and the controversial cultural practices of polygamy and bride price, stated:

> '*Women and girls should be more aware than men* of disadvantages of institutions such as polygamy and payment of bride price and of discrimination of status in marriage caused by those practices and *should recognise that they themselves must take steps to eradicate old customs, traditions and prejudices* which tend to give women an inferior position in the family…' (emphasis added)

This provision is at odds with the Nairobi Report (1985) which identified several categories of women who are of 'special concern' to the international community, including young women. Indeed, the Nairobi Report expressly stipulated that the onus was on the government to 'recognise and enforce the rights of young women to be free from sexual violence, sexual harassment and sexual exploitation.' Another example is found in Article 325(i) LPA which provided that women should be involved in 'law-making processes in order to ensure that legislation is better adapted to current realities' yet there was no guidance as to how this objective was to be achieved.

While the Abuja Treaty (1991) complements the LPA, it provided only one clause on women and gender. Article 75 Abuja Treaty stipulated that Member States should 'agree to formulate, harmonise, coordinate and establish appropriate policies and mechanisms for the full development of the African woman through the improvement of her economic, social and cultural conditions.' In addition, it stated that Member States 'shall take all measures necessary to ensure greater integration of women in development activities within the Community.' Chapter XII LPA, together with the Abuja Treaty, has served as the blue-print for the inclusion of gender clauses in the RECs and the commitment to promoting women as economic and social agents, albeit often framed in the narrative of 'development.' The advancement of women in development is, therefore, a common goal of the RECs.

In 2001, the African Union launched the New Partnership for Africa's Development (NEPAD), which formed part of Thabo Mbeki's strategy for an 'African Renaissance.'[77] NEPAD was created in 2001 as the successor to the LPA and focuses on the need to improve infrastructure in Africa to facilitate cross-country investment and foster regional integration.[78] The objectives of NEPAD are development oriented and aim to eradicate poverty and inequality in Africa, to promote empowerment and improve the economic status of women, and to integrate African states into the global economy through sustained economic growth. NEPAD recognises that 'postcolonial Africa inherited weak states and dysfunctional economies, which were further aggravated by poor leadership, corruption and bad governance in many countries'[79] and created a peer review mechanism that enables countries to provide a 'self-assessment' of their progress in key areas for review by other African states. However, this process has been widely criticized for failing to overcome institutionalised neopatrimonialism with one scholar describing the peer review mechanism as a nothing more than 'neocolonial governance mask.'[80] Nevertheless, and notwithstanding its shortcomings, NEPAD represents an effort by the African Union to support sustainable development through good governance and human rights protection, and although it seems to lack clear priorities,[81] it is the development framework within with the RECs now operate.

The intersection between development, trade and gender is outlined in paragraph 11 of NEPAD, which states:

> 'In Africa's efforts at democracy, good governance and economic reconstruction, women have a central role to play. *We accept it as a binding obligation* to ensure that women have every opportunity to contribute on terms of full equality to political and socio-economic development in all our countries.' [emphasis added]

Under this framework, NEPAD aims 'to end the moral shame exemplified by the

77 Thabo Mbeki, South African Deputy President, *Speech: The African Renaissance, South Africa and the World (*Apr. 9, 1998), *available at* http://archive.unu.edu/unupress/mbeki.html.

78 For an account of the origins and scope of NEPAD, see C. Landsberg, *The African Union and the New Partnership for Africa's Development (NEPAD): Restoring a Relationship Challenged?*, 12 Afr. J. Conflict Res. 49–71 (2012).

79 NEPAD, para. 22.

80 Patrick Bond, *Removing Neocolonialism's APRM Mask: A Critique of the African Peer Review Mechanism*, 36 Afr. Pol. Econ. 595–603 (2009).

81 James Thuo Gathii, *A Critical Appraisal of the Nepad Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development*, 13 Transnat'l L & Contemp. Probs. 179 (2003); Rachel Murray, Human Rights in Africa: From the OAU to the African Union (Cambridge University Press, 2004). See in particular *Chapter 8: Development, NEPAD and Human Rights*.

plight of women, children, the disabled and ethnic minorities'[82] by recognising and realising human rights and gender equality across all activities of the African Union. On the one hand, the long-standing tradition of situating women within the broader (social) development discourse enables a wide interpretive reading of the many and diverse issue linkages between gender and development, including the feminisation of poverty, trade and labour. On the other hand, an analysis of the constitutional documents and treaty frameworks governing the RECs reveals a diverging approach to gender in the context of development.

IV. GENDER-SENSITIVE TRADE POLICIES IN AFRICAN RECS

It is important to note that all RECs have their own rich historical origins that have played a role in the extent to which gender features in their treaties. Ideological divergences about the social, economic, and cultural orientation of regional integration initiatives have created conflict among regional partners and threatened to undermine the feasibility of African regionalisms.[83] The following sections examine how the RECs address and respond to the challenges of gender inequalities.

A. North Africa: AMU and CEN-SAD

There are two agreements covering the North African countries: the Arab Maghreb Union (AMU) and the Community of Sahel-Saharan States (CEN-SAD). Originally established in 1998 by six states, the CEN-SAD[84] regional community now consists of twenty-four signatories. The main religion of the CEN-SAD states is Islam but the legal text for this REC is currently inaccessible and we are not able to present *how* and *to what extent* gender-sensitive policies are advanced by this group.

The Arab Maghreb Union (AMU)[85] is an agreement between the Islamic states in northern Africa. Its constitutional treaty makes no reference to women or their economic empowerment. The idea for the creation of this region dates back to 1956 but it was formally created in 1989. Its treaty consists of just nineteen articles and

82 NEPAD, para. 10.

83 Julius Emeke Okolo, *Integrative and Cooperative Regionalism: The Economic Community of West African States*, 39 Int'l Org. 122 (1985).

84 The member states of CEN-SAD are: Benin, Burkina Faso, Central African Republic, Chad, the Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.

85 The AMU entered into force in 1998 and its members are: Algeria, Libya, Mauritania, Morocco, and Tunisia.

an associated Declaration. The only explicit gendered reference in the AMU Treaty is found in Article 2, which states an aim of the treaty as 'strengthening the ties of *brotherhood* which link the states and their peoples to one another.' While women are not directly referred to in the Treaty, the preambular recitals of the Declaration of the Institution of the Arab Maghreb Union give an insight into the broader context in which this regional group operates. For example, the seventh preambular statement 'proclaim[s] our firm determination to reinforce the foundations of justice and dignity for our Peoples and to confirm the individual and collective rights in our homelands on the basis of our cultural identity and spiritual values' while the penultimate recital stipulates that the parties envisage 'a world order where justice, dignity, freedom and human rights would prevail and the relations of which would be marked by sincere cooperation and mutual respect.' Although gendered aspects of trade are not explicitly addressed, there are references to values and principles implicit to gender equality – justice, dignity, freedom and human rights – albeit these aims should be read through an 'Arab lens.'

In the Northern African Arab countries,[86] 'the religious, the cultural and the social realms are intertwined firmly.'[87] The official religion of the state in these countries is Sunni Muslim, Sharia law is applied in the courts, and societies are governed and structured according to traditional cultural norms. As noted by Samar El-Masri:[88]

> 'It is this culture that crowned man as the king of his castle, and woman as a follower. This position was determined by the biological role of the woman in society, where it is believed that she is better suited for domestic responsibilities and is generally less capable and more irrational than a man. She is born to bear children and look after her house and family.
>
> Her male guardian is responsible for taking care of her. This downward inferior social status of women led to human rights violations on various fronts.'

Gender inequality is socially, culturally and legally constituted in these localities. The ratification of an international human rights treaty like CEDAW will not immediately undo centuries of cultural practices. Women's rights in Northern Africa, and indeed across other African states where Islam is the dominant religious framework, can

86 Algeria, Egypt, Libya, Morocco and Tunisia.

87 Samar El-Masri, *Challenges Facing CEDAW in the Middle East and North Africa*, 16 Int'l J. Hum. Rts. 931, 935 (2012).

88 *Id.*

only be properly understood if situated in their specific cultural context.[89] The RECs were created after CEDAW was implemented and marked an opportunity to commit to gender equality and non-discrimination through the newly-created regional communities. Instead, the AMU represents a restatement of Islamic values in the legal text. Perhaps unsurprisingly, a more inclusive approach to gender is expressed in the RECs involving non-Islamic African states.

B. West Africa: ECOWAS

Women have a prominent place in the text of the ECOWAS constitutional treaty. The original text was set out in 1975 and the ECOWAS Treaty was subsequently revised in 1993.[90] However, the provisions relating to women and gendered dimensions of development remained unchanged in the new text. The Treaty makes nine references to the term 'women' across the Agreement and a stated objective of ECOWAS is 'the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, *women* and youth organisations and socio professional organisations such as associations of the media, business men and *women*, workers and trade unions.'[91] ECOWAS Members have expressed their commitment to promote 'women's organisations and professional associations… as a means of ensuring mass involvement in the activities of the [ECOWAS] Community,'[92] which is seen as an integral part of social affairs and social development in the region.

Of most significance is the stand-alone provision on 'Women and Development' set out in Article 63, the original iteration of which predates Article XII LPA. This article provides that Member States of ECOWAS should 'undertake to formulate, harmonize, coordinate and establish appropriate policies and mechanisms, for enhancement of the economic, social and cultural conditions of women.'[93] In doing so, they 'shall take all measures necessary' to 'identify and assess all constraints that inhibit women from maximising their contribution to regional development efforts' and 'provide a framework within which the constraints will be addressed and for the incorporation of women's concerns and needs into the normal operations of the society.'[94] The

89 Abdullahi Ahmed An-Na, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 Emory Int'l L. Rev. 785–809 (2011).

90 Treaty of the Economic Community of West African States Treaty (May 28, 1975) [hereinafter ECOWAS Treaty (Original)]; Revised Treaty of the Economic Community of West African States Treaty (July 24, 1993) [hereinafter ECOWAS Treaty (Revised)].

91 ECOWAS Treaty (Original & Revised), art. 3(1).

92 ECOWAS Treaty (Original & Revised), art. 61(c).

93 ECOWAS Treaty (Original & Revised), art. 63(1).

94 ECOWAS Treaty (Original & Revised), art. 63(2).

Treaty envisages that the empowerment of women in the ECOWAS region will be achieved by 'stimulat[ing] dialogue… on the kinds of projects and programmes aimed at integrating women into the development process'[95] and 'promoting knowledge exchange on those programmes so that individual Member State experiences can be shared.[96] Finally, the ECOWAS Treaty proposes the creation of a mechanism for cooperation with bilateral and multilateral organisations to inform and respond to the challenges facing women in the African economies.[97]

While it appears that the language used in the Treaty is framed in a mandatory way with the verb '*shall*' being used throughout, the commitments and obligations set out in the provisions are both vague and ambiguous. In other words, the language confers discretion on the individual States and the Community to determine how these objectives are to be achieved and what constitutes realisation of these objectives. There is no baseline to measure whether the provisions of Article 63 have been realised. Rather, the permissive language enables each Member State of ECOWAS to establish its own baseline. This approach enables the political, social, cultural and traditional normative structures in each respective ECOWAS country, but it seems at odds with the need to create a coherent mechanism to monitor gender equality in the region. This has been recognised by the ECOWAS Commissioner for Social Affairs and Gender, Dr. Fatima Jagne, who in 2019 reiterated the importance of creating a 'regional gender establishment that will serve as a reference centre while activating a gender scorecard that seeks to bring up all the countries in the region to the same level.'[98]

In the absence of a protocol on gender covering all aspects of activity in the ECOWAS, Article 63 has served as a legal basis for the ECOWAS community to promote women's access to and control of economic resources through initiatives like the Business Incubator for African Women Entrepreneurs (BIAWE) project and the Programme on Gender Mainstreaming in Energy Access (2013). ECOWAS Commissioners recognise that more needs to be done to prioritise the interests of women in the region. In 2019, the Commissioner for Education, Science and Culture, Professor Leopoldo Amado, stated that 'the advancement of women has become a *community priority* and women are more than ever at the heart of the decision-making power of

95 ECOWAS Treaty (Original & Revised), art. 63(3)(a).

96 ECOWAS Treaty (Original & Revised), art. 63(3)(c).

97 ECOWAS Treaty (Original & Revised), art. 63(3)(b).

98 *ECOWAS Commission and UN Women Partner on Gender Mainstreaming*, Economic Community of West African States (Oct. 24, 2019), https://www.ecowas.int/ecowas-commission-and-un-women-partner-on-gender-mainstreaming/.

our community.'[99] This has been reiterated in March 2020 by Dr. Fatima Jagne on International Women's Day. There are plans afoot to implement the Supplementary Act on gender equality in sustainable development[100] but this has yet to materialise.

C. Central Africa: ECCAS

ECCAS was established in 1983 as a regrouping of the Central African Economic and Monetary Community (CEMAC) and the Economic Community of the Great Lakes (CEPGL). Today, it comprises ten central African states[101] and of all the sub-saharan RECS. The ECCAS Treaty is the least comprehensive in terms of its treatment of gender issues. Like ECOWAS, the ECCAS Treaty mentions women only in relation to social affairs (Article 60) but it merely states that Members shall 'develop collective research by appropriate policies aimed at improving the economic, social and cultural status of women in urban and rural areas and increasing their integration in development activities.'[102] There is no indication of how this will be monitored by the Community.

D. East Africa: EAC

The EAC was established under its Treaty in 1999 and promotes cooperation amongst six East African nations,[103] although the region has enjoyed a much longer history of cooperation. Its mission is to 'widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.'[104] Gender equality and the economic empowerment of women has been a focal point for the community and Article 5(3)(e) of the EAC Treaty provides for the 'mainstreaming of gender in all its endeavours and the enhancement of women in cultural, social, political, economic and technological development'. The EAC Treaty includes references to

99 *ECOWAS Commission to Consolidate Gender Equality and Women Empowerment Drive*, Economic Community of West African States (Mar. 12, 2019) (emphasis added), https://www.ecowas.int/ecowas-commission-to-consolidate-gender-equality-and-women-empowerment-drive/.

100 *A Series of Recommendations to Ensure Gender Equality and Equality in ECOWAS Member States*, Economic Community of West African States (Feb. 15, 2017), https://www.ecowasint/a-series-of-recommendations-to-ensure-gender-equity-and-equality-in-ecowas-member-states/.

101 Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Gabon, Equatorial Guinea, São Tomé and Principe.

102 Treaty for the Establishment of the Economic Community of Central African States, art. 60(2)(b) (1983) [hereinafter ECCAS Treaty].

103 The members of the EAC are Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda.

104 *Overview of EAC: Our Mission*, The East African Community (EAC), https://www.eac.int/overview-of-eac.

'gender', which it defines as 'the role of women and men in society.'[105] For example, Article 9 provides that 'in the appointment of staff and composition of the organs and institutions of the Community, gender balance *shall be taken into account*.' Again, the language here implies a mandatory obligation to act yet there is no framework instituted through the EAC Treaty to explain what 'taking into account' the 'gender balance' requires in practice.

Women are recognised as *socio-economic agents* and they are positioned as a 'vital economic link between agriculture, industry and trade' in the EAC. Chapter 22 of the EAC Treaty (1999), entitled 'Enhancing the Role of Women in Socio-Economic Development,' contains two provisions relating to the role of 'women in socio-economic development' (Article 121) and 'women in business' (Article 122). This chapter is framed by the preambular statement of Article 121, which reads:

> 'The Partner States recognise that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes for the economic and social development of the Partner States without the full participation of women.'

Rhetorically, at least, this statement demonstrates that the agency of women in social, economic and cultural terms is recognised in the Treaty. Article 121 provides that EAC states should adopt 'appropriate legislative and other measures' to 'promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision-making',[106] abolish legislation and discourage customs that have discriminatory effects against women,[107] promote education,[108] create and adopt technologies to support women in the labour force,[109] and 'take other such measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every respect.'[110]

Furthermore, Article 122 EAC Treaty provides that the partner states will undertake a number of commitments in the context of business to increase the participation of

105 Treaty for the Establishment of the East African Community, art. 1 (1999) [hereinafter EAC Treaty].
106 EAC Treaty, art. 121(a).
107 EAC Treaty, art. 121(b).
108 EAC Treaty, art. 121(c).
109 EAC Treaty, art. 121(d).
110 EAC Treaty, art. 121(e).

women at both the policy formulation and implementation levels individually[111] and by way of national and regional associations of business.[112] The Treaty provides that its Members shall undertake to 'promote special programmes for women in small, medium and large scale enterprises'[113] and 'eliminate all laws, regulations and practices that hinder women's access to financial assistance including credit.'[114] Education strategies and skills training should be provided to improve women's access to and participation in the labour market.[115]

Gender is a priority under the current EAC Development Strategy (2016/17–2020/21). The EAC promulgated the Equality and Development Bill in 2016 which has the principle objective to 'advance gender equality… in the economic, political, social and cultural aspects.'[116] A Technical Working Group on Women, Gender and Development was created to meet twice a year to discuss progress made at the national and community levels in relation to gender and women. In addition, the EAC Vision 2050 recognises that investing in women's empowerment is 'fundamental for breaking the inter-generational cycle of poverty.'[117]

To complement the legal provisions set out in the EAC Treaty, the Community has adopted policies to tackle gender inequalities. Article 6(d) EAC Treaty, which upholds the principles of democracy, rule of law, transparency, social justice, gender equality and human rights serves as the legal basis for the EAC's Gender Policy (2018).[118] The Gender Policy 'takes cognizance of the fact that women's poverty is also a result of socially enforced gender roles and relations and that if the causes of gender inequality are not addressed, gender related poverty will persist.'[119] A commitment under the Gender Policy is to coordinate a Regional Gender Policy Implementation Plan by 2023 and develop an effective Monitoring and Evaluation framework.[120] Overall, the EAC is to date demonstrating the most progressive and transformative commitment

111 EAC Treaty, art. 122(a).
112 EAC Treaty, art. 122(e).
113 EAC Treaty, art. 122(b).
114 EAC Treaty, art. 122(c).
115 EAC Treaty, art. 122(d).
116 The East African Community Gender Equality and Development Bill, *The East African Community Bills Supplement No. 3*, art. 4 (Jan. 8, 2016), *available at* http://www.eala.org/documents/view/the-east-african-community-gender-equality-and-development-bill2016.
117 East African Community, *East African Community Gender Policy* 12 (May 2018) [hereinafter EAC Gender Policy 2018], *available at* https://www.eac.int/documents/category/gender.
118 EAC Gender Policy 2018.
119 EAC Gender Policy 2018, at 27.
120 EAC Gender Policy 2018, at 49.

to gender mainstreaming and gender-sensitive trade policies through these initiatives and its Simplified Trade Regime, discussed below .

E. Eastern and Southern Africa: COMESA

COMESA was established in 1994, replacing the former preferential trade agreement that had been created in 1981, 'as an organisation of free independent sovereign states which have agreed to cooperate in developing their natural and human resources for the good of all their people.'[121]

It brings together twenty-one states[122] with an overarching objective to achieve 'economic prosperity through regional integration.'[123] The region comprises eight Arab countries, the majority of whom are also party to either AMU or CEN-SAD, [124] and it is interesting to note that the approach to gender in the COMESA framework is vastly different to the approach taken under those agreements.

Chapter 24 COMESA Treaty (2009), 'Women in development and Business', sets out its commitment to promote the participation of women and their agency in socio-economic development. Much like Chapter 22 of the EAC Treaty, the COMESA text separates out its obligations into two provisions: one addressing the 'Role of Women in Development' (Article 154) and the other addressing the 'Role of Women in Business' (Article 155). The similarities in approaches to these provisions is likely to stem from the overlapping membership of the two groups.

The preambular statement in Article 154 is almost identical to Article 121 EAC Treaty and reads:

> 'The Member States agree that women make significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes *for rural transformation and improvements in the informal sector* without the full participation of women.' (Italics indicating textual differences.)

Again, the substantive commitments of Article 154 are almost identical to those set

121 Treaty Establishing the Common Market for Eastern and Southern Africa (Nov. 5, 1993) [hereinafter COMESA Treaty], *available at* https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf.

122 Burundi, Comoros, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Eswatini, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Somalia, Tunisia, Uganda, Zambia, Zimbabwe.

123 *COMESA Objectives and Priorities*, COMESA, https://www.comesa.int/company-overview-2/.

124 Djibouti, Egypt, Eritrea, Ethiopia, Libya, Sudan, Somalia and Tunisia are Arab members of COMESA. Ethiopia is not a member of AMU or CEN-SAD.

out in Article 121 EAC. However, there are important and notable textual differences between the COMESA Treaty and the EAC Treaty. In the context of 'women and development,' Article 154(b) provides that COMESA members will undertake to 'eliminate regulations and customs that are discriminatory against women *and specifically regulations and customs which prevent women from owning land and other assets*' while the wording of Article 121 EAC simply provides that its Members should 'abolish legislation and discourage customs that are discriminatory against women.' Article 154(b) COMESA goes beyond the scope of Article 121 EAC in its explicit reference to women and ownership of land and assets. Furthermore, Article 154(e) calls for the Members to 'encourage and strengthen institutions which are engaged in the promotion and development of labour-saving devices aimed at improving the productive capacity of women' and does not include the reference to 'eliminating prejudices against women' set out in Article 122(e) EAC Treaty.

Article 155 on the 'Role of Women in Business' of the COMESA Treaty resembles Article 122 of the EAC Treaty. Whereas the EAC Treaty seeks to 'increase the *participation* of women in business at the policy formulation and implementation levels,'[125] the COMESA Treaty aims to 'increase the *awareness* of Women in Business issues at the policy level'[126] and '*create an enabling environment for the effective participation of women*'[127] in the trade and development opportunities of the Community. The parties of both treaty frameworks commit to 'promote special programmes for women in small and medium-sized enterprises.'[128] In terms of financial assistance, the wording in the EAC Treaty is broader with the parties undertaking to 'eliminate all laws, regulations and practices that hinder women's access to financial assistance *including* credit,'[129] whereas the COMESA Treaty merely stipulates that the parties 'agree' to 'eliminate such laws and regulations that hinder women's access to credit.'[130]

Both the EAC Treaty and the COMESA Treaty codify the agreement or undertaking by the parties to 'initiate changes in educational and training strategies to enable women to improve their technical and industrial employment levels through the acquisition of transferable skills offered by various forms of vocational and on-the-

125 EAC Treaty, art. 122(a).
126 COMESA Treaty, art. 155(1)(a).
127 COMESA Treaty, art. 155(1)(b).
128 EAC Treaty, art. 122(b); COMESA Treaty, art. 155(1)(c).
129 EAC Treaty, art. 122(c).
130 EAC Treaty, art. 155(1)(d).

job training schemes'[131] and recognise the importance of federal, regional and national associations to 'promote the effective participation of women' in business.[132] However, the COMESA Treaty goes further than the EAC Treaty insofar as it provides that the Federation of National Associations of Women in Business shall be represented at the COMESA Consultative Committee and at Technical Committee meetings.[133] In addition, implementation activities adopted in pursuit of Chapter 9 may be submitted to the Technical Committees 'depending on the technical items under consideration.'[134] Overall, the spectrum of obligations to promote gender equality and non-discrimination in the EAC and COMESA treaties squeeze and pull at different points.

Under the legal bases of Articles 154 and 155, the Community adopted the COMESA Gender Policy and Addis Ababa Declaration on Gender in 2002. Furthermore, and since 2009, the COMESA Secretariat has been implementing its Gender Mainstreaming Strategic Action Plan, which includes the creation of gender specific manuals for trade, investment, private sector development, environment, peace and conflict prevention, HIV and AIDS, information and communication and COMESA institutions. Mainstreaming gender in agriculture and climate change policies is prioritised under the Regional Strategy and Action Plan (RESTRAP). Gender policy in the region is overseen by the Gender and Social Affairs division in the COMESA Secretariat.

However, the Secretariat has acknowledged that progress has been made towards the advancement of women and social development but 'the region continues to struggle with gender inequalities across all sectors of the economy.'[135] As a result, in its 2016–2020 Medium Term Strategic Plan, the COMESA community have prioritised gender and social development as one of its strategic objectives.[136] Again, gender and women's empowerment is situated within the broader framework of social development:

> 'People-centred regional development and social justice will be realised through gender equality, empowerment of women and youth, protection and promotion of the rights of vulnerable groups. Promoting gender equality is an important

131 EAC Treaty, art. 122(d); COMESA Treaty, art. 155(1)(e).

132 EAC Treaty, art. 122(e); COMESA Treaty, art. 155(1)(f).

133 COMESA Treaty, art. 155(2).

134 COMESA Treaty, art. 155(3).

135 COMESA, *Medium Term Strategic Plan 2016-2020: In Pursuit of Economic Trans-formation and Development* 7–8 (2016), *available at* https://www.comesa.int/comesa-medium-term-strategy-2016-2020/.

136 Strategic Objective 7, entitled 'Foster Gender Equality and Social Development', identifies a range of initiatives to realise gender equality. *See id.* at 32–33.

part of the development strategy that seeks to enable people, both women and men, to diminish their poverty and improve the standard of living.'

Overcoming the challenges of feminisation of poverty and trade remains a key concern for COMESA today.

F. Southern Africa: SADC

The original SADC Treaty, referred to as the Windhoek Declaration, was initially signed by ten countries[137] but eventually another four joined the group, including South Africa following its liberation from apartheid.[138] Women are not explicitly referred to in the SADC Treaty (as revised in 2015) but gender is a 'cross-cutting' issue for the community. The promotion of gender equality, women's rights and the economic empowerment of women fall implicitly within the terms of the Treaty's aims and objectives. A stated principle of the Community is 'human rights, democracy and the rule of law'[139] while 'mainstream[ing] gender in the process of community building'[140] is an objective of the bloc. Article 6 sets out the 'General Undertakings' of the SADC states, among which is the commitment of non-discrimination of 'any person on the grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.'

Other objectives of the bloc include 'promot[ing] sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration'[141] and 'promot[ing] self-sustaining development on the basis of collective self-reliance.'[142] The creation of 'democratic, legitimate and effective' regional institutions is a stated objective which should, of course, by implication mean that gender balance and representation is a concern of the community. It identifies the private sector, civil society, non-governmental organisations and workers and employers organisations as

137 Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

138 South Africa (August 1994); Mauritius (August 1995); DRC (June 1998); Madagascar (August 2005). Although the Seychelles became a member of SADC in February 1998, it subsequently withdrew from the group.

139 Treaty of the Southern African Development Community, art. 4(c) (revised 2015) [hereinafter SADC Treaty].

140 SADC Treaty, art. 5(1)(k).

141 SADC Treaty, art. 4(a).

142 SADC Treaty, art. 4(d).

'key stakeholders' with whom the SADC 'shall seek to involve fully… in the process of regional integration.'[143]

Gender issues are addressed explicitly in two Declarations; one on Gender and Development (1997) and one known as the Addendum to the Declaration on Violence Against Women (1998). The impetus behind these declarations comes from the task force of SADC women in government and non-governmental organisations that was created to attend the Beijing Declaration and Platform for Action (1995).[144] Following the Beijing Conference, this task force became the Regional Advisory Committee for SADC and gender mainstreaming became an objective of the institutional and policy framework for the region.

In 2008, the SADC Community adopted a Protocol on Gender and Development which addresses substantive and procedural gender issues.[145] Gender is defined as 'the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys' with 'gender equality' defined by the Protocol as meaning 'the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys.' The Protocol defines 'gender sensitive' as meaning 'acknowledging and taking into account the specific gender needs of both men and women at all levels of planning, implementation, monitoring and evaluation.' The SADC Protocol identifies that women have 'multiple roles' in the 'reproductive, productive and community management sphere' and sets out objectives to ' provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects.'[146] It sets out twenty-three progressive targets including the aim to recognise gender equality and equity as constitutional rights in the SADC States domestic system. For example, Article 4 stipulates that the SADC States were to 'endeavour' to 'enshrine gender equality and gender equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices.' Furthermore, all existing law that discriminates against women

143 SADC Treaty, art. 23.

144 Fareda Banda, *Going It Alone? SADC Declarations and the Gender Debate*, 46 J. Afr. L. 259, 260 (2002).

145 Southern African Development Community, *Protocol on Gender and Development* (Oct. 17, 2008) [hereinafter SADC Protocol on Gender].

146 SADC Protocol on Gender, art. 3(a).

should have been repealed by 2015.[147] However, Malawi and South Africa have yet to ratify the Protocol.[148]

This section has revealed the diverging approaches to gender-sensitive trade policies advanced by the RECs. Where progressive approaches toward gender and trade has been seen through the treaties and associated acts of the EAC, ECOWAS, SADC and COMESA, the same cannot be said for ECCAS, AMU and CEN-SAD. However, and even where progressive frameworks are adopted to embed gender within a development framework, it does not necessarily follow that these market-based arrangements genuinely value human capital and gender.[149]As African states continue to negotiate trade commitments under the AfCFTA, what promise might this pan-African agreement hold for women and their economic empowerment?

V. THE AFCFTA: A PAN-AFRICAN APPROACH TO GENDER AND TRADE?

Research is already being undertaken at the multilateral level to develop better insights into how existing trade rules and 'unregulated spaces' in WTO Agreements can be reoriented to empower women.[150] The Buenos Aires Declaration, supported by almost two-thirds of the WTO membership, has marked an important step toward the creation of more inclusive trade policy. It is against this background that the transformative potential of the AfCFTA must be problematised. What, for example, should pan-African gender-sensitive trade policy look like? How can it incorporate the diverse concerns of women across the continent? Can the commitments to gender equality and the non-discrimination of women expressed in some of the RECs be strengthened through pan-African approaches to regional integration to deliver an African approach to the trade and gender? These are just a few of the questions that

147 SADC Protocol on Gender, art. 6.

148 Mauritius is not a signatory to the Protocol as it violates a provision of its civil code on marriage.

149 Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, 26 Mich. J. Int'l L. 199–243 (2004). For compelling accounts from heterodox and social reproduction theorists, *see* Social Reproduction Theory: Remapping Class, Recentring Oppression (Tithi Bhattacharya ed., 2017); Women and Work: Feminism, Labour and Social Reproduction (Susan Ferguson ed., 2019); Sakiko Fukuda-Parr , James Heintz & Stephanie Seguino, *Critical Perspectives on Financial and Economic Crises: Heterodox Macroeconomics Meets Feminist Economics*, 19 Feminist Econ. 5 (2013).

150 *See* Rohini Acharya et al., *Trade and Women – Opportunities for Women in theFramework of the World Trade Organisation*, 22 J. Int'l Econ. L. 323–54 (2019).

need to be answered as the negotiators advance through the forthcoming rounds of negotiations.

It is perhaps unsurprising that gender-sensitive trade policy does not feature in the AfCFTA, given the diversity of approaches to gender illustrated in the preceding section. The current AfCFTA Treaty draft references the term 'women' once and 'gender' twice. In the seventh preambular recital the state parties 'recognis[e] the importance of international security, democracy, human rights, *gender equality* and the rule of law, the development of international trade and economic cooperation.' Furthermore, a 'general objective' of the AfCFTA is to 'promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties.'[151] The AfCFTA recognises the special position of women in the African economy and State parties have agreed to 'mobilise resources… and implement measures' to 'improv[e] the export capacity of both formal and informal service suppliers, with particular attention to micro, small and medium size; women and youth service suppliers.'[152] In the absence of a provision or chapter on gender in AfCFTA the gender-sensitive trade strategies advanced in the RECs shall be maintained until a comprehensive customs union agreement is negotiated.[153]

The *rendez-vous clause*[154] incorporated into the current draft of the AfCFTA Treaty provides for the ongoing negotiation of State Parties in outstanding areas including tariffs, rules of origin, services, intellectual property, investment and competition policy. Negotiations will continue in phases until agreement is reached in all areas. There is, therefore, scope for the inclusion of gender-sensitive trade policies on an unprecedented scale. However, it is not the immediate intention of the AfCFTA to abolish or supersede the RECs.[155] So, for the time being, the regional gender-sensitive trade policies set out under the RECs will continue to apply.

151 African Union, *Agreement Establishing the African Continental Free Trade Area*, Part II, art. 3(e) (2019) [hereinafter AfCFTA Treaty], *available at* https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area.

152 AfCFTA Treaty, Part VI, art. 27(2)(d).

153 AfCFTA Treaty, Part V, art. 19 provides: "(1) In the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement; (2) Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trade arrangements and customs unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain higher levels among themselves."

154 AfCFTA Treaty, Part II, art. 7.

155 *See* Gerhard Erasmus, *What Will Happen to the Regional Economic Communities and other African Trade Agreements once the AfCFTA is Operational?*, Tralac (June 11, 2018), https://www.tralac.

However, we argue that the existing RECs do not go far enough to promote gender equality and non-discrimination against women. There are flashes of innovation across the RECs in their approaches to gender-sensitive trade policies, but overall there is still a stark disparity between the status of men and women across many African societies. Patriarchal normative structures are prevalent in African cultures and, while they manifest in different ways, the subordinate position of women socially, economically, culturally and politically vis-à-vis their male counterparts is common. Culture has often been used as a reason to treat women on an inferior basis. As a result, women have occupied a different space in the economy to men. However, culture is not the only factor that must be considered in designing gender-sensitive trade policy in Africa. In crafting and implementing gender-sensitive trade policies under the RECs or in future AfCFTA negotiations, other characteristics stand to define the position of women in Africa, in relation to trade; which characteristics must take centre stage in the conceptualisation and design of regional and continent-wide trade policy.

The first of these characteristics is that women make up a large proportion of traders in the informal economy and the informal economy accounts for a large portion of business activities on the continent. The informal economy is a term 'used broadly to include both modern and traditional non-agricultural work that stands in contrast to the formal economy in that it involves work without recognised contracts, fixed wages or government protection, and is located outside the established sphere of factory and office-based employment.'[156] Since the 1990s, studies have shown that women in Africa participate in and contribute to the informal economy in a significant way[157] and informal cross-border trade (ICBT) in Africa is a significant source of revenue particularly for women in border communities. In the Southern African Development Community (SADC), ICBT is estimated to be 30-40 percent of total intra-SADC trade, with an estimated value of US$17.6 billion.[158] In West Africa, ICBT is estimated

org/publications/article/13135-what-will-happen-to-the-regional-economic-communities-and-other-african-trade-arrangements-once-the-afcfta-is-operational.html.

156 Ibipo Johnston-Anumonwo & Donna L Doane, *Globalisation, Economic Crisis and Africa's Informal Economy Women Workers*, 32 Singapore J. Tropical Geography 8, 9 (2011).

157 *See* Shirlena Huang & Brenda S.A. Yeoh, *Gender and Urban Space in the Tropical World*, 17 Singapore J. Of Tropical Geo. 105–112 (1996).

158 Suffyan Koroma et al., *Formalization of Informal Trade in Africa: Trends, Experiences and Socio-Economic Impacts*, U.N. Food & agric. Org. vi (2017), *available at* https://globalinitiative.net/wp-content/uploads/2018/01/FAO-Formalization-of-informal-trade-in-Africa.pdf. Christopher Changwe Nshimbi, *The Human Side of Regions: Informal Cross-border Traders in the Zambia–Malawi–Mozambique Growth Triangle and Prospects for Integrating Southern Africa*, 35 J. Borderlands Stud. 75–97 (2020). Migration, Cross-Border Trade and Development

to account for 20 percent of GDP in Nigeria and 75 percent in Benin.[159] Unlike in Asia, where increased trade liberalisation has grown the manufacturing sector[160] and with it, increased Asian women's access to employment opportunities,[161] most African countries do not have a similar trajectory, as they continue to rely heavily on the export of primary commodities as opposed to high-value finished products.[162] Many African women therefore continue to be involved in subsistence farming and agriculture which they trade within their countries or cross border.[163] Ndumbe's study of cross border trade in the vegetable Eru[164] shows that this commodity contributes on average 62 percent of a harvester's annual income.[165] Over half of Eru exporters are women.[166]

This informality is not only evident in trade in goods, but also extends to trade in services, as women cross borders to provide various services, albeit menial, from hair dressing to serving as nannies or domestic workers.[167] Lack of attention to the various hues of informal transactions described above has contributed to a regulatory blindness on how to extract value from these informal industries, while ensuring that the women who dominate these industries are protected and derive commensurate benefit. For instance, there are established, albeit informal routes for transporting people (mostly women) who work as domestic workers in large African cities like Lagos, Nigeria. However, lack of proper understanding and regulation of such informal migration flows have left those involved susceptible to being exploited and open to sexual and

in Africa: Exploring the Role of Non-State Actors in the SADC Region, (Christopher Changwe Nshimbi & Inocent Moyo eds., 2017).

159 Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade (United Nations, African Union, & African Development Bank eds., 2010).

160 Women and industrialization in Asia (Susan Horton ed., 2003).

161 Although there are well-documented negative implications of the manufacturing industry on women including but not limited to abuse of their fundamental human rights. Pahuja, *supra* note 29, at 39.

162 The Challenge of African Economic Recovery and Development 163 (Adebayo Adedeji, Patrick Bugembe & O. Teriba eds., 2014).

163 *See* Louis Njie Ndumbe, *Unshackling Women Traders: Cross-border Trade of Eru from Cameroon to Nigeria*, World Bank (June 2013), http://documents.worldbank.org/curated/en/262591468292477021/pdf/797110BRI0PN380Box0377384B00PUBLIC0.pdf.

164 *Eru* is a popular vegetable of the *Gnetum* species—*Gnetumafricanum* and *Bucholzianum*—which is traded heavily between Cameroon and Nigeria. *See id.* at 3.

165 *Id.* at 2.

166 *Id.*

167 The World Bank, The Unexplored Potential of Trade in Services in Africa: From Hair Stylists and Teachers to Accountants and Doctors (Nora Dihel & Arti Grover Goswami eds., 2016).

gender violence.[168] They also experience harassment at the border, often have to pay bribes to border officials and they may also experience delays which can affect the market value of perishable products. [169] While it is acknowledged that 'empowering women informal cross border traders will have a multiplier effect on poverty reduction, employment creation, intra-African trade and regional integration,'[170] it is vital that this acknowledgment translates into trade policies that address the needs of women in the informal economy. The recognition of national identity cards as a travel document among Kenya, Rwanda and Uganda since January 2014 is an example of trade policy that has positively affected ICBT traders. [171] This policy has led to a significant uptick in travel between the partner states, with majority of travel being conducted by ICBT actors.[172]

Second, African women involved in trade are often hampered by legal and institutional constraints. These legal and institutional limitations manifest in several ways, including but not limited to obscurity about regulations affecting trade, particularly standards, rules of origin and customs procedures, thereby limiting women's ability to maximize existing trade routes and regimes. An OECD survey of 1997 entrepreneurs in the rice sector between Benin, Niger and Nigeria shows that men involved in the similar business of rice trading earn five times more than women who are limited by formal and customary laws, public policies, limited access to credit and other financial instruments.[173]

In East Africa, lack of information about the legal aspects of trade has been recognised as one of the most significant non-tariff barriers facing traders, especially those engaging in ICBT, in the EAC region:[174]

> 'Traders struggle to find information regarding the goods and services allowed for trade in each Partner State, the standards and authorisation certifications required, the taxes and tariffs expected in each Partner State, the import and

168 The World Bank, Women and Trade in Africa: Realizing the Potential 6 (Paul Brenton, Elisa Gamberoni & Catherine Sear eds., 2013).

169 *Id.* at 6.

170 *Unleashing the Potential of Women Informal Cross Border Traders to Transform Intra-African Trade*, UN Women (2011), https://www.unwomen.org/-/media/headquarters/media/publications/en/factsheetafricanwomentradersen.pdf?la=en&vs=944.

171 Koroma et al., *supra* note 145.

172 *Id.*

173 OECD and Sahel and West Africa Club, *supra* note 43, at 21.

174 East African Community, *A Simplified Guide for Micro and Small-Scale Women Cross Border Traders and Service Providers within the East African Community*, Foreword, iv-v (Apr. 20, 2017) [hereinafter EAC Simplified Guide].

> export laws of each Partner State, the trade processes and controls, the rules of origin and the customs procedures among other details that are important for successful trade in the region...the lack of clear and accessible information is more acute among women entrepreneurs as communication channels and means have not necessarily been developed along their needs.'

Women owned businesses in the EAC are thought to account for between 35–55 percent of the total number of businesses in the region.[175] The majority of women-owned business in the EAC are micro, small and informal[176] and there are gender-specific challenges facing women traders in this region including cultural prejudices, access to affordable finance and credit, educational attainment levels, skills and business acumen. To overcome the disempowerment of women, and in partnership with the International Labour Organisation, the EAC has developed a user-friendly toolkit to make trade rules accessible for women in the region. The 'Simplified Guide for Micro and Small-Scale Cross Border Traders and Service Providers within the EAC' is an excellent example of how complex trading norms can be made accessible to women from all backgrounds. It builds on the EAC Strategy for Promoting Women in Business and the Women's Socio-Economic Empowerment Draft to support women in understanding changes in legislation, like the introduction of the EAC Customs Union (Rules of Origin) Rules in 2015. It is a practical guide that points users not only to the rules but to the main government agencies that can assist them in trading. Initiatives like those taken by the EAC are welcome as they tackle the feminisation of poverty and trade on the continent.

Third, the high rate of unemployment in many African countries, adds a different dimension to African women's struggles and their interaction with trade, as unemployment has necessitated or encouraged the growth of informality and entrepreneurship. Historically, African women have played a role in entrepreneurship and retail and have demonstrated the ability to operate organised market structures.[177] However, increased unemployment has made it pertinent for many Africans to become entrepreneurs – spawning an entrepreneurship model based on necessity. While female entrepreneurship is encouraged, research shows that businesses owned by female entrepreneurs in Africa are less likely to export.[178] According to the International Trade

175 EAC Simplified Guide, at 3.

176 EAC Simplified Guide, at 4.

177 Davis A. Bullwinkle, *Women and Their Role in African Society: The Literature of the Seventies*, 15 Current Bibliography Afr. Aff. 263–91, 264 (1983).

178 Unlocking Markets for Women to Trade 7 (International Trade Centre ed., 2015).

Centre (ITC), only 20 percent of exporting firms are led by women, with West-Africa having the least number of women-led exporting firms globally.[179] The ITC explains that women encounter gender-based discrimination when obtaining trade-related paperwork,[180] and not only do they face the typical tariff and non-tariff barriers associated with exporting in Africa, which disproportionately affect smaller businesses, they also balance domestic family responsibilities which are largely unremunerated and unaccounted for.[181]

Fourth, African women not only deal with the difficulties associated with trading in Africa, they also deal with barriers such as structural inequalities in patriarchal societies, limited access to education, health-care, as well as other institutional inequities that limit their capabilities. The problems militating against African women's include 'customary law, family law (polygamy), inheritance law and property law, and stem from religious practices, external and family violence, FGS, their status as refugees, education, employment, health care, trafficking, slavery and lack of representation in the political and economic spheres.'[182] These problems co-exist with other inherently difficult issues associated with trade in and particularly *within* Africa, such as corruption,[183] non-tariff barriers like difficulties with border crossings, [184] lack of connecting infrastructure,[185] delays in shipping and customs,[186] and other practical issues like limited access to electricity for production and in some cases, a volatile political terrain. Trade within Africa is already difficult without the added layer of difficulty that African women

179 *Id.*

180 Arancha González, *When She Trades, We All Benefit*, *in* Reshaping Trade Through Women's Economic Empowerment 13–14, 14 (2018), https://www.cigionline.org/sites/default/files/documents/Women%20and%20Trade.pdf.

181 *Id.*

182 Wing, *supra* note 29, at 479–80; Brenton, Gamberoni & Sear, *supra* note 155, at 1.

183 Jacob Wanjala Musila & Simon Pierre Sigué, *Corruption and International Trade: An Empirical Investigation of African Countries*, 33 World Econ. 129–46 (2010).

184 Bernard Hoekman, Lemma W Senbet & Witness Simbanegavi, *Integrating African Markets: The Way Forward*, 26 J. Afr. Econ. ii3–ii11, ii4 (2017); John Ravenhill, *Regional Integration in Africa: Theory and Practice, in* Region-Building in Africa: Political and Economic Challenges 37–52, 37 (Daniel Levin & Dawn Nagar eds., 2016).

185 Roberto Longo & Khalid Sekkat, *Obstacles to Expanding Intra-African Trade* 10 (OECD Development Centre, Working Paper No. 169, 2001), https://www.oecd-ilibrary.org/development/obstacles-to-expanding-intra-african-trade_042583120128.

186 George R. G. Clarke, *Beyond Tariffs and Quotas: Why Don't African Manufacturers Export More?* 21–22 (The World Bank, Policy Research Working Paper No. WPS3617, 2005), http://documents.worldbank.org/curated/en/411421468211771497/Beyond-tariffs-and-quotas-why-dont-African-manufacturers-export-more; Yongzheng Yang & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward: Regional Trade Arrangements in Africa*, 19 Afr. Dev. Rev. 399–431, 418 (2008).

face navigating the socio-economic and cultural impediments associated with their very status as *African women*.

The challenges associated with ICBT, difficulties faced by female exporters, limited manufacturing capacity in Africa, gender norms and cultural stereotypes, unpaid domestic labour, and limited representation in management are all additional problems faced by women in Africa that limit their capacity to conduct or maximize trade in a way that is comparable to their male counterparts. Non-tariff barriers to trade raise costs associated with compliance procedures and regulations, and the recent joint report by the WTO and World Bank recognises that these barriers have a gender differential that disproportionately affect women traders.[187] The implementation of the Continental Online reporting, monitoring and eliminating mechanism[188] set out in Annex 5 of the AfCFTA can play a key role in promoting gender equality across the continent. This mechanism replicated and expands the non-tariff barrier system that has been implemented in the Tripartite FTA, which consists of COMESA, EAC and SADC.[189] At the time of writing, there have been almost 700 registered complaints resolved and a further 70 registered complaints remain active.[190] Creating a robust system of monitoring and evaluation at the pan-continental level is key to the future success of the AfCFTA and important lessons can be learned from existing regional initiatives.[191]

Mainstreaming gender in trade agreements and trade policy in Africa could serve several useful purposes. Even if there are no express commitments to gender dimensions or if such provisions are non-actionable, Choudhury suggests that 'states conduct ex-ante gender and social impact assessments for all forthcoming trade agreements and for preliminary negotiations on new trade-related topics.'[192] By deliberately

187 Women and Trade: The Role of Trade in Promoting Gender Equality (WTO & World Bank Group, 2020), https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf.

188 Vonesai Hove, *The Proposed Online Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism*, TRALAC (May 17, 2019), https://www.tralac.org/blog/article/14077-the-proposed-afcfta-online-non-tariff-barrier-reporting-monitoring-and-eliminating-mechanism.html.

189 For more information on this mechanism and how it operates in practice, see https://www.tradebarriers.org/about.

190 *See* Non-Tariff Barriers Reporting, Monitoring and Eliminating Mechanism: Active Complaints [undated], https://www.tradebarriers.org/active_complaints.

191 Economic Commission for Africa, *Synergies between the AfCFTA and Tripartite FTA will Benefit Africa's Traders and consumers, says ECA Chief* (June 18, 2018), *available at* https://www.uneca.org/stories/synergies between afcfta and tripartite fta will benefit africa's traders and consumers says.

192 Choudhury, *supra* note 42, at 156.

including women's voices in the planning stages, states are more likely to have a better understanding of the needs, fears and opportunities that trade agreements and policies present for women. These impact assessments must be conducted with a wide variety of women who represent the various core sub-categories of women to be affected by such policies.

Recent collaboration between the RECs suggests synergies amongst regional policies on gender can be realised. As a collaborative effort between EAC-COMESA-ECOWAS, a digital platform to empower women was launched in November 2019 to connect 50 million women in business across the 38 intra-community countries.[193] The platform is known as the '50 Million African Women Speak' (50MAWS) platform.[194] Resources to support women in starting up and running business is provided and it enables women to connect with one another to share their experiences. Going forward, and in the negotiations for AfCFTA, it is important to harness the role of digital economies and trade facilitation measures for promoting women's economic empowerment. Part of this strategy must include mechanisms to bridge the existing technological divide that currently hinders their participation in trade. However, women and ICBTs in Africa are not sufficiently acknowledged in data and this has considerable implications on the effectiveness of human rights impact assessments carried out in preparation for the AfCFTA.[195] The many data gaps must be filled if meaningful and transformative progress is to be made for gender equality.

CONCLUDING REMARKS

This article has problematised existing approaches to gender-sensitive trade strategies in African RECs. We have mapped the historical origins of gender in Africa's regional development policies and identified how the failure to properly understand the diverse roles of women as traders, workers, and consumers in African economies has sustained inequalities through the guise of development discourse.

We submit that while progress has been made to advance gender equality through legislative and policy instruments across the RECs, the diverging approaches to gender-

193 *EAC-COMESA-ECOWAS launch digital platform to empower women*, EAC Commission (Nov. 28, 2019), https://www.eac.int/press-releases/146-gender,-community-development-civil-society/1633-eac-comesa-ecowas-launch-digital-platform-to-empower-women.

194 The 50MAWS platform can be found here: https://www.womenconnect.org/.

195 Economic Commission for Africa & Friedrich Ebert Stiftung, *The Continental Free Trade Agreement in Africa: A Human Rights Perspective* (2017), https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf.

sensitive trade policy may result in the reproduction of existing structural inequalities for women in African economies. Women remain one of the most vulnerable groups in Africa and they are subject to different trading rules across different regions. Multiple commitments and overlapping obligations which characterise regionalisms across Africa create additional burdens that constrain women's participation in both the formal and informal economies. To date, insufficient attention has been given to the unique place of African women in African economies. Furthermore, their significant role in unpaid work – as mothers and carers – is almost completely absent from official data. Remedying the 'data gap'[196] is key to formulating gender-sensitive responses to trade problems.

As a result of the complex interconnections between the social, political, cultural and economic spheres, it seems inappropriate to advocate for a 'one-size fits all' approach to women and trade at the continental level. Instead, what the preceding analysis has shown is that regional approaches to gender-sensitive trade policy can yield positive results in their specific context. We have identified innovations in gender-sensitive trade policies – like the Simplified Trade Regime and the Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanism - which are to be celebrated as examples of good practice for other RECs, the AfCFTA and beyond. However, the AfCFTA should not replace regional initiatives; instead, the continental approach should complement and facilitate regional approaches.

Inclusive trade policies, which should incorporate both legally binding commitments and 'soft law' instruments, at the pan-African level must build on the progressive steps taken by some of the RECS and follow innovations at the multilateral level. If the AfCFTA is to offer the promise of change for women, its transformative potential must be harnessed not only in the written legal text but in the implementations of harmonised policy reforms at the sub-regional and domestic levels

196 Invisible Women: Exposing Data Bias in a World Designed for Men (Caroline Ciado Perez ed., 2019).

The Spread of Competition Law and Policy in Africa: A Research Agenda

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Economic law – the focus of this new journal – has enabled and shaped the phenomenal, extremely dynamic, yet also highly uneven development of markets in Africa in recent years. It also is called upon to "govern" those markets and to ensure that individually rational behavior by economic actors produces outcomes that are beneficial for the people of Africa, as well as economically and ecologically sustainable.

This paper focuses on competition law as an area of economic law that has inspired particularly high hopes for ensuring that the benefits of a market economy are widely shared. Competition law seeks to encourage and safeguard competition in markets by making anti-competitive agreements and conduct illegal and to constrain economic power by punishing its abuse and by regulating mergers and acquisitions to reduce the risk of monopoly and oligopoly. We consider not just "black letter law" but also the public institutions needed

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Authors are listed alphabetically. Vellah Kigwiru conducted most of the empirical research for the paper (building on the work of The Politics, Law, and Economics of Market Competition project, led by Tim Büthe) and took the lead in writing sections 2 and 4; both authors contributed equally to writing the other parts of the paper. For helpful comments and suggestions, we thank Olabisi Akinkugbe, Eleanor Fox, Elizabeth Gachuiri, James Gathii, Zlatina Georgieva and the members of the International Relations Research Group at the *Hochschule für Politik*/School of Governance at the Technical University of Munich. For invaluable advice and help in creating the maps, we thank Eric Monson and Mark Thomas from the Duke University Libraries' Center for Data and Visualization Sciences. Vellah Kigwiru gratefully acknowledges funding support from a German Academic Exchange Service doctoral dissertation fellowship (DAAD, grant # 57381412 - 91693212).

to implement and enforce competition law such that it maintains and creates economic opportunities, as well as incentives for innovation, greater efficiency and lower prices. In doing so, we are cognizant of the inherently political and controversial character of competition law and its enforcement, because it entails the use of the power of the state to constrain and possibly redistribute private economic power.

Competition law used to be very uncommon in Africa, but in the last two to three decades has rapidly spread throughout most of the continent. We therefore first take stock of the status of competition laws and agencies at the national and – especially – at the regional level. Based on this overview of the history and current state of competition law and policy throughout Africa, as well as our review of the literature, we then set out a research agenda for better understanding the reality, promise, and limitations of competition law and policy in Africa. In doing so, we make the case for a multidisciplinary and indeed genuinely interdisciplinary approach to the study of competition law and policy, which incorporates political analysis along with legal and economic analysis.

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1. Introduction

Africa came to be regarded as the last frontier in the global economy in the 1990s (Moghalu 2014). This led to various efforts to integrate African markets, including several regional initiatives (O'Brien 2000; OECD 2018a). The resulting – on average phenomenal – economic growth, however, has been highly unevenly distributed across countries (Austin 2010; Hout and Salih 2019:esp. 60-75), as well as within countries; poverty and inequality still prevail in much of Africa (Hartzenberg 2013:147; Lundvall and Lema 2014:455; Heinrich Böll Stiftung 2014:5).

In this context, some have recommended turning to competition law and policy to "mak[e] markets work for [the people of] Africa" (Fox and Bakhoum 2019; see also Lewis 2013a; Ejemeyovwi et al 2019). This recommendation is underpinned by research suggesting that competition law and policy can help alleviate poverty and foster *inclusive growth* (Lipimile 2004; World Bank and OECD 2017).

African countries started to enact modern national-level competition laws in the late 1980s.[1] Gabon, Kenya, and South Africa enacted their first competition laws prior to 1990; others followed in the 1990s and 2000s. Today, most African countries have at least a competition law on the books; many also have established an agency to implement and enforce the law (Habimana 2016; Koop and Kessler (forthcoming)).

Remarkably, the adoption of competition laws in Africa has gone well beyond the national level. African countries have established five regional competition regimes (RCRs) with a supranational competition law, in addition to two RCRs that follow what we call the "confederate model:" committing their member states to the adoption of national competition laws and enforcement cooperation without establishing a common set of competition rules.

In this paper, we take stock of the spread of competition law and policy in Africa and set out a research agenda for better understanding the reality, promise and limitations of competition law and policy at the national and, especially, at the regional level.[2] In doing so, we make the case for a multi- and indeed

1 For a law to count as a competition law, we require it, following Büthe and Minhas (2015), to have at a minimum the declared purpose of safeguarding or fostering market competition and to prohibit cartels or cartel-like forms of collusion.

2 African countries are, at the time of writing, also negotiating a continental-level competition regime under the African Continental Free Trade Agreement, AfCFTA. See section 5.1 below.

genuinely interdisciplinary approach to the study of competition law and policy, which incorporates political analysis along with legal and economic analysis.

In section 2, we provide an overview of the enactment of national-level competition laws and the establishment of competition agencies throughout Africa. Based on the manifold differences that we observe across the competition regimes of Africa, we identify in section 3 important gaps in the existing scholarship, and lay out an agenda for research on national competition regimes in Africa. In section 4, we then sketch the history and the current status of Africa's seven regional competition regimes. In light of this, section 5 develops a research agenda for scholarship on regional competition regimes in Africa. The concluding section 6 reflects upon our findings and suggestions in light of the COVID-19 pandemic and technological changes that affect both the object and the practice of competition law and policy.

2. REGULATING COMPETITION AT THE NATIONAL LEVEL

At the national level, the evolution of competition law in Africa has resulted in four distinct outcomes, as shown in Figure 1.

- countries with a national competition law (but no agency);
- countries with both a national competition law and a competition agency;
- countries with no national competition law, but covered by a regional law; and
- countries with neither national nor (access to a) regional competition law.

2.a. Countries with Competition Laws

Canada was the first country in the world to enact a national-level modern competition law in 1889, followed by the United States in 1890. By 1990, there were still only some thirty jurisdictions with a competition law on the books. Since then, many more countries have adopted competition laws, especially in the developing world. After a truly global process of diffusion, there are now more than 140 jurisdictions with competition laws, mostly at the national but increasingly also at the regional level (Büthe and Minhas 2015; Bradford and Chilton 2018; see also Büthe 2018).

Table 1: Adoption of National-Level Competition Laws in Africa and Status Quo 2020

	pre-1990	1990-1999	2000-2009	2010-2019	Status 2020: No national competition law but part of RCR	Status 2020: No national nor regional competition law
Countries	Gabon, Kenya, South Africa (3)	Algeria, Tunisia, Burkina Faso, Cameroon, Cote D'Ivoire, Malawi, Mali, Niger, Senegal, Tanzania, Togo, Zambia, Zimbabwe (13)	Botswana, Cabo Verde, Djibouti, Egypt, Eswatin *(former Swaziland)* Ethiopia, Madagascar, Mauritania, Mauritius, Morocco, Namibia, Seychelles, Sudan, The Gambia (14)	Angola, Benin, Burundi, Chad, Comoros, Democratic Republic of Congo, Liberia, Libya, Mozambique, Nigeria, Rwanda (11)	Central African Republic, Congo Brazzaville, Equatorial Guinea, Eritrea, Ghana, Guinea, Guinea Bissau, Sierra Leone, Somalia, South Sudan, Uganda (11)	Lesotho, Sao Tomé and Principle (2)

Source: Authors' research.

As shown in Table 1, only three African countries – South Africa, Kenya and Gabon – enacted a competition law prior to 1990. The 1990s and 2000s then saw more than half *of Africa* enact national competition laws; nine more African countries enacted competition laws in the 2010s. As of early-mid 2020, 41 African countries (76%) have enacted a modern competition law.

Out of the 41 African countries with a national-level competition law, nine – Benin, Burundi, Comoros, Cabo Verde, the Democratic Republic of Congo, Libya, Mauritania, Mozambique and Niger – do not yet have an operational competition agency. And this seems to be not just a matter of a slight delay in the course of establishing a new competition regime: several of these countries have had their laws on the books for more than a decade now. Cabo Verde, for instance, enacted its competition law by Decree Law No. 53/2003 on 24 November 2003. UNCTAD (2007:37) noted delays due to budgetary and human resource constraints – which appear to have lasted a long time: Cabo Verde's Directorate-General for Industry and Trade and its Competition Council,

both envisioned in the law, are still not operational (Gonçalves 2019). In Mauritania, it has been 20 years since the law was enacted; in Burundi it has been 10 years.

2.b. Countries with an Operational Competition Regime (Law and Agency)

Enacting a competition law is only the first step. Its effective implementation and enforcement also require having a competition agency. As of early-mid 2020, 32 out of the 41 African countries with a competition law have also set up an operational competition agency at the national level. The existing agencies' capacity to implement and enforce their respective national laws, however, differs substantially. In part, the variation in implementation and enforcement may be simply a function of time, as establishing a resiliently effective agency can take two decades (Kovacic and Lopez-Galdos 2016), and many of the African competition regimes have only been established in the last few years.[3] For the time being, in any case, capacity and effectiveness of the existing agencies vary substantially.

Notwithstanding this variation, the agencies also exhibit some common trends: Many African agencies have in recent year begun to focus more on cartel detection and enforcement – as well as competition advocacy and building a competition culture (Lewis 2013b; Kaira 2013; UNCTAD 2015). Toward that end, many agencies have sought to increase their analytical capabilities (especially for market analysis), as well as their capacity for cartel enforcement.

The example of Nigeria shows that such capacity-building can in fact occur quite quickly, if the agency has strong political support: After Nigeria's 2018 Federal Competition and Consumer Protection Act entered into force in 2019 (concluding a 17-year struggle over enacting a modern competition law), it led to the establishment of the epinomous Commission (FCCPC) later the same year – building on the earlier Consumer Protection Council but adding the competition agency function de novo (see Idigbe 2019). The FCCPC has already demonstrated its ability to function as the Nigerian antitrust/competition agency, even in the midst of the COVID-19 pandemic, by putting in place an electronic merger filing system and using market analyses to intervene against the sale of surgical masks at supra-competitive prices on the online marketplace/platform Jumuia (FCCPC 2020).

3 Angola, for instance, established its Competition Regulatory Authority in January 2019 and has not yet gone much beyond accepting merger notifications (Pereira and Barreiros 2019). In fact, even the national competition agencies (NCAs) of South Africa, Kenya, Malawi, Ethiopia, Zambia and Zimbabwe, which are today considered the most advanced and effective, spent a disproportionate amount of time on merger reviews in their early years (O'Brien 2018).

A few African competition agencies (in Egypt, Ethiopia, South Africa, Tanzania and Zambia) have also started to use more aggressive investigative tools, most notably dawn raids, in cartel investigations (Aranze 2019; Baker McKenzie 2019, *passim*). The Namibian, Kenyan, South African, Mauritanian, and Zambian agencies have also adopted leniency programs to supplement the agency-initiated enforcement efforts. By all indications, however, only South Africa has operated an effective and successful leniency program so far (Lavoie 2010).

2.c. Countries with No Competition Law

13 African countries have no national competition law. The proximate reasons appear highly varied. In some cases, it appears to be the government's unwillingness to introduce a competition law (despite a recognized need for such laws), presumably because it would be detrimental to entrenched interests. In Ghana, Zakari and Adomako (2015) found that big firms dominate markets and often abuse their dominant position. More than 80% of the firms throughout Ghana, which participated in Zakari and Adomako's survey, reported a "need" for Ghana to have a competition regime; more than 70% of consumers similarly anticipated numerous benefits from the introduction of a competition regime (2015:44, 52-54). Responding to these demands, Ghana's government has promised to put forth a competition law for years (Craig 2019). But it has yet to introduce such legislation.

In other cases, draft laws have gotten stalled in the legislature. Uganda's Competition Bill has been pending in parliament for more than 15 years (Uganda Law Reform Commission 2004). In yet other countries, the government has invoked the need to educate the population about the benefits of a market economy and to establish a competition culture before passing a law (Harris 2001; Denters and Gazzni 2017).

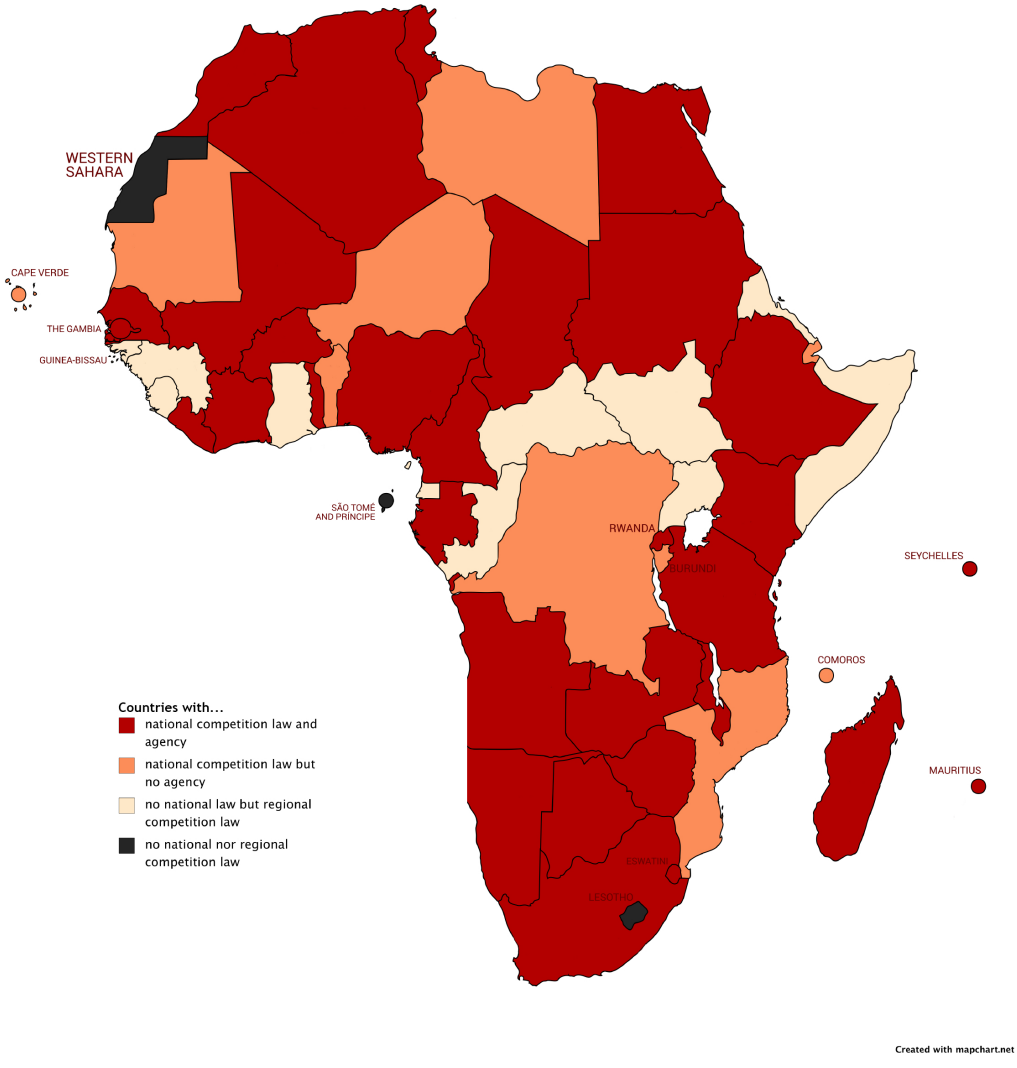
Some of the countries without a national competition law (as we have defined it) have industry-specific laws and competition regulators. To return to the example of Ghana, mergers for banking, mining and telecommunication require approval by sectoral regulators, and the 2005 National Petroleum Act even criminalizes cartel conduct in the downstream petroleum market. Yet, without a broader mandate to safeguard market competition throughout the national economy, these sectoral regulators tend to be ineffective and rarely address the anti-competitive structures and conduct that have the greatest effect on the population (Zakari and Adomoko 2015).

13 African countries currently have no national competition law. Remarkably, however, 11 of them are members of a regional body with common competition

rules for its members. Those supranational rules could in principle serve as a substitute for the missing national-level laws, as discussed in section 2.D below.

Only 2 African countries (and the Western Sahara, whose jurisdictional status is disputed) have neither a national law nor are they covered by the supranational rules of a regional competition regime. Sao Tomé and Principe is not a member of any RCR; and Lesotho is a member (only) of SACU and SADC, the two RCRs without a regional competition law (as discussed in section 4).

Figure 1
Current Status of African Countries' Competition Regimes (July 2020)



2.d. Countries with No Competition Law but Part of a Regional Competition Regime with a Competition Law

11 African countries without a national competition law are members of one or more of the five African RCRs that have adopted competition laws at the supranational level: the Central African Economic and Monetary Union (CEMAC); Economic Community for the West African States (ECOWAS); West African Economic and Monetary Union (WAEMU); Common Market for Eastern and Southern Africa (COMESA); and the East African Community (EAC). All five took the initial decision to do so at a time when the majority of their member states did not yet have a national competition law, though some, such as EAC and ECOWAS, delayed the implementation with the express objective to first strengthen the "competition culture" in the member states and allow more of them to adopt national competition laws. This raises a number of interesting and important questions about the effect of membership in regional competition regimes on national competition law and policy, discussed in section 5 below.

3. AN AGENDA FOR RESEARCH ON NATIONAL COMPETITION REGIMES IN AFRICA

In light of the varied state of national competition regimes in Africa, sketched above, we highlight several issues for future research. We submit that these questions are important both for scholars trying to better understand the evolution and current practice of competition law and policy, as well as practitioners wondering what the future of competition law and policy in Africa might look like.

3.a. To Have or Not to Have a Competition Law

Statistical panel analyses of the adoption of competition laws, which include at least some African countries, yield valuable insights into conducive conditions for enacting a modern competition law at the national level (Kronthaler and Stephan 2007; Parakkal 2011; Büthe and Minhas 2015; Weymouth 2016). Any particular instance of adopting such a law, however, is bound to involve intense conflicts, as any competition law and policy that is more than just declamatory politics (or expected to be meaningless due to widespread corruption) is a threat to entrenched rent-seekers (Aydin and Büthe 2016; Büthe 2018). Yet, detailed studies of the legislative history and the broader political struggles exist only for a few African countries (e.g., Youssef and Chahir 2019). Such studies would need to examine not just the reasons for the enactment of a competition law, where this was the ultimate outcome, but also the

reasons for the sometimes massive delays (e.g., 15 years in the case of Gabon; 10 years in Madagascar), as well as the reasons for the defeat of often repeated attempts to pass such a law. Particularly clearly lacking are analyses of the endogenous, domestic drivers of the (non)adoption of competition law in African countries, such as economic ideology and political-economic institutions. As Fox and Bakhoum (2019:12) note, existing accounts of African competition regimes too often invoke external pressures without equally considering those domestic factors (see, e.g., Li 2017). This is not a minor omission, shown by studies that take domestic factors seriously. Manhare's analysis of the SADC countries, for instance, finds that even though in some cases "economic pressure from donors" played a major role, in several SADC countries "the government's [endogenously motivated] program of liberalization" and "studies [of the] practices of private businesses" played a much more important role (2012:58). The omission of domestic politics in other accounts of competition law adoption thus seems akin to omitted variable bias.

Beyond promising insights into specific African countries' national competition regimes, filling these gaps in the literature would also be valuable for understanding the politics of competition law and policy more generally. Existing accounts from Africa and elsewhere suggest that *not* having a competition law is by no means just a matter of missing the conducive conditions generally found in countries that ended up enacting such a law (Emmert et al 2005; Forslid et al 2011). Incumbents seem to have a range of options available to them to stop the adoption (or implementation and enforcement) of pro-competition laws and policies. To provide insights into the steps that are necessary to prevent such obstruction requires understanding more fully the practices that lead to non-adoption. Given that Africa still has 17 countries that have (so far) not adopted a national competition law – despite internal demand and external incentives – in-depth analyses of African cases promise additional insight into whether (or to what extent) the politics of preventing a competition law are simply the inverse of the politics of bringing about the adoption of such a law.

3.b. Implementation and Enforcement

If empirical research on the adoption of national competition laws in Africa seems scarce, in-depth studies of the implementation and enforcement of those laws is much rarer still. With the exception of the South African competition regime (e.g., Ramburuth and Roberts 2009; Bleazard 2013; Davis and Granville 2013; Lewis 2013b; Klareen et al 2017), African countries' competition laws and policies have received

little sustained scholarly attention. This analytical scarcity is especially severer for the competition regimes in West Africa (Fox and Bakhoum 2019, esp. 6575).[4]

A key issue here are the drivers of (and the impediments to) the establishment of a competition agency. The determinants of the political independence of such agencies are similarly under-researched. In addition, we need more detailed analyses to identify and understand the specific measures taken to implement and enforce African countries' competition laws – including the various ways in which they gather data, analyze markets, conduct investigations, and possibly try to incentivize customers, suppliers, and competitors (and in the case of leniency programs: co-conspirators) to alert the competition regulators to anti-competitive agreements and conduct. Such analyses should ultimately also allow for an assessment of the relative effectiveness of those various measures, including comparatively across jurisdictions – which, however, would require competition regulators to agree upon a set of common standards and practices on how to measure and report what they do. Bringing scholars and practitioners together in forging such an agreement would be a major step forward toward an analytically sound, more "evidence-informed" (Bowers and Testa 2019) competition law and policy.

3.c. The Evolution of National Competition Regimes

Competition law, once enacted, does not necessarily remain static. The same applies *a fortiori* for competition policy. Numerous African countries have by now amended or even replaced their initial competition laws, presumably strengthening the institutional framework for competition regulation (Bowman 2018). Just as democratic consolidation (or decay) is theoretically distinct from democratization and may require different explanations (Schedler 1998; Solomon and Liebenberg 2000; Moehler and Lindberg 2007; Svolik 2008), the evolution and institutional development of competition laws, agencies, and policies should be theorized and empirically examined as distinct from the initial decision(s) to establish them.

A related promising direction for future research is to examine the extent to which competition law and policy have changed – or maybe *should* change – in light of changing priorities (UNCTAD 2010). Particularly important here is the ongoing debate over the features, which competition regimes might need to have, to serve the interests and reflect the political and socio-economic context of African countries (e.g., Fox 2000; Mehta 2006; Kronthaler 2007; Bakhoum 2011;

4 Koop and Kessler (forthcoming) include numerous African countries in their global analysis of competition agency independence, as do some analyses of the consequences of competition law and policy (e.g., Büthe and Cheng 2017), but none of them examine African competition regimes specifically.

Lewis 2013a; Gal 2015; Bonakele 2019). Does competition law for African – or more generally for developing – countries need to be built on distinct normative foundations? How we answer this question has immediate implications for policy priorities, as evident in Bhattacharjea's recommendation that agencies focus on "competition issues in sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture, and health care" (2013:35).

In light of the critiques of "legal transplants" (Berkowitz, Pistor, and Richard 2003) that are ill-suited to "addressing particular challenges within their local economies" (Chisoro and Landani 2019), much of this debate takes on a strongly normative tone. The question often immediately becomes: *Should* competition law and policy incorporate goals such as alleviating poverty, enhancing equality, and economic development (or even prioritize them over traditional goals such as safeguarding the contestability of markets) to be "fit" for the "purpose" of African countries (Shahein 2012; Aydin and Büthe 2016; Strunz 2018)? Or as Fox and Bakhoum (2019) put it: What would African competition laws look like if they were guided by these goals?[5] The actual introduction of unconventional principles, criteria and procedures into some African countries' competition laws – concerning competitive pricing, profitability, the viability of SMEs, and abuse of dominance – allows shifting the focus to empirical research, which can inform the normative debate by examining how effective such measures are in achieving more inclusive development and what other consequences they might have.[6]

4. REGULATING COMPETITION AT THE REGIONAL LEVEL

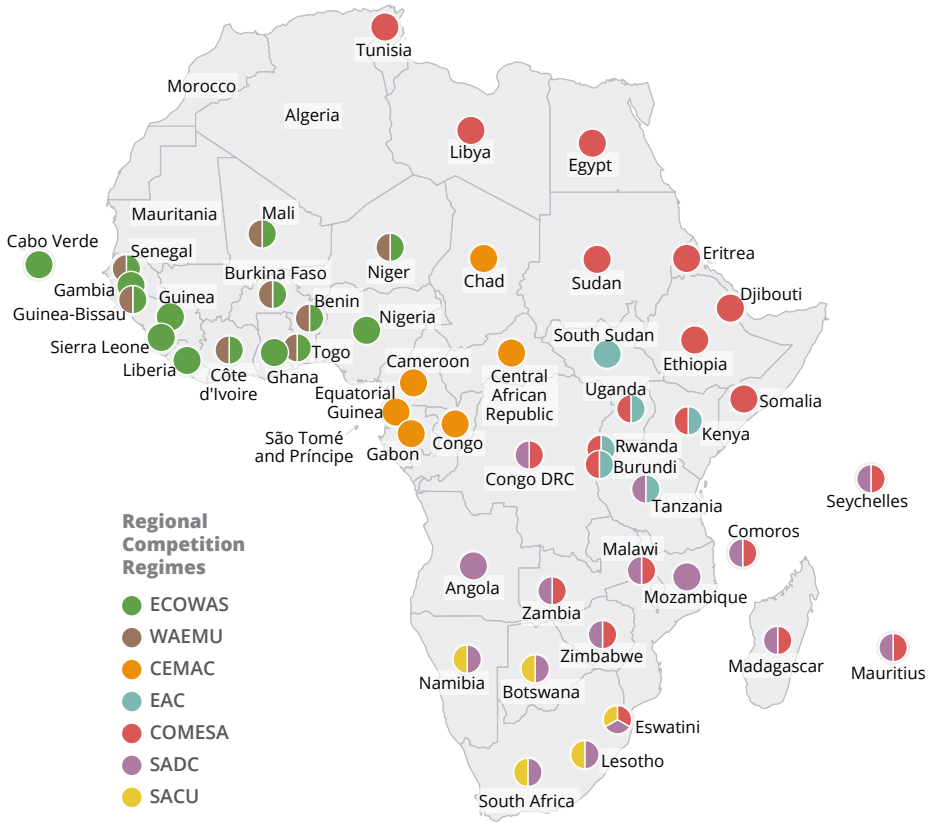
4.a. Complex Web of African Regional Regimes

The most remarkable feature of competition law and policy in Africa, we submit, is the number and density of regional competition regimes (RCRs), summarized in Figure 2. Of the ten regional bodies in the world with supranational competition laws and agencies, five are in Africa (OECD 2018b:6). In addition, two African regional bodies have established regional regimes for competition law and policy cooperation on what we call the "confederate" model.

5 See also Büthe and Kigwiru 2019.

6 Several such measure have in recent years been introduced into the national competition law of South Africa (see Shahein 2012:57; Mncube and Angwenya 2017; Madge-Wyld 2019); another example is the new Nigerian competition law's Section 74(2), which criminalizes abuse of dominance (see Steyn 2019). Naturally, such research should also (but not only!) examine unintended consequences about which critics have raised concerns (Oxenham et al 2019, Connor 2019, Katsoulacos and Jenny 2019).

Figure 2 The Complex Web of African Regional Competition Regimes



In this section, we offer a sketch of the seven African regional competition regimes shown in Figure 2, distinguishing between the RCR with and without a regional competition law. In section 5, we then lay out an agenda for research on regional competition regimes.

4.b. The Confederate Regional Competition Regimes

What we call the confederate model of regional competition regulation – also sometimes called the "cooperative," voluntary or "soft law" model – does not involve creating or adopting a common regional competition law for the regional body. Rather, it involves "only" a commitment by the member states to adopt national-level competition laws and to cooperate with each other in enforcement. The role of the regional body is to provide an institutional platform for such cooperation. A closer look at the two African regional regimes that have adopted a confederate model of an RCR suggests

that this comparatively modest agenda has had a notable impact, though it is not without its challenges (Mamhare 2012; Roberts et al 2017).

4.b.i. The Southern African Customs Union (SACU)

Established in 1910, SACU is among the oldest customs union in the world. It has five member states (all of whom are also members of SADC, discussed below): South Africa, Botswana, Eswatin (formerly Swaziland), Lesotho, and Namibia. The foundation of the SACU competition regime are Articles 40 and 41 of the 2002 SACU Agreement, which replaced earlier versions of the agreement without similar provisions. These articles do not establish a regional competition law. Rather, Article 40(8) of the SACU agreement requires member states to adopt a competition law and policy at the national level and to cooperate with each other in the enforcement of such laws.[7] Moreover, Part 8 of the 2002 Agreement highlights competition policy and unfair trade practices, along with agriculture and industrial development, as the four areas of common policies.

At the time, South Africa was the only SACU member state with a national competition law (UNCTAD 2005). Today, all SACU member states except for Lesotho have national competition laws. There are very few studies of the SACU competition regime (Ayayee 2012) and, to the best of our knowledge, no studies of competition law enforcement cooperation among SACU member states.

4.b.ii. The Southern African Development Community (SADC)

SADC was established in 1992 to promote regional integration and today has sixteen member states including the SACU members (see Figure 1). Competition provisions were added as part of the 1996 Protocol on Trade, which came into force in 2000. Section 25 of the Protocol requires Member States to implement measures that prohibit unfair business practices and hinder competition in the community (SADC 2000). Mamhare (2012:6165) suggests that SADC adopted such a confederate regional model because very few SADC member countries at the time had operational competition regimes. And it was expected that once all the countries adopted national competition laws and developed a competition culture, SADC would adopt a regional competition law.

7 In addition, in 2006, SACU entered into a cooperation agreement with the European Free Trade Association (EFTA). The SACU-EFTA agreement recognizes in Article 15 the need to eliminate anticompetitive conduct that would hinder the enforcement of the agreement (Dabbah 2010:389).

The first part seems to have worked. By 2009, when SADC adopted its Declaration on Competition and Consumer Policies to implement Section 25 of the Protocol on Trade, the number of SADC member countries with competition laws had increasing from five to eleven.[8] Angola, Comoros, the Democratic Republic of Congo, and Mozambique additionally established competition laws after the Declaration was adopted. At the same time, after another decade of occasional re-affirmations of their shared understanding and commitment to competition law and policy, long-standing member state Lesotho remains without a national competition law. The originally envisioned transformation of the confederate SADC competition regime into a supranational regime also has not yet materialized.

4.c. Regional Regimes with Binding Supranational Competition Laws

Five other regional bodies in Africa have created RCRs with supranational competition laws and (at least the beginnings of) regional enforcement reminiscent of the EU model. We briefly discuss each of these RCRs in the order in which they established regional authorities.

4.c.i. The West African Economic and Monetary Union (WAEMU)

WAEMU was established through the 1994 Treaty of Dakar among the francophone West African states of Benin, Burkina Faso, Côte d'lvoire, Mali, Niger, Senegal, and Togo, joined in 1997 by Portuguese-speaking Guinea Bissau.

WAEMU included competition provisions in Articles 88, 89 and 90 of its founding Treaty. To implement those provisions, WAEMU adopted in 2002 its regional competition rules, which came into force in 2003. The WAEMU competition rules cover state aid, anti-competitive conduct, cartels and abuse of a dominant position, but not mergers. To implement and enforce those rules, the WAEMU Commission in 2007 created the Directorate of Competition under the Department of the Regional Market Trade, Competition and Cooperation (also known as the WAEMU Competition

8 SADC at the same time established a committee to boost advocacy. Recent scholarship from various parts of the world suggests that, for recently established agencies, competition advocacy can be a particularly important activity to establish themselves and gain political support, potentially resulting in significant reductions in anti-competitive conduct independent of law enforcement; see (Clark 2005; Fels and Ng 2013; Glanz and Büthe 2016; Jenny 2012; Kovacic 2006; Serebrisky 2003; Aydin and Büthe 2016). Accordingly and in line with Kariuki and Roberts' call for African countries to build their own competition cultures (2015:166), the African Competition Forum (ACF), an association of African competition agencies, as well as the NCAs of Kenya, Zambia, South Africa and Namibia provides technical and other support to recently established African agencies to strengthen their capabilities for deepening competition culture and creating awareness.

Commission; see Molestina 2019). A key focus of the Competition Commission have been member state governments' policies that restrain and distort competition – often to a greater extent than private measures.[9] As of 2018, Fox and Bakhoum report (2019:145-149), the WAEMU Commission had concluded only three enforcement actions with publicly recorded decision; one of them appears to have been a cartel case.

In 1994, Niger was the only WAEMU member state that had a national competition law; no others WAEMU member state had such a law on the books. By now, all but Guinea Bissau have by now enacted national competition laws (and established competition agencies).

WAEMU is the only RCR in the world that has established a centralized, hierarchical model, under which its competition rules enjoy supremacy and direct effect, and the member state agencies (NCAs) play a subordinate role in the enforcement of those rules, primarily assisting the WAEMU Competition Commission it its investigations and inquiries. The NCAs participate in the decision making through the Advisory Committee on Competition, whose advice, however, is not binding on the WAEMU Commission.

This centralized, hierarchical model was controversial between the WAEMU Commission and the member states from the beginning (Bakhoum 2006; Molestina 2019:5961). It is not specified in the Dakar Treaty, but was ultimately achieved only once the WAEMU Court of Justice granted the Commission exclusive (rather than shared) jurisdiction in competition matters, which it saw as supposedly required to prevent jurisdictional conflicts (Bakhoum amd Molestina 2012). The hierarchical model, however, has not prevented conflicts nor low-level contestation; it has made member state agencies reluctant to collaborate and has prompted measures to circumvent the regional competition law (Bakhoum and Molestina 2012:99). Concerns that the contested subordination of national laws and agencies ultimately undermines the effectiveness of both the national and the regional competition regimes have prompted both UNCTAD (2007) and the World Bank (2018) to call upon WAEMU to review its model and delegate or share more competences with member state NCAs.

4.c.ii. The Common Market for Eastern and Southern Africa (COMESA)

COMESA is comprised of 21 member states: Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe.[10]

9 For a general discussion of state constraints on competition, see Fox and Healey 2014.

10 COMESA's membership has fluctuated considerably over the years; Somalia and Tunisia are the newest member states. It is a successor to the 1981 Preferential Trade Agreement of Eastern and Southern Africa.

The COMESA competition regime is embedded in Article 55 of its founding 1994 Treaty, which prohibits any conduct that would undermine free trade, including specifically any agreement that seeks to distort, restrict and prevent competition within the common market. At the time, only Kenya and Zambia had a national competition law on the books and only Kenya had an enforcement agency (Lipimile 2012). As of early-mid 2020, all but four COMESA member states (Uganda, Djibouti, Eritrea and Somalia) have national competition laws.

In order to give practical meaning to Article 55, the COMESA Council in 2004 enacted the original COMESA Competition Regulations. The Regulation put in place the regional competition regime, including its norms, institutional framework, and the allocation of competence between the COMESA Competition Commission (CCC) and the NCAs. The Regulations prohibit cartels, concerted practices, and abuse of dominance (but not state aid); they also empower the CCC to review and regulate mergers that meet a regional dimension test.

Although the legal framework has been in place since 2004, the CCC only commenced its operations in January 2013 (Angwenyi 2013). In the seven years since then, it has become the most experienced of the African RCR agencies (Gachuiri 2019; Kigwiru 2020a), especially with respect to merger reviews (of which it has handled more than 240 as of the end of 2019). In recent years, the CCC has started to engage in analysis, advocacy and enforcement beyond mergers.[11] In its first non-merger action on its own initiative, in 2015, it launched a market analysis of the grocery retail market, resulting eventually in a report released in November 2019 (Tzarevski 2019). It also has started to investigate alleged anti-competitive behavior in the common market, as illustrated by its investigation of the Coca-Cola distribution agreements in Ethiopia and Comoros (Aranze 2018).

4.c.iii. The Central African Economic and Monetary Union (CEMAC)

CEMAC, established in 1994 as a customs and monetary union for central African countries, has six-member states: Cameroon, the Central African Republic, Chad, the Republic of the Congo, Equatorial Guinea and Gabon – none

11 The CCC initially had jurisdiction over all mergers with a regional dimension – with a threshold of zero. This exacerbated jurisdictional conflicts between the CCC and some of the NCAs and became extremely cumbersome, with merger reviews effectively tying up virtually all of the CCC's resources. The CCC reviewed its merger regime and introduced merger thresholds in 2014. This has not completely resolved the jurisdictional conflicts, but put COMESA in a more promising position to overcome some of the key challenges that have impeded the work of the CCC in the early years (Kekesi 2018).

of which is a member of any other RCR. CEMAC did not include competition provisions in its founding 1994 Treaty. Instead, the CEMAC Competition regime was created by two later additions: the 1999 CEMAC Regulations on Anti-Competitive Business Practices (as amended in 2005)[12] and the 1999 Regulations on Trade Practices Affecting Trade Between Member States.[13] These regulations cover anti-competitive agreements, abuse of dominance, mergers, and state aid.

CEMAC has adopted a decentralised model of enforcement. Initially, the CEMAC Regional Council of Competition was tasked with implementing the 1999 Regulations; the 2005 Amendments granted this power to the CEMAC Competition Commission (Both 2018:175). However, the Council retained some of its investigative and advisory functions, creating jurisdictional conflicts within (Both 2018:185). Also, Gal and Wassmer warn that the CEMAC Competition Commission operates on an ad hoc basis (as cases arise), which "creates instability and lack of confidence in the new regional institution" (2012:311).

The CEMAC Competition Commission declared itself ready to receive notifications of mergers with a regional dimension in 2016. We have been unable to find public information about the outcome of CEMAC enforcement actions in merger or anti-competitive conduct cases, if any. The development of national competition laws has also been poor. Only three countries – Cameroon, Gabon, and the Democratic Republic of Congo – have competition laws, and only Cameroon has a functioning competition agency.

4.c.iv. The East African Community (EAC)

The EAC has six member states: Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.[14] It was established in 2000 as a customs union and became a common market in 2010 (Gastorn and Wanyama 2017). The EAC regional competition regime is indirectly based on the EAC founding treaty, whose Article 75(1)(i) obliges the member states to adopt a Customs Union Protocol, which is required to include competition provisions. The EAC Council of Ministers took up the issue of developing a competition policy in 2004, and in 2006 EAC enacted the Competition Act, which applies to all sectors and all economic activities within the community, provided that they have

12 Regulation No. 1/99-UEAC-CM-639) of 15 June 1999 as Amended by Regulation No.12/05-UEAC-639) U-CM-SE of 25 June 2005).

13 Regulation No. 4/99-UEAC-CM-639 of 18 August 1999.

14 Only Kenya, Tanzania and Uganda signed the original 1999 agreement, which entered into force in 2000; Rwanda and Burundi acceded in 2007; South Sudan in 2016.

cross-border effects. It was supplemented in 2010 by the EAC Competition Regulations, setting out procedural mechanism for the implementation and enforcement of the Act.

The 2006 EAC Competition Act covers restrictive trade practices, abuse of market dominance, mergers, and subsidies, as well as public procurement and consumer welfare. The 2006 Act also provides for the establishment of the EAC Competition Authority (EACCA) to implement and enforce the Act. It was not until 2010, however, that the EAC Competition Regulations were adopted to give effect to the EAC Competition Act in accordance with its Section 49, and in light of a lack of funding and political will, the EACCA was only able to commence its operations in 2018 (Karanja-Ng'ang'a 2017:434). Moreover, during its initial five years, the EACCA is to operate on an ad hoc basis. To date, it has focused on investigating restrictive trade practices and abuse of dominance; it is also engaging in advocacy, sector studies, and market inquiries in order to enhance competition culture; it is not yet accepting merger notifications (Anyanzwa 2018).

Article 44 of the EAC Competition Act gives the EAC exclusive original jurisdiction to determine any violations of competition law under the Act; it assigns to the EACCA supremacy in community-level competition matters, such that its decisions are legally binding upon the member state NCAs and national courts (Karanja-Ng'ang'a 2017).[15] At the same time, the NCAs have primary jurisdiction over competition cases within their territories and are not required to apply the EAC competition law at the national level (but they are required to refer any case or dispute within the scope of the EAC Competition Act to the EACCA).

The EAC also faces an extremely diverse set of member states. Kenya and Tanzania, alone among the EAC member states, have fully functioning national competition regimes (Karanja-Ng'ang'a 2017; Kigwiru 2017; CAK 2019). Burundi and Rwanda have competition laws on the books, but their competition agencies are not yet operational; in Rwanda, the competition law is temporarily enforced by the Ministry of Trade. South Sudan and Uganda have yet to enact a competition law, though they have drafts pending before their respective parliaments. Burundi, Kenya, Rwanda and Uganda moreover have overlapping memberships with COMESA, while Tanzania is also a member of SADC.

4.c.v. The Economic Community of West African States (ECOWAS)

ECOWAS is a regional group of 15 West African states, established in 1975. It includes the eight mainly francophone countries of WAEMU along with the six anglophone

15 Binda (2017:103114) attributes this explicit assignment of competences to conscious learning from COMESA, since the EAC member states except South Sudan and Tanzania are also members of COMESA.

countries of the West African Monetary Zone (WAMZ; Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone), and Portuguese-speaking Cape Verde.[16]

The ECOWAS competition regime is based on the 2008 Community Competition Rules and the Modalities of their Application. These "ECOWAS Competition Rules" cover prohibited agreements and practices, abuse of dominant position, mergers, and state aid. The implementation and enforcement of the Competition Rules is assigned to the ECOWAS Competition Authority, which was finally launched in 2019, making ECOWAS the youngest of the African competition regimes with a regional authority. Staff appointments are still ongoing, and publicly available information, as well as not-for-attribution interviews suggest that no investigations have been undertaken yet, as the ECOWAS Competition Authority has, for the time being, focused on fostering a stronger competition culture.

Once the Competition Authority is fully operational, ECOWAS envisions an allocation of competences where the ECOWAS Authority investigates cases at the regional level, while the member state NCAs investigate cases at the national level (supporting the regional investigations locally upon request).

Several ECOWAS member states have adopted national-level competition laws for the first time in recent years, most recently Liberia in 2016 and Nigeria in 2019. However, one WAEMU country (Sierra Leone; see Ngom 2011) and three WAMZ countries (Ghana, Guinea, and Guinea Bissau) still do not have national competition laws. And some ECOWAS member states, including Liberia, have a competition law but no functioning authority yet.

5. AN AGENDA FOR RESEARCH ON REGIONAL COMPETITION REGIMES IN AFRICA

Our stocktaking of the development of regional competition regimes in Africa suggests several important foci for future research.

5.a. Origins and Evolution of RCRs

Few studies so far examine the origins or the evolution of the African regional competition regimes. Existing accounts mostly emphasize that the African regional competition regimes were founded as explicit complements to the regional economic

16 Mauritania, a founding member in 1975, left ECOWAS in 2000. Cape Verde joined in 1977; all other current members are original founding members of ECOWAS. WAEMU has its own competition regime, discussed below, but WAEMU countries are subject to ECOWAS competition regime, too.

integration efforts (Gal 2010; Drexl 2012; Heimler and Jenny 2013; IMF 2019:23). At a time of already increasing concerns over the power of international cartels (Connor 2001), economic integration risked making the cartel problem worse. And given that most national competition regimes in Africa were at the time still weak or non-existent – and efforts to build a global competition regime into the World Trade Organization (WTO) seemed to have failed – a regional approach to competition regulation was appealing to many (Heimler and Jenny 2013:183; Elhiraika 2016). Moreover, regional trade agreements create larger markets, making it more likely that anti-competitive conduct will transcend national borders as existing international cartels break into these newly attractive markets (Both 2015) or newly competing firms from the now-integrated markets have incentives to avoid actual competition by entering into anti-competitive agreements (Büthe 2014; 2018; for an early warning about cartels undercutting free trade, see Edwards 1944). Such concerns suggest that a key reason for establishing RCRs in Africa was that doing so offered an opportunity for African countries to pool resources and thus gain the ability to jointly defend their interests more effectively – both against global cartels and against transnational anti-competitive forces from within Africa (Gal 2010; Papadopoulos 2010).

Accounts emphasizing factors related to trade integration seem theoretically sound and a natural fit to explain competition regimes based on regional bodies devoted to increased economic integration (see esp. Damro 2006; Büthe 2014; 2018). So far, however, we lack thorough empirical studies of the origins of the African regional regimes. Such analyses would also need to take seriously alternative explanations that take seriously political-economic conflicts concerning competition law and policy and concerning any shift of authority from the national to the regional level.[17]

One source of possible alternative explanations might be the substantial literature on the origins of national competition laws and agencies (see Büthe and Minhas (2015) and Aydin and Büthe (2016) for recent reviews), though as noted above, the literature on national competition regimes in Africa is actually quite sparse. It also is not clear to what extent explanations for the adoption of competition laws at the national level can be readily extended to the regional level, especially if the regional body includes some countries with and others without a national competition law and policy. Research on the origins of the European (EU) and other regional competition regimes (Allen 1977; McGowan and Wilks 1995; Gerber 1998; Büthe

17 Notable exceptions in the literature on African RCRs, which take political contestation of shifting authority to the supranational level seriously, are Mwasha (2011) and Milej (2015).

2007; Cini and McGowan 2009; Seidel 2009) might in fact be more informative than research on national regimes. One particularly important question in this context is to what extent the (existence or specific features of) national competition laws and agencies affect the chances and the characteristics of regional regimes (Papadopoulos 2010). We therefore see great promise in comparative regional research.

The evolution of the (mostly still rather young) regional competition regimes is another issue that will become increasingly important for future research. All of the questions noted above (in section 3.3) also arise here – although the answers might need to differ.

Finally, the African RCRs are established under the auspices of regional economic communities that are now the "pillars" of the new pan-African regional integration process. Some have suggested that the continental competition regime, envisioned under the African Continental Free Trade Agreement (AfCFTA), will be particularly helpful to countries without national competition regimes or access to regional competition regimes (e.g., UNCTAD 2019:XV). It is currently still too early for an assessment of these claims, but the effect of the regional regimes on the ongoing negotiations over a continental competition policy for the AfCFTA Area (see Kigwiru 2019a; 2020a; Gachuiri 2019), as well as the consequences of such an AfCFTA competition regime for the regional regimes, are promising foci for future research.

5.b. Conflict of Laws

The co-existence of a regional legal regime and national legal regimes creates the potential for a conflict of laws whenever the laws and/or the underlying principles differ (Basedow *et al* 2012).[18] For instance, while the EAC Competition Act (in Part V) restricts government subsidies, the competition laws of some EAC members states, such as Kenya, do not. The complex web of national and regional competition regimes in Africa provides ideal opportunities for examining what happens (empirically) and what should happen (normatively) when competition laws are established at the regional or supranational level, which at least partly conflict with the national competition laws within the same region.

In addition, the multiple, partly overlapping regional regimes in Africa create the potential for conflict of laws between regional legal regimes. For example, COMESA member states Burundi, Kenya, Rwanda, and Uganda are also members of the EAC (which also includes non-COMESA states South Sudan and Tanzania,

18 On differences between international and domestic conflict of laws generally, see Michaels and Whytock 2017.

whereas COMESA also includes 15 other member states that are not part of the EAC). The situation of COMESA vis-à-vis SADC is even more complex: The Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, the Seychelles, Swaziland, Zambia and Zimbabwe are member states of both COMESA and SADC; Burundi, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Rwanda, Sudan, and Uganda are members of COMESA, only; Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, and Tanzania are members of SADC, only. These different overlapping arrangements, while they can be frustrating for practitioners, promise to give scholars of African competition laws analytical leverage to better understand conflict-of-laws issues than would be possible anywhere else in the world.

In addition to the empirical questions, scholars of African RCRs might explicit take up the normative question of how the problems arising from conflicting laws *should* be overcome, yielding policy recommendations grounded in theoretical and empirical analyses.

5.c. Jurisdictional Conflicts

Moving from issues that might be resolved by strictly legal analysis to issues that require political as much legal and/or law & economics analysis, we note that the co-existence of a regional legal regime and national legal regimes also creates the potential for jurisdictional conflicts, which might occur over authority for implementation and enforcement, *even when the applicable laws do not differ or are compatible* (Wagener and Upfold 2012). For instance, all WAEMU member states are also members of ECOWAS. Which regional authority has jurisdiction when cases have a "regional dimension" under both regimes? Answering this question is especially difficult since ECOWAS operates in accordance with the decentralized model, allocating some competencies to member countries' NCAs (including the enforcement and hence interpretation of certain ECOWAS regional competition provisions), whereas NCAs under WAEMU only play a subordinated, supporting role.

The often ambiguous allocation of competences between a regional body and the member states' NCAs is another key source of jurisdictional conflicts in Africa. A recent study by the OECD (2018b:7) identifies four models of the allocation of competences, which differ especially with regard to the roles of regional and national agencies in investigations and subsequent decisions in antitrust enforcement. As shown in Table 2, one or more African RCRs fit three of the four models.

Table 2: OECD Regional Competition Law Enforcement Models

Regional Competition Model	**RCAs** corresponding to that model
"Regional referee" model	CAN, MERCOSUR
"Two-tier" model	CARICOM, CEMAC, EAC, EAEU, ECOWAS
"Joint enforcement" model	COMESA, EFTA, EU
"One-tier regional state" model	WAEMU

Source: OECD 2018b: 8. CAN = Communidad Andina; CARICOM = Caribbean Community; EAEU = Eurasian Economic Union; EFTA = European Free Trade Association; MERCOSUR = Mercado Común del Sur

In the Regional Referee model, the NCAs investigate regional competition cases and report to the RCA, which coordinate regional competition cases and makes the final decision. The NCAs do not apply or enforce the regional competition provisions to their domestic markets. No African RCR with a regional law fits this model.

In a Two-Tier model, the RCA and NCAs each have exclusive jurisdiction on regional and national matters respectively. In Africa, the CEMAC, EAC and ECOWAS competition regimes fit this model. Member states are required to establish national competition regimes, but regional competition provisions do not automatically apply within the domestic market. As a consequence, a country like Uganda, having no national competition law, has no obligation to apply the EAC competition law within its market, either.

In the Joint Enforcement model, which COMESA, EFTA, and the EU have adopted, both the RCA and NCA enforce the regional competition law, which has direct effect within each member state. Institutionalized coordination supports this joint model. The objective is to enhance coherence. Given this model, COMESA competition law applies in Uganda, Eritrea, Somalia and Djibouti by virtue of their membership in COMESA.

In the One-Tier Regional State model, not only has the regional law supremacy, the RCA has the prerogative from agenda-setting and the launch of investigations at both the national and regional level to making final decision. It thus exercises centralized power; the NCAs play "only" a supportive role. WAEMU is the only region in the world that has adopted this model.

In addition to analyzing the conditions under which jurisdictional conflicts are more or less likely, research on jurisdictional conflicts might examine the key

obstacles to (and conducive conditions for) overcoming such conflicts.[19] Here, conflicts between the regional and national regimes are surely a key issue, but conflicts between regional regimes also need to be examined, as several of the African RCRs have the potential to become what Connor (2015) has called "rest of the world enforcement powers" due to the increased presence of large international companies in African markets through trade and inward investments (Schwarz 2017). The coexistence of partly overlapping or nested legal regimes with the potential for jurisdictional conflicts, even in the absence of divergence in laws, here again promises to make analyses of the African competition regimes particularly insightful.

5.d. Promise and Limits of Regional Competition Law in the Absence of National Law

As noted above, all of the African RCRs were set up when some (and sometimes the majority) of the member states did not yet have competition laws (see, e.g., Oppong 2008). While this scenario is not unique,[20] it provides opportunities to better understand the potential and limits of such an arrangement. One way to think about it may be as a special case of conflict of laws: When, for instance, Eritrea, and Uganda remain without a national competition law 25 years after COMESA set out to create a regional competition regime, 15 years after it drew up a regional supranational law, and 7 years after it set up a functioning agency to implement and enforce that law, they may be seen as having made a conscious decision that they prefer national legal institutions to differ from the regional one.

The coexistence of a regional competition law with the absence of a national competition law in several member states, however, is not just interesting as a special case of conflict of laws, but also a *sui generis* important phenomenon, which raises generally important questions. Does the absence of a national law undermine the regional law? How can the goals of competition law and policy be advanced when a regional competition law coincides with the absence of

19 An interesting recent example of a compromise, which might be generalizable, is how Kenya and COMESA settled their jurisdictional conflict regarding merger review, whereby the Competition Authority of Kenya (CAK) accepts that COMESA review takes precedence, but merging parties with Kenyan commercial activities must inform the CAK.

20 When the first regional competition law was drawn up for the European Coal and Steel Community in 1951/52, none of the six member states had a functioning competition law at the national level. By the time the more comprehensive competition regime for the European Economic Community (the predecessor of today's European Union, EU) came into force in 1957, France had adopted a such a law and Germany did so virtually in parallel; Italy and the Benelux countries were still without such a law at the national level (Dumez and Jeunemaître 1996; Büthe 2007).

national laws in some of the member states? And as discussed below, does the regional law make the adoption of a national law in those member states more or less likely? The variation in competition law arrangements make the study of African competition regimes particularly promising for addressing these questions.

5.e. Regional Competition Agencies in the Absence of National Agencies

While getting a competition law "on-the-books" can be challenging enough, enforcement and more broadly implementation are often even more challenging for developing countries (Gal 2009; Mehta and Evenett 2009; Rodriguez and Menon 2010; Schatan 2012; Molestina 2019; Horna 2020; Koop and Kessler (forthcoming)). One reason is the often very limited state capacity and weak tradition of regulatory and judicial independence – which we would expect to be particularly crucial when agency officials and judges are asked to hold politically and economically powerful individuals and companies accountable or constrain their (ab)use of their power (see Aydin and Büthe 2016). And indeed, we have identified multiple African countries where the adoption of a national competition law has—at least so far—not been followed by the establishment of a(n operational) competition agency.[21] An important line of research on African competition regimes will therefore ask: How can the goals of competition law and policy be advanced by a supranational competition agency when there is no such agency (or only a substantially less powerful/less independent agency) at the national level in some or all of the jurisdictions that are part of the regional regime?

5.f. Pros and Cons of the Supranational vs. the Confederate Model of RCRs

The parallel existence of two models of RCRs have prompted a lively discussion about their relative strengths and weaknesses. As Gal and Wassmer (2012:317) have pointed out, "the lower the level of cooperation, the lower the potential benefits, but possibly also the lower the obstacles to its adoption and enforcement" – echoed by Both's (2018:173) warning that "the adoption of an overly ambitious binding cooperation agreement may lead to inadequate enforcement and thereby risk damaging the reputation of both the regional and national institutions, and reduce the trust between the parties." At the same time, as Geradin (2004) points out, the effectiveness of the confederate model for addressing cross-border anti-competitive conduct depends to a much greater

21 Here again we see parallels with the early years of the EU competition regime, underscoring the potential of comparative research.

extent on all the member states' political will to cooperate without fear or favor (see also Geingos 2005; Shumba 2015).

Another key issue is whether (or under what conditions) the one or the other regional regime is more conducive to fostering the adoption of suitable national competition laws in member states previously lacking such laws and more generally to fostering effective, public interest-oriented competition regimes. Specifically, some scholars have argued that enacting a competition law at the regional level before it is well established at the national level (as inherently happens when an RCR with a supranational law includes countries without a national competition law) may stunt the development of indigenous competition law and policy, whereas joining a confederate-type RCR is helpful because it provides an incentive for national competitions law to be adopted (Denters and Gazzni 2017).

The many African countries where a competition law was introduced via a regional body of either type prior to the adoption of a national competition law provides a wealth of opportunities to study in depth how this sequencing affected the balance of support for (and opposition to) the adoption of a national competition regime (as well as the contents of the laws and features of the agency and policy subsequently established, if so). Equally important will be negative cases, such as Lesotho, which, despite being a member state of both SACU and SADC, has so far not adopted a competition law.[22] Examining the political economy of competition law adoption in a case like Lesotho should allow us to learn why the incentives of these confederate RCRs have proven insufficient and how Lesotho's experience compares to countries without a national law under an RCR with a supranational law.

The diversity of competition regulation in Africa might also offer insights into other consequences of sequencing. Insofar as establishing a competition regime at a particular level requires overcoming the resistance of entrenched interests at that level, adopting a competition regime should be politically easier for a country nested within an existing regional regime or for a regional body with national competition regimes already existing in the countries the constitute the regional body (Kaira 2017). At the same time, if the issues that need to be addressed differ (and if hence the needed statutory or procedural provisions differ), previously establishing a competition regime at a different level of aggregation might be an impediment to developing effective, public interest-oriented competition regimes.

22 Cambodia similarly has refrained from adopting a national law within the Association of Southeast Asian Nations (ASEAN) confederate-type competition regime (Ong 2018).

6. CONCLUSION: AFRICAN COMPETITION LAW AND POLICY FIT FOR A POST-COVID-19 DIGITAL WORLD

Markets throughout Africa have developed in highly dynamic ways in recent years. Economic law has enabled and shaped this process; it also is called upon to "govern" it, not least by ensuring that individually rational behavior produces outcomes that are also socially beneficial, as well as economically and ecologically sustainable. To advance our understanding of how competition law shapes the operation of markets in Africa, we have in this paper taken stock of competition law and policy in Africa and sketched a research agenda both at the national level (in section 3) and at the regional level (in section 5), highlighting unique research opportunities, especially with regard to the development of regional competition regimes, where Africa exhibits extraordinary diversity.

In this conclusion, we want to note two recent developments that raise further, new questions for research. The first is the COVID-19 pandemic and its aftermath. The second is technological change, especially the increasing importance of digital goods and services.

6.a. Competition Law and Policy and Open Economies Post Corona

The COVID-19 pandemic has not spared Africa. As in other parts of the world, the pandemic not only threatens our physical well-being but also affects economic life. In many Western countries, it has led to a clamoring for suspending competition laws or at least their enforcement, especially where those laws prohibit government subsidies; similar tendencies appear to be underway in African countries but are barely even getting traced or analyzed (Kigwiru 2020b).

Moreover, the pandemic has sparked a new debate over prioritizing *domestic* production of "essential" goods and service over reliance on the market mechanisms to source goods and services most efficiently. While adopting a broader human security framework (instead of the traditional, narrow military security framework) to guide exemptions from the market allocation of goods and services may well be justified, law & economics as well as political economy scholarship has often shown that such exemptions are prone to abuse by producers seeking protection from foreign competitors and/or opportunities to extract rents from domestic consumers or from the public sector (e.g., Sinnaeve 2001; Thee 2002; Gilmore et al 2007; McGinnis 2014). This is a particularly important concern at the current stage of the development of markets and economic law in Africa. Just a few years ago, major multinationals and de facto monopolists *from outside Africa* were considered most likely to have and abuse

market power in African markets. Recent studies have shown, however, that the most consequential de facto monopolies in Africa are no longer all foreign-owned, and it is now increasingly *African* firms (including state-owned enterprises as well as private enterprises from within the same regionally integrated market) that are dominating African markets (Maritz 2018; Ovia 2018; Tyce 2019). Under these circumstances, suspending competition rules in ways that restrict foreign competition may actually increase market power within African markets and reduce domestic and regional supply. Scholars of competition law and policy here can make important contributions by scrutinizing any such (proposed) exemptions to examine the extent to which they (can be expected to) improve preparedness for future crises and the extent to which they merely benefit already dominant African firms at the expense of consumers and to the detriment of their African/domestic (as well as foreign) competitors.

6.b. Competition Law and Policy in the Era of Digital Disruptions

Technological change is increasingly transforming the landscape of competition law and policy. Among the people of Africa, 1 in every 5 now has access to the internet, with Kenya and Liberia leading with more than 80% penetration (Mahler et al 2019). And while African online search and social media is still dominated by the global giants Amazon, Apple, Facebook, and Google (Osiakwan 2016; DW 2019; Goga et al 2019; UNCTAD 2019:2), the mobile money ecosystem in Africa is now increasingly African-owned and indigenous transformative technologies are emerging in many places in Africa (Mbiti 2016; Makina 2017; GSMA 2019). The introduction of these services, along with new e-commerce opportunities is disrupting conventional markets (Kigwiru 2019a). This digital transformation of markets opens up important new opportunities for policy-relevant research, as digital markets create not just new opportunities for economic growth but also new forms of (abuses of) market power and new winner-take-all dynamics, which risk making markets less contestable.

Technology is also directly transforming the practices of competition regulators. To be sure, the digital revolution has arrived very unevenly. Some African competition agencies' quite literally still struggle to keep their phones working; others to keep their insecure websites from getting hacked. It is easy to see why they might primarily see risks in new technologies. Yet, there are also indications that digital technologies might allow African countries to "leapfrog" and achieve rapid advances in competition advocacy and law enforcement. While some promising new tools, such as the computer-assisted system for detection of bid-riggng in public procurement ("BRIAS"), developed by the South Korean competition agency (Cho and Büthe 2020), might not yet be

suitable for most African agencies due to the "big data" analytics required, many other technological innovations are readily usable in many African countries. The gamification of competition economics 101, for instance, or even just smartphone apps that convey a basic understanding of how markets work and why it harms consumers and citizens if some are allowed to manipulate those markets, can help build a broad-based competition culture. Apps that allow consumers to report suspicions of coordinated price movement can help enforcers detect cartels and collusion. Some African agencies have been at the forefront of developing such apps (see, e.g., ICN and World Bank 2016).

Last but not least, competition agencies that had integrated digital technologies into their work, such as Kenya, South Africa and the newly established Nigerian NCA, have been able to continue merger reviews and even enforcement actions during COVID-19-induced lockdowns – while otherwise comparable NCAs, such Botswana's, have had to close down for extended periods of time (Kigwiru 2020b).

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Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison

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Competition regimes are usually analysed through legal and economic lenses, taking existing markets as given, and examining the extent to which competition is present and identifying obstacles and market failures that hinder competition and enforcement of the law. In a pioneering study, Fox and Bakhoum interrogated the competition regimes in Sub-Saharan Africa through a historical and political-economy approach, revealing those market failures deeply rooted in the colonial experience. They then examined the competition regimes of those countries in that context. In this paper, a similar approach is used to examine economies in the Caribbean Community, providing historical insights into how those societies were created by European expansion and imperialism, with the resulting market failures that persist today, making diversification and transformation of these economies very challenging. Against this grid, the competition regimes of this region are examined, and some proposals advanced for transformational strategies for Sub-Saharan Africa and the Caribbean.

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Objectives

This brief paper is inspired by the path-breaking work of Eleanor Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa*,[1] and attempts to provide a preliminary comparison between the experiences of Sub-Saharan Africa and the Caribbean Community (CARICOM) in developing their competition regimes. The work of Fox and Bakhoum is path-breaking among competition law research efforts because it takes a political economy approach to explore the legacy of colonial history of these countries as an entry into explaining the economic and political environment into which competition law is introduced.

In this comparative brief, I first provide a synopsis of the findings of the study on Sub-Saharan Africa. Then, using a political-economy approach similar to that used in that study, I specifically target the following areas for comparison between the findings of Fox's and Bakhoum's research and conditions in CARICOM States.

1. Economic, social, and political overview of CARICOM.
2. Treatment of State Owned Enterprises (SOEs) versus the Private Sector.
3. Corruption, the judiciary, and rule of law.
4. The colonial experience and its impact on the current socio-economic landscape and distribution of wealth and power.
5. Current economic and political conditions derived from the colonial past that close and capture markets.
6. Competition policy in the region.
7. Competition laws in the region and enforcement experience.
8. Regional competition law and its enforcement.

Because South Africa's competition regime is so mature compared to CARICOM's and those in other Sub-Saharan states, I chose not to delve too deeply into the South African regime. Finally, I consider the analysis and recommendations in the study for applicability to CARICOM.

1 Eleanor Fox & Mor Bakhoum, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (Oxford Univ. Press, 2019).

I. SUMMARY OF FINDINGS OF THE STUDY ON SUB-SAHARAN AFRICA

> *Our thesis is that Africa needs more "market" but not the kind that simply works for powerful interests. It needs markets governed by rules that control the powerful and unleash the talents and energies of the masses of people long left out of the economic enterprise.*[2] *(Fox and Bakhoum, p.2)*

The study initially explores the colonial experience, provides a profile of the economies, and measures the level of human development using indicators: Gross Domestic Product (GDP), Population levels, Human Development Index (HDI), Ranking in Doing Business chart, and Democracy Index. Fox and Bakhoum then explore the economic and political conditions that close and capture markets by powerful local and foreign interests: SOEs dominating markets, highly concentrated markets with high barriers to entry, and dominance of multinational corporations in key extractive sectors that vertically integrate to capture profits. Findings are that the economies and societies of Sub-Saharan Africa were transformed by colonialism from production primarily for domestic consumption and self-reliant food security to export oriented extractive industries dominating economic activities, to the benefit of the metropole. With this shift in production came growing import dependence on the metropole for consumables, creating a demand for goods and services from the metropole.[3] A large part of the labor force was redirected into export oriented industries of agricultural and mineral products, and away from production for domestic consumption. Despite this, there remains a residentiary sector, producing for local consumption. In Sub-Saharan Africa today, most of the working people are employed in agriculture—60 % to 70 % of the population—and most agriculture is subsistence farming and most of the farm families live below the poverty line.[4]

The findings in Francophone Sub-Saharan Africa show an extreme level of naked exploitation during the colonial period that has resulted in paucity of institutions and lack of experience in self-government.[5] With independence, local elites replaced the colonial administrators, patterned their rule by the colonial example, and favored foreign elites and capitalists rather than seeking the interests of the local population.

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2 *Id.* at 2.
3 Fox & Bakhoum, *supra* note 1, at 27.
4 *Id.* at 3.
5 *Id.* at 24, 30.

Political instability, coups, and authoritarian governments prevail. Anglophone Africa's colonial experience offered a higher level of institution building and later on, opportunities for locals to gain political experience through representation in government, leading to greater tendencies toward democracy and political maturity in these countries. Yet, there are high levels of dysfunctional markets in both West and East/South Africa, the origins of which can be traced to market structures created by colonial policies which enabled the capture of wealth and power by the privileged colonizers[6] and reinforced through racial discrimination and segregation. In southern African countries, apartheid policies imposed racial segregation, with Africans relegated to the most infertile lands, and resources captured by the white colonizers, condemning the indigenous peoples to extreme poverty that persists today despite the dismantling of apartheid in the 1990s.[7]

Markets in Sub-Saharan Africa were found to be highly concentrated, with high barriers to entry and SOEs dominating markets and competing unfairly with the private sector. The study found that corruption and cronyism are rampant in several of these economies.[8] There is a high presence of Multinational Corporations (MNCs) that dominate key sectors, further capturing markets through vertical integration.[9] These conditions leave little room for new firms to enter markets and challenge the status quo. In East/South Africa, a greater measure of stability, rule of law, functioning institutions, and economic opportunities were observed, as compared with Francophone Africa.[10]

Fox and Bakhoum then explore the competition regimes in the two areas of Sub-Saharan Africa. There is a marked difference between the competition regimes that emerged in Francophone Africa versus East/South Africa, and the study explores in detail the provisions of the national laws, the extent of and constraints to enforcement, regional laws and enforcement, and the weaknesses of these regimes but also the successes. National competition regimes were being introduced in Francophone Africa, and Senegal in particular had started enforcing its domestic competition law.[11] In a reversal of this progress, the national institutions were defanged by the West African Economic and Monetary Union (WAEMU). The WAEMU Court of Justice

6 *Id.* at 54.
7 *Id.* at 57.
8 *Id.* at 27, 54, 107.
9 *Id.* at 27.
10 *Id.* at 54.
11 *Id.* at 43–44.

interpreted the law to give exclusive competence to the WAEMU Commission, thus assigning to it both cross border and national jurisdiction. So, the national authorities could only enforce unfair competition (because WAEMU's law does not include unfair competition) and not competition law, even though they do have competition provisions in their national laws.[12] To compound the problem, the regional authority has been feeble and ineffective, and the national authorities are reluctant to cooperate with them. An effort was made in 2016 to return power to national authorities, but this floundered and has been in abeyance since.

South Africa has emerged as one of the strongest regimes in the developing world, and did this in an amazingly short period of time, enabled by the positive and supportive environment for competition law in the wake of the dismantling of apartheid.[13] East/South Africa fares much better than Francophone Africa in the design of their competition regimes, provisions in the laws, and enforcement successes. Kenya[14], Zambia[15], Mauritius[16], and others have been making good progress in strengthening their institutions and enforcing their laws. This good progress is evidenced by successes in enforcement of some of the competition regimes as illustrated in some examples below.

An example is bid-rigging in fertilizer procurement by the Zambian state. The findings of the investigation by the Zambian Competition Authority not only proved the bid-rigging, but also found that government officials in the procurement department designed the request for tenders to exactly match the companies involved, and that there were links between the officers and the companies. The effect of the bid-rigging was that smaller companies were foreclosed from selling fertilizers to the government, and the government overpaid for fertilizer by about US$20 million over four years, leading to increase in prices. There are many other success stories recounted in the study which benefitted consumers, particularly the poor.[17]

The study reports on several successful interventions by the Commissions in Anglophone Africa. The Kenyan Competition Commission, for instance, has taken cartel decisions in cement, fertilizer, advertising, insurance, and the retail industry, and three of the decisions led to fines of US$170,000.[18] A major victory was that the

12 *Id.* at 41–42.
13 *Id.* at 119.
14 *Id.* at 67–71.
15 *Id.* at 76–78, 93–94.
16 *Id.* at 82–84.
17 *Id.* at 10.
18 *Id.* at 86.

Commission forced the company that created the local mobile money, M-Pesa, to drop its exclusivity clauses with agents which allowed rivals like Airtel to enter markets. South Africa has a wealth of cases that can be cited as very successful enforcement.[19]

Finally, the study explores regional arrangements in Sub-Saharan Africa: West African Economic and Monetary Union (WAEMU) and the West African Monetary Zone (WAMZ) with the CFA franc as the common currency, a Francophone Africa Customs Union and Common Currency; Economic Community of West African States (ECOWAS) (customs union that includes Anglophone Western Sub-Saharan Africa); Common Market for Eastern and Southern Africa (COMESA), a Free Trade Area & Customs Union; East African Community (EAC), a Customs Union; and South African Development Community (SADC), an organization to facilitate cooperation in Eastern and Southern Africa. There is also the African Free Trade Zone (AFTZ), consisting of EAC, SADC, and COMESA. In 2018, the African Continental Free Trade Area (AfCFTA) was formed that brings all African countries into an overarching trade arrangement, in an attempt to increase intra-African trade and to strengthen Africa's voice in global trade negotiations. While AfCFTA is still in its infancy, there is much optimism on the potential of this arrangement.[20]

WAEMU, COMESA and EAC have regional competition regimes. The issues in the WAEMU's competition regime has already been raised above, and regional enforcement is weak while there is no national enforcement. Regional arrangements were found to be still in its infancy in East/South Africa, but are in the process of being developed. There are issues, though. Both COMESA and EAC have regional competition regimes, but have overlapping jurisdictions between COMESA and EAC that spell trouble for the future if there are different judgements for the same case, and disagreements over cases. SADC is a cooperative arrangement, with no competition law and enforcement, but is working very well as South Africa extends capacity building and technical assistance to its members.[21] Finally, Fox and Bakhoum make strong recommendations for reform of laws and enforcement strategies that could open up spaces for entrepreneurship and lift these economies and societies out of poverty.[22] These recommendations are summarized concluding, as interrogated for relevance to CARICOM countries.

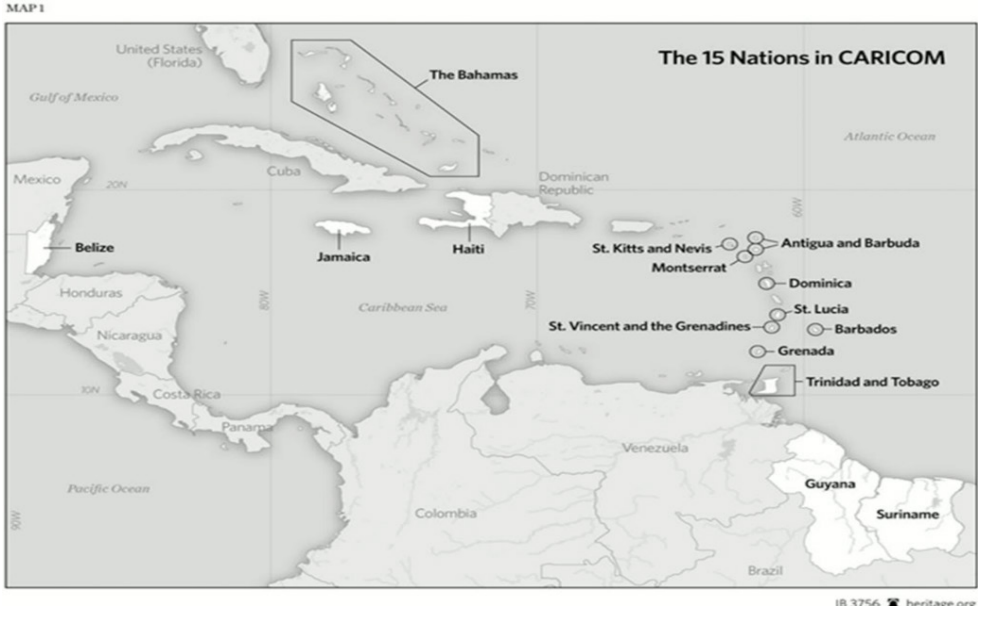
19 *Id.* at 105–06.
20 *Id.* at 164, 165–90.
21 *Id.* at 191–205
22 *Id.* at 233–58.

II. CARICOM: ECONOMIC, SOCIAL AND POLITICAL OVERVIEW

A. Economic Conditions

Like Sub-Saharan Africa, Member States (MS) of CARICOM[23] are all former colonies of Europe, mainly of Britain, but include Suriname which was Dutch, and Haiti which was French. Belize, Guyana and Suriname are on the mainland of Central and South America, and the rest are small island states in the Caribbean Sea. The three mainland territories have vast geographic territory in comparison to the island states, but have small populations and small economies comparative to their geographical size as seen below in the map of CARICOM and in Table 1.

Figure 3.01 showing the map of CARICOM and the greater Caribean 10



23 The Caribbean Community (CARICOM) includes the following countries: Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. There are five associate members and several observer countries.

Table 1: Statistical Profile of Member States of CARICOM

Country	Popu. 2020	Land area Sq. Km.	GDP current prices US$ billions 2019	GDP per capita US$ units 2019	Current acct. BOP US$ billions 2019	HDI *
Antigua / Barbuda	97,929	442	1.688	18,109	-0.102	0.780
Bahamas	393,244	13,939	12.660	33,261	-0.933	0.807
Barbados	287,375	431	5.189	18,069	-0.203	0.800
Belize	397, 628	22,966	2.001	4,925	-0.141	0.708
Dominica	71,986	750	0.593	8,380	-0.141	0.715
Grenada	112,523	345	1.238	11,381	-0.140	0.772
Guyana	786,552	216,970	4.121	5,252	-0.936	0.654
Haiti	11,402,528	27,750	8.819	784	-0.292	0.498
Jamaica	2,961,167	10,991	15.702	5,460	-0.389	0.732
Montserrat	4,992	103				
St. Kitts/Nevis	53,199	269	1.032	18,245	-0.065	0.778
St. Lucia	183,627	616	1.992	11,075	-0.049	0.747
St. Vincent & the Grenadines	110,940	389	0.856	7,750	-0.099	0.723
Suriname	586,632	163,820	3.774	6,310	-0.217	0.720
Trinidad & Tobago	1,399,488	5,128	22.607	16,365	0.533	0.784

World Economic Outlook Database, October 2019; CARICOM Statistics, www.caricom.org; World Population Review: Country Review 2020, https://worldpopulationreview.com/countries/caricom-countries/; United Nations: Human Development Index 2019.

**UN, HDI index measures health, education, standard of living, life expectancy, among other indicators of human development, with the higher the measurement, the better the quality of life.*

Table 1 above illustrates the smallness of economies, with small size populations and smallness of landmass, isolated in the Caribbean Sea. The continental countries have large land mass, but their population, GDP, GDP per capita and Balance of Payments (BOP) are not dissimilar to the small island economies (Bahamas, Barbados, and St.

Kitts/Nevis stand out with higher levels of GDP per capita). Yet, all of these countries with the exception of Haiti did very well on the Human Development Indicator compared to Sub-Saharan Africa where the average was 0.5 with the highest being Mauritius with 0.781, Botswana with 0.69 and Namibia with 0.64. [24]While Trinidad and Tobago (T&T) is the only country that shows a positive Balance of Payments (BOP), this is rapidly eroding given the drastic fall in the price of oil and the economic contraction taking place now: BOP 2018 US$ 1.856 billion and 2019 US$0.533. [25]Severe constraints have been placed on access to foreign currency in this country, reflecting the shortage of foreign reserves. Most of the small island states rely heavily on tourism, as sector that is prone to external shocks from hurricanes and from a fall in tourist arrivals in situations of crisis, as is the case with the current COVID-19 pandemic. More is said on this extreme vulnerability below.

B. Regional Integration

Recognizing that these small colonies were not economically viable as independent nation states, the movement towards integration of these countries started back in 1958, before independence was granted, with the formation of the West Indian Federation. The British forged a political union of its former colonies in the West Indies, but this quickly collapsed because Jamaica opted out on a referendum: its people were unhappy that they would have to share the country's wealth (gained through extraction and export of bauxite) with the less wealthy ones. Jamaica and Trinidad and Tobago were granted independence soon after, in 1962, with independence of the rest of the colonies following over the next decade and a half. In 1965, the Caribbean Free Trade Area (CARIFTA) was formed, which was a multilateral free trade agreement amongst the Anglophone Caribbean to undertake measures to increase, diversify and liberalize trade in the economic area. It came into effect in 1968[26]. This arrangement was deepened in 1973 to move towards economic integration of the countries with the formation of a common market: the Caribbean Community (CARICOM)[27].

There is disparity of development levels in CARICOM, and for this reason, the Community recognizes that there are more developed countries (MDCs)

24 Fox & Bakhoum, supra note 1, at 56.

25 IMF, The Great Lockdown, World Economic Outlook (Apr. 2020). Given the abrupt decline in global industrial activity leading to a drastic decline in demand for oil, the failure of OPEC to reach an agreement, and the Saudi's increase in production, the price of oil has fallen more than $30 in the month of March 2020.

26 *Brief History of* CARIFTA, Caribbean Elections (updated July 25, 2020), http://caribbean-elections.com/education/integration/carifta.asp.

27 *Our Mandate,* CARICOM Caribbean Community, http://www.caricom.org.

and less developed countries (LDCs) in the group. The Treaty of Chaguaramas, the legal agreement for the formation of the Common Market, recognizes this disparity and include special and differential treatment of the LDCs. A sub-regional group, the Organization of the Eastern Caribbean States (OECS)[28], was established, and, together with Belize, are designated the LDCs of CARICOM. The MDCs are The Bahamas, Barbados, Guyana, Jamaica, Suriname, and Trinidad and Tobago. A CARICOM Single Market and Economy (CSME) was established in 2002 by the Revised Treaty of Chaguaramas (The Bahamas declined to be a part of the CSME because of the clauses on free movement of peoples). While the instruments for finalizing this union are still not fully in place, there is deep functional cooperation between the member states of the CSME. While CARICOM and the CSME are generally patterned after the integration movement in Europe, a fundamental difference is that, unlike Europe, there is no supra-national authority equivalent to the EU Parliament and the EU Commission. Instead, member states were reluctant to give up sovereignty and so the regional arrangement is managed through a Heads of Government Conference and a Secretariat.

C. Openness of Trade and Investment Policies in CARICOM

CARICOM economies are extremely open, with few constraints on Foreign Direct Investment (FDI), and directed mainly at the tourism sector.[29]

ECLAC's report analyzes the situation of 16 MS in the Caribbean. Tourism is the sector that receives the most FDI in countries such as Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines, while in other nations natural resources predominate (Guyana, Suriname and Trinidad and Tobago). In Haiti and Jamaica FDI is principally aimed at the transportation and telecommunications sector. [30]For instance, The Bahamas received 5.1% less FDI in 2018 —US$ 947 million— than it had in 2017 and was the second-biggest destination for FDI in the Caribbean.

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28 Antigua/Barbuda, Dominica, Grenada, Montserrat, St. Kitts/Nevis, St. Lucia, St. Vincent and the Grenadines.

29 *See*, *e.g.*, U.S. Dep't of State, 2019 Investment Climate Statements: Trinidad and Tobago (2019), https://www.state.gov/reports/2019-investment-climate-statements/trinidad-and-tobago/; U.S. Dep't of State, 2019 Investment Climate Statements: The Bahamas (2019), https://www.state.gov/reports/2019-investment-climate-statements/bahamas-the/.

30 Press Release, UN Economic Commission for Latin America and the Caribbean, The Caribbean Received $6.027 Billion Dollars in Foreign Direct Investment in 2014, Down Nearly 5% from 2013 (May 27, 2015), https://www.cepal.org/en/comunicados/el-caribe-recibio-6027-millones-de-dolares-de-inversion-extranjera-directa-en-2014-casi.

Equity flows were higher (rising by 63.3%) and accounted for the largest share of inflows (61%). The attractiveness of these islands for tourists continues to drive investment.[31] There are in some countries restrictions on access to hard currency because of decline in export earnings and therefore decline in foreign reserves needed to import, for example, Trinidad and Tobago's current plight because of the fall in the price of oil and contraction in tourism in the region. That being said, the region has formed a Single Market, seeking to unify the internal market and with a Common External Tariff (CET) regime applied by all member states of the CSME. Divergence from the CET is allowed in special circumstances.

All CARICOM member states (i.e., the CSME plus the Bahamas) have developed extremely investment-friendly regimes to attract FDI, providing tax exemptions for 20 years and more, duty free imports for their businesses, and many other concessions that provide the investors with maximum profit making while considerably reducing gains to the local economy. The direction of foreign investment policy has been largely in the tourism sector, and in export zones. Foreign-owned hotels are an example, and few restrictions are placed on the investors who are free to capture the higher levels of employment, import inputs, and internalize services. The experience of FDI in The Bahamas is an example, with the Heads of Government Agreements with Atlantis Hotel on Paradise Island, Baha Mar Hotel on Cable Beach and other resorts.

Intra-regional trade is minimal in relation to trade with the rest of the world. Between 2011 and 2016, intra-regional imports in the CSME was 12.6 % of total imports, and the major source of imports was the USA with 32.9%. In the same period, intra-regional exports was 15.2%, with the USA receiving 42.9 % of exports from the region. Trinidad and Tobago dominates intra-regional trade, representing in the period from 2011 to 2016, 42.5% of imports, and 68.3% of exports. [32][These statistics do not include The Bahamas which is not a member of the CSME,

31 U.N. Econ. Commission For Latin Am. & Caribbean (Eclac), Foreign Direct Investment In Latin America And The Caribbean (2019), https://repositorio.cepal.org/bitstream/handle/11362/44698/10/S1900447_en.pdf. In The Bahamas, for instance, the cruise ship segment, Royal Caribbean International invested US$ 200 million in renovating its properties on CocoCay, an island that it leases in its entirety (Chicago Tribune, 2018). The Walt Disney Company has purchased a large part of Eleuthera Island from the United States conglomerate Meritage Hospitality Group (GlobeNewswire, 2018), where it will spend between US$ 250 million and US$ 400 million to construct a port for its cruise ships and other facilities; as part of the deal, it has made a commitment to provide jobs and business opportunities for citizens of the Bahamas (Government of the Bahamas, 2019). Margaritaville Enterprises has also announced plans to build a new luxury hotel complex in Nassau; that project is valued at an estimated US$ 250 million (Hospitality Net, 2019).

32 CARICOM Secretariat, *Snapshot Of Caricom's Trade Series 2: Caricom's Total Trade Summary By Trading Partners: 2011-2016* (2018), https://statistics.caricom.org/Files/Publications/Snapshot/

but, the major export of The Bahamas is tourism, and the majority of tourist arrivals are from the US]. Figure 1 above showed the negative BOP in all countries (except Trinidad and Tobago at that time, but which now has a negative BOP (April 2020)).

According to the study by the Inter-American Institute for Cooperation in Agriculture (2018)[33] on non-tariff barriers, although Caribbean countries have historically maintained trade ties, intraregional trade only accounts for 16.6 % of total food imports. In Trinidad and Tobago, for instance, in 2015, agriculture contributed 0.5% of GDP and 3.4% of employment while agrofoods export was only 2.6% of total exports. Trinidad and Tobago imports 85% of its food supply. [34]Reliance on extra regional sources for import of food is therefore substantial. The sugar industry came to a standstill in Trinidad and Tobago in 2007, but is still a major part of agricultural production in Guyana: production for export. There is a high level of food insecurity in the region, given this dependence on imports, particularly from extra-CARICOM sources. As Table 1 above illustrated, there is negative balance of payments in all CARICOM countries except Trinidad and Tobago. This positive balance for Trinidad and Tobago has to be evaluated against the severe clamp down on access to foreign currency which dampened imports. The IICA report also indicated that there has been a reduction of non-tariff barriers in the Caribbean and most of the remaining barriers are based on outdated regulations, such as those that are linked to technical barriers to trade (TBTs) and to sanitary and phytosanitary measures (SPS). There is a regional effort to update and regularize SPS rules and measures. [35]

D. Social and Political Profile

The region is not without problems. Social stability is threatened by an exponential increase in crime with Trinidad and Tobago ranking number 6 of 133 countries evaluated for their crime rate, Guyana, number 8, Jamaica, number 11, and The Bahamas, number 18.[36]

Series_2_2011-2016.pdf.

33 Press Release, Inter-American Institute for Cooperation in Agriculture, Caribbean Market Seeks to Strengthen Trade Links by Eliminating Non-Tariff Barriers, (Oct. 23, 2018), https://www.iica.int/en/press/news/caribbean-market-seeks-strengthen-trade-links-eliminating-non-tariff-barriers.

34 Inter-American Development Bank, Agricultural Policy Reports: Analysis Of Agricultural Policies In Trinidad And Tobago (Jan. 2018), https://publications.iadb.org/

35 *See* Facilitating Intra-Regional Agri-Food Trade, CARICOM Thematic Group Business Development Technical Brief # 1 /2018 (2018), https://caricom.org/documents/16578/ronnie.pdf.

36 *Crime Index by Country 2020 Mid-Year*, Numbeo, https://www.numbeo.com/crime/rankings_by_country.jsp.

The Chair of CARICOM Heads of Government Conference commented on the unacceptable rates of crime in the region reporting that a brief snapshot of crime and security as articulated in the Caribbean Community Security Strategy (CCSS), shows high rates of homicide and violent crimes; trafficking in guns, ammunition and illegal narcotics; organised crime. rising cybercrime; and the growing power of transnational and organised crime networks.[37] Many of these countries, particularly Trinidad and Tobago, were being used as transshipment conduits to the United States for the drug trade from Columbia.[38] The increase in crime escalated in the last two decades when the US started deporting criminals to their country of citizenship, including the Caribbean. The United States has deported thousands of convicted criminals to the Caribbean annually since 1996, when Congress mandated that every non-citizen sentenced to a year or more in prison be kicked out of the country upon release. In all, the US is responsible for about three-quarters of the region's returning criminal deportees, with the United Kingdom and Canada accounting for most of the other ex-cons arriving in the islands.[39] The result was that criminals who were brought to the US as children and were socialized and nurtured in the US, but never obtained US citizenship, were sent back to Caribbean islands, sometimes with no contacts and family ties, only to slip into the underworld of crime and bringing the sophistication of criminality and weaponry of the US with them. And so, currently, violent crime is the most important social issue in these island states.

Vulnerability to increasingly ferocious hurricanes and erosion of beaches by rising sea levels are serious issues that have consequences for development planning and demands on government revenues.[40]

37 https://www.caricom.org; Press Briefing at the Close of the Thirty-First Intersessional Meeting of the Conference of Heads of Government (Barbados, Feb. 19, 2020).

38 Christopher Woody, *Drug traffickers may be returning to a popular smuggling route into the US,* Business Insider (Oct. 25, 2016), https://www.businessinsider.com/drug-trafficking-caribbean-smuggling-routes-2016-10 (US Customs and Border Protection Air and Marine Operations intercepted a small wooden vessel carrying two men and $3.6 million in cocaine on Sunday, the latest sign that the Caribbean smuggling routes popular in the 1980s are seeing renewed traffic.).

39 Mike Melia, *Caribbean Crime Wave Linked to US Deportations,* Independent (Sept. 26, 2017), https://www.independent.co.uk/news/world/americas/caribbean-crime-wave-linked-to-us-deportations-2089388.html.

40 Statement by Prime Minister Holness at the Regional Conference, Building Resilience to Disasters and Climate Change in the Caribbean: From Vulnerability to Sustainable Prosperity, CARICOM (Nov. 27, 2018), https://caricom.org/building-resilience-to-disasters-and-climate-change-in-the-caribbean-from-vulnerability-to-sustainable-prosperity-pm-holness/ ("Moody's Analytics in its Economics of Natural Disasters, published earlier this year states that among the 20 most vulnerable countries in the world, more than half represent small island states across the Caribbean

Additionally, a significant level of poverty and unequal distribution is an enduring feature of Caribbean economies. For instance, Haiti is third in the world for unequal distribution of wealth, and Suriname is fifth and Belize is ninth. Trinidad and Tobago[41] is now further challenged to meet the needs of mass illegal migrants from Venezuela, fleeing their troubled country to this little island, seeking safety and basic needs and stretching social services to limits. Relative to the percentage of its population, it has received more Venezuelans than almost any other country.[42] Haiti is the only country in CARICOM that has many of the features of Francophone Sub-Saharan Africa: an extremely exploitative colonial master in the French, a history of dictatorships following independence, extreme poverty, social and political fragility and unrest, and weak institutions. Indeed, it is the only country in this Community that won its independence through uprising and war, but paid heavily for its fierce spirit, for France extracted reparation until 1947, and in the process stripped the country of its forests. Haiti's current dire circumstances are rooted in this 127 years of reparation payments to France for the loss of planters' property, that is, the slaves (estimated at 150 million gold francs in 1825, later reduced to 90 million). [43]Here lies the explanation for this country's extreme poverty and absence of opportunity for pursuing human-centered socio-economic development and political stability. In this brief comparison between the experiences of sub-Saharan Africa and CARICOM, Haiti will not be included, given its very different history and experiences from the Anglophone countries, its current circumstances, and the fact that it does not even have the beginnings of a competition regime.

Suriname was, for the most part, a Dutch colony, with forays of control by the British during and immediately after the Napoleonic wars. It was granted full self-government by the Dutch in 1954, with defense and foreign policy retained by the metropole. In 1975, Suriname gained its independence, but was plagued thereafter by civil unrest, military coups and remained under questionable democratic rule in

and Pacific Regions. To illustrate this point further, let us recall that the 2017 Atlantic Hurricane Season – a watershed year for the region – left 18 countries in the Caribbean severely battered with an estimated damage and loss of $130 billion US dollars.").

41 Benjamin Elisha Sawe, *Countries with Uneven Distribution of Wealth*, World Atlas (July 18, 2019), https://www.worldatlas.com/articles/the-world-s-most-unequal-countries.html.

42 Melanie Teff, *Report: Forced Into Illegality: Venezuelan Refugees and Migrants in Trinidad and Tobago,* Refugees International (Jan. 27, 2019), https://www.refugeesinternational.org/reports/2019/1/27/forced-into-illegality-venezuelan-refugees-and-migrants-in-trinidad-and-tobago

43 Kim Ives, *Haiti: Independence Debt, Reparations for Slavery and Colonialism, and International "Aid",* Global Research (May 10, 2013), https://www.globalresearch.ca/haiti-independence-debt-reparations-for-slavery-and-colonialism-and-international-aid/5334619.

the last decade. In a military coup, Bouterse, the head of the army, seized power in 1980 and consolidated his power by eliminating opponents. Bouterse recaptured power in Suriname in a bloodless coup in 1990 and has held the country in his grips since then, but became the first elected President in 2010. On November 28, 2019, he was convicted and sentenced to 20 years imprisonment by the Surinamese Military Court for the 1982 killing of 15 political opponents. The court decision stands, but in a boost for democracy, Bouterse was voted out in the elections of May 2020, and victory for the opposition was declared July 2020. His prison sentence is still to be enforced, but poses risk of instability due to reactions of dire hard supporters. [44]Suriname's political history lacks the democratic institutions of the Anglophone Caribbean.

Finally, a caveat on Guyana, a former Dutch, then British colony, which experienced civil unrest in the 1950s and 60s that were based on ethnic rivalry between Afro and Indo Guyanese. It is now verified that the racial strife was instigated by the United States (US) during the height of the Cold War, when the US was paranoid about the rise of socialist/communists leaders in Guyana: Forbes Burnham and Cheddi Jagan.[45] Despite the fragility of the ethnic divide between peoples of Indian and African descent, the basic Westminster model of government and democracy has prevailed, and racial rivalry was largely contested through democratic elections and contestation for the spoils of government.

This accommodation is now being sorely tested since March 2020. Parliamentary elections took place on March 2, but controversy erupted when the officer of the Guyana Elections Commission (GECOM) in charge of the count in the most populous region declared victory for the incumbent party without counting all the votes. The diplomatic missions of the EU, US, Canada, the Organization of American States and CARICOM amongst others called for a full recount in order to secure legitimacy of the elected government. The Opposition Party secured a court injunction to stay the declaration of the election until a full recount was done and the Court ruled in its favour. After several court hearings and appeals, instigated by the incumbent, a recount was done under the supervision of a team from CARICOM. However, the incumbent still stalled and the case taken to the Caribbean Court of Justice, the highest Court

44 *Suriname election: Preliminary results show opposition winning,* ALJAZEERA (May 27, 2020), https://www.aljazeera.com/news/2020/05/suriname-election-preliminary-results-show-opposition-winning-200527174008725.html

45 Matthew Lange, Lineages Of Despotism And Development: British Colonialism And State Power 130 (U. Chicago Press, 2009).

of Appeal, by the Opposition, and the Judges pointed to several discrepancies in the submission of the ruling party. Issues turned to whether the votes counted should be all the votes or only the recount, with the rest of the results standing. Finally, on July 20, 2020, the Chief Justice ruled that only the recounted votes should be considered. Meanwhile, there had been expressions of disapproval from international organizations and US, Canada, Britain. The Commonwealth Secretariat also took a keen interest in the issues surrounding the elections results and supported CARICOM's efforts. [46]The Organization of American States convened a meeting with CARICOM on July 21 to discuss the political crisis in Guyana; and expert, Sir Ronald Sanders, warned that Guyana is in grave danger of being ostracised in the regional, hemispheric and global communities. [47]The US State Department imposed visa restrictions on those engaged in denying democracy in Guyana, and the UK has started the process to sanction those thwarting democracy. [48]Finally, on August 2, the result of the election was declared in favour of the Opposition Party, and there was peaceful transfer of power.

What is interesting about this political crisis in Guyana is that the battle was fought in the Courts of Law. A second interesting aspect is that the CARICOM Heads of Government intervened, offering good offices, and to supervise a re-count, based on the Charter of Civil Society which Heads of Government adopted in 1997. Article VI.1 provides that "States shall ensure the existence of a fair and open democratic system through the holding of free elections at reasonable intervals, by secret ballot, underpinned by an electoral system in which all can have confidence and which will ensure the free expression of the will of the people in their choice of their representatives." [49]All in all, despite the very fragile political situation in Guyana, democracy and rule of law prevailed.

Thus, in general, Anglophone countries have a different experience from Haiti and Suriname; democratic institutions were built that have proved to be enduring, and have

46 *Commonwealth SG Lauds Guyana's Leaders for Committing to Respect, Adhere to Recount Results,* Inews Guyana (June 7, 2020), https://www.inewsguyana.com/commonwealth-sg-lauds-guyanas-leaders-for-committing-to-respect-adhere-to-recount-results/.

47 *OAS to Meet on Guyana's Electoral Crisis Today,* Inews Guyana (July 21, 2020), https://www.inewsguyana.com/oas-to-meet-on-guyanas-electoral-crisis-today/.

48 *Guyana Elections 2020,* Stabroke News, https://www.stabrokenews.com/topics/guyana-elections-2020/; *See also, Guyana will find itself more isolated than any other country in the world-Ram,* Guyana Standard (July 20, 2020), https://www.guyanastandard.com/2020/07/20/guyana-will-find-itself-more-isolated-than-any-other-country-in-the-world-ram/

49 Caribbean Community Secretariat, Charter Of Civil Society For The Caribbean Community (1997), *available at* https://caricom.org/documents/12060-charter_of_civil_society.pdf. *See also* Sir Ronald Saunders, *CARICOM Should Help But Guyana Must Save Itself,* Caribbean News Global (Apr. 3, 2020), https://www.caribbeannewsglobal.com/caricom-should-help-but-guyana-must-save-itself/.

secured for these countries a far greater measure of stability. They are ruled by governments chosen through parliamentary elections every five years and based on the Westminster model of government. The separation of the Executive branch from the Judiciary is respected, the Judiciary is independent, and generally, there is a greater level of rule of law. [50]Having said this, these countries are not immune to corruption and the plundering of state resources, and this will be addressed later. These pillars of democracy prevail despite the current socio-economic problems.[51] There is a level of accountability demanded by the citizenry, and this will be addressed below.

E. State Owned Enterprises in CARICOM as Compared to Sub-Saharan Africa

The work by Fox and Bakhoum points to economic and political conditions in Francophone Africa that close and capture markets, with State-Owned Enterprises (SOEs) dominating highly concentrated markets with high barriers to entry and competing unfairly with private sector firms. For instance, the authors give an account of the pyrethrum industry in which the Kenyan Competition Commission, working in tandem with the World Bank, identified bottlenecks in the industry created by the SOE, the Pyrethrum Board, which led to the plummeting of production and exports, so that Kenya's share of the world market fell from 82 % in 1980 [and 91 % in 1995] to 4 % in 2004. Corruption was rampant and the farmers were given little support, were not paid in a timely manner, and sometimes had to wait up to four years to get payment. Furthermore, nurseries were abandoned making it difficult for farmers to obtain certified seeds and the Board allowed processing plant and equipment to deteriorate. The Commission succeeded in getting legislation passed in 2013 to break the monopoly power of the Pyrethrum Board. This case demonstrates how state intervention in the market can be detrimental to farmers and the economy

50 *See, e.g.*, U.S. Dep't of State, 2019 Investment Climate Statements: Trinidad and Tobago 1 (2019), https://www.state.gov/reports/2019-investment-climate-statements/trinidad-and-tobago/. "Some of the positive aspects of TT's investment climate include TT's stable democratic political system, its educated and English-speaking workforce, and well-capitalized and profitable commercial banking system and insurance industry. In addition, investors have noted that there is an established rule of law and respect for contracts, substantively fair independent judicial system that is substantively fair, and lack of domestic competition in certain sectors. As such, TT's investment climate is generally open and most investment barriers have been eliminated." Similarly, their view of The Bahamas is that the country maintains a stable environment for investment with a long tradition of parliamentary democracy, respect for the rule of law, and a well-developed legal system.

51

by destroying functioning markets and replacing with corrupt monopoly power. [52](*See box below*)

The Plummeting of Pyrethrum Exports in Kenya

Pyrethrum is used to make an environmentally friendly pesticide, and Kenya dominated world markets since the 1930s. The Pyrethrum Board required farmers to sell their output through the Board. Corruption, mismanagement and outright theft bedeviled the pyrethrum industry from the early 1990s, according to a report in the Business Daily (3 October 2019). The industry was brought to its knees and farmers lost hope and money. Most farmers abandoned production, and Kenyan export of the product fell to 4% of world market in 2004. As a result of the efforts of the Kenyan Competition Commission a law was passed in 2013 repealing the monopoly of the Board.

Further research shows that this victory was short-lived. Despite this successful intervention by the competition commission, the state was not chastened, and proceeded to create another Regulatory Body, the Pyrethrum Processing Company of Kenya (PPCK), and the same inefficiency and plundering of the resources of the state monopoly continued. Many farmers have ceased producing pyrethrum, so that today (2019), pyrethrum export is only 2% of the world market. And, on 27 September 2019, the Managing Director of the Board was arrested on charges of economic crimes and procurement irregularities.

An addendum to this story is that the newspaper, the Business Daily, reported on October 3, 2019, that a US company, Kentedra Biotechnologies, invested in Kenya. The company has set up a seed nursery, laboratory, and processing plant, and is purchasing dried flowers from 3,000 farmers under contract. They also switched the strain of pyrethrum grown to one that flowers every two weeks, giving the farmers a steady income. This augurs well for the farmers and the growth of the industry, rescued by foreign direct investment.

During the 1980s and 1990s, many SOEs were privatized in CARICOM as part of Structural Adjustment Programmes imposed by the IMF and World Bank as conditionality for debt restructuring and access to loans. While there are still SOEs in CARICOM, these are necessary in small economies where the private sector is unwilling or unable to engage in very large investments, such as public utilities and solid waste management, and in most countries the state has to provide the following public services: water, electricity, transport infrastructure (airports and ports) housing, education, public health services. In addition to these services, state investment can be found in support of development policies, including tourism investment support services and Small Business development, and in strategically key sectors such as broadcasting and media, postal services, and agriculture (where the private sector is reluctant to invest and banks are reluctant to give financial support).

52 Fox & Bakhoum, *supra* note 1, at 9.

In Suriname, SOEs exist in the financial services sector, agribusiness, mining, travel services, and energy among others. This in itself is not dissimilar from the Anglophone Caribbean, but in Suriname, there is little transparency about the operations of these firms, with few annual reports accessible to the public, and several have been discredited because of fraud and corrupt practices. The SOEs receive advantages when competing in the domestic market, having access to government guarantees and loans that are unavailable to private enterprises, and access to land and raw materials that are not available to private entities.[53]

Generally, in the Anglophone Caribbean, SOEs do not compete with the private sector, but where they do, they compete on the same terms as the private sector for market access, licenses, and other business operations, as is the case in Guyana. In Jamaica, SOEs do not generally receive preferential access to government contracts and they must adhere to Government Procurement procedures. They are subjected to the same tax requirements as private firms, and transparency and accountability is generally required. And, they are held accountable with audited finances. That being said, the US Department of State evaluation found that in Trinidad and Tobago in sectors open to both public and foreign competition, SOEs are sometimes favoured for government contracts.[54]

F. Corruption in Political Office

The levels of public sector corruption in many Sub-Saharan African economies and societies, as described in the study, and the impunity with which such actions are taken, are far greater than what is found in CARICOM. Statistics published by Transparency International, Corruption Perceptions Index 2019[55] (100 being the least corrupt) show that, bar Haiti (22) and Guyana (38), the rest of CARICOM scored much better than Sub-Saharan Africa. Trinidad and Tobago, Jamaica, and Suriname scored in the 40s, but all other countries were above 55, with Barbados and The Bahamas scoring in the 60s, similar to Botswana, deemed to be the least corrupt country in Sub-Saharan Africa. By contrast, the highest score in West Africa was Senegal at 45, and all others were in the 30s, with Guinea Bissau at 17. In East/Southern Africa, states fared better than West Africa (Botswana-60, Namibia-51,

53 *See* U.S. Dep't of State, *supra* note 29.

54 *See* U.S. Dep't of State, *supra* note 29.

55 Transparency International, *Corruption Perception Index* (2019), https://www.transparency.org/cpi2019.

and Mauritius-50)[56]. The rest were in the 30s and 20s. Transparency International's *Citizens' Views of Experiences of Corruption 2019* is less comforting. Over 60 % of people in Trinidad and Tobago,[57] The Bahamas, Jamaica, and Guyana (59%) think that corruption in government is a major issue. The report by Transparency International also highlights bribery of government officials by people as a way of getting things done. The percentage of public service users who paid bribes in the previous 12 months are as follows: Bahamas 20 %; Jamaica 17 %; Trinidad and Tobago 17 %; Guyana 27 %. In these small societies, corruption and cronyism is facilitated by the closeness between the political and economic elites.

So, yes, there is corruption, and public perception of corruption, but there are also demands for accountability by civil society and a higher level of rule of law in more of these countries than was seen in many Sub-Saharan African countries. For instance, in August 2019, in Trinidad and Tobago, a Minister of Government and her husband were arrested on corruption charges. Media reports indicated that it is in connection with misuse of State funds, stemming from the alleged siphoning off more than TT$1 million (US$147,650) from a government ministry to three organizations linked to the Minister's family and friends.[58] In the Bahamas, in October 2015, the government charged and convicted a former State Energy Company Board member under the Prevention of Bribery Act.[59] And, in February 2019, the government arraigned a former Urban Renewal Deputy Director on charges related to defrauding the government. The case is on-going.[60]

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56 Fox & Bakhoum, *supra* note 1, at 270.

57 Trinidad and Tobago is the home to the infamous Jack Warner, former Vice President of FIFA, who has been indicted by U.S. prosecutors for accepting bribes in exchange for Russian and Qatar World Cup votes. The money allegedly came from 10 different shell companies, including entities in Anguilla and the British Virgin Islands. Warner has been fighting extradition to the US since he was charged in 2015 with 12 offences related to racketeering, corruption and money laundering (Caribbean360, Apr. 8, 2020). He was a Minister of Government in Trinidad and Tobago during this time, but there is no evidence that he defrauded the public purse in his country, and he is regarded as a "Robin Hood" to his constituents whose interests he sought. He did, however, direct that tickets, travel and accommodations to World Cup 2006 in Germany, which Trinidad and Tobago qualified for, to be procured through his son's agency in which he had an interest.

58 Keino Swamber, *Update: Minister Marlene McDonald Under Arrest*, Trinidad and Tobago Newsday (Aug. 8, 2019), https://newsday.co.tt/2019/08/08/update-minister-marlene-mcdonald-under-arrest/.

59 *2019 Investment Climate Statements: Bahamas,* U.S. Department of State (2019), https://www.state.gov/reports/2019-investment-climate-statements/bahamas-the/ (see Section 9 on Corruption).

60 *Former Urban Renewal Deputy Director Charged with Fraud*, The Nassau Guardian (Feb. 13, 2019), https://thenassauguardian.com/2019/02/13/former-urban-renewal-deputy-direce

Finally, as another example of corrupt officials held to accountability, in October 2019, a former minister of government in Jamaica is in police custody while he is being investigated into allegations of corruption, fraud and misappropriation of funds from the Ministry he served, and the Caribbean Maritime University. In another case in July 2019, the Integrity Commission of Jamaica completed it's investigated of the SOE, Petrojam Ltd., and forwarded its report to the Director of Corruption Prosecution. Indications are that criminal charges are pending. The probe revealed that millions were spent on lavish parties and unapproved sponsorships, while glaring human resource breaches occurred which caused Petrojam to end up in court as sacked employees challenge their dismissal. It also found that Petrojam made questionable payments related to procurement activities, had significant project cost overruns, and overspent on donations which impaired cash flow. The revelations about the free-for-all at Petrojam has led to the resignations of then energy minister, the then chairman of its board, other board members, its General Manager and the Human Resources Manager, among others. [61] In sum, while there is certainly corruption, those responsible are more likely to be held accountable than in several of the Sub-Saharan countries.

So far we have demonstrated that CARICOM is made up of small open economies, mostly island states that are export-oriented, producing mostly at the lowest value-added in the product chain, dependent on imports for consumables, and therefore extremely exposed to the vagaries of the international pricing for their export earnings and imports. In order to understand the contours of CARICOM economies and societies today, it is necessary to explore its colonial past. The following section examines how colonialism shaped Caribbean societies and economies to serve the interest of the metropole, and left behind structural, societal, and economic rigidities that still inform socio-economic conditions, and keep the major sectors of the economies in the hands of a few.

III. EXPLAINING THE CARIBBEAN TO THE WORLD: CREATION, NOT RESHAPING, OF SOCIETIES AND ECONOMIES

The West Indian (Caribbean) islands were pawns in European wars in the 17th and

tor-charged-with-fraud-2/.

61 Arthur Hall, *Criminal Charges Looming Over Former Petrojam Managers*, Jamaica Observer (July 14, 2019), http://www.jamaicaobserver.com/news/criminal-charges-looming-over-former-petrojam-managers_169886?profile=1373.

18th centuries, and many of the islands changed hands frequently. For instance, by the Treaty of Paris (1763) which ended the Seven Years War, the European powers agreed to an exchange of colonial territories. St. Lucia, which was captured by the British, reverted to French control, while Grenada (which had always been French), St. Vincent, Dominica (declared neutral territory but surreptitiously settled by the French since 1650) and Tobago (claimed by the French but never settled) became British.[62] Trinidad and Jamaica were originally Spanish colonies until they were captured and settled by the British. In the case of Jamaica, the island was captured in 1645, and formally ceded to the British in 1670. Trinidad was captured in the Napoleonic wars, and formally ceded in 1801. Tobago was even more of a 'football' in the European wars. The French captured it in 1781; the British took it back in 1793; the French regained it through the Treaty of Amiens (1802), but it was returned to the British in 1814.[63] Antigua, established in 1632, and Barbados, established in 1627, were the only ones that were originally British settlements in the former, and in the latter, and remained so.[64] Caribbean societies have been described as a microcosm of the world-society/world-economy because they both reflect and is a reflection of the evolution of capitalist world-history. The Caribbean is the oldest and most intensely penetrated part of the periphery of the World-System.[65] A significant difference between Sub-Saharan Africa and the *island territories* of CARICOM is that these economies and societies were totally created by capitalist expansion and imperialism. From the beginning of the plantation system (from the colonization of Barbados in 1625), the economies were created to produce commodities for export, and to import consumption needs. Labor needed for sugar plantations was satisfied through the African slave trade and slavery, and later, through Indentureship primarily from India. Here lies the links with West Africa, and the destruction of their societies, denuding their populations and forcibly transplanting them as slaves to the Caribbean.[66]

62 D.L. Niddrie, *Eighteenth-Century Settlement in the British Caribbean*, 40 Transactions of the Institute of British Geographers 67–80 (1966), www.jstor.org/stable/621569.

63 *Trinidad and Tobago: History,* The Commonwealth, https://thecommonwealth.org/our-member-countries/trinidad-and-tobago/history.

64 *Antigua and Barbuda: History*, The Commonwealth, https://thecommonwealth.org/our-member-countries/antigua-and-barbuda/history; *1625–1627 – The Early Beginnings of English Settlement of Barbados*, Totally Barbados, https://www.totallybarbados.com/articles/about-barbados/history/early-beginning-settlement/#.Xxdcy3uSnIU.

65 Herb Addo, Approaching the Peculiarity of the Caribbean Plight within the Paradox of the Reprresentative State in the Contemporary World-System (U.N. University, HSDR GP 1980).

66 Fox & Bakhoum, *supra* note 1, at 27.

A. **Transplanted Population**

"By the beginning of the seventeenth century, European colonization had reduced the Caribbean Islands to a blank canvas… The people and civilizations that had flourished in the Greater Antilles before Columbus had been virtually obliterated."[67] Unlike in Africa, Caribbean societies were created by immigration from Europe and transplanting of non-European peoples: the European (white) colonizers, slaves from Africa, and after slavery was abolished (1834), and the end of the Apprentice period (1838), indentured workers from Portuguese-Madeira, China, and India.[68] Trinidad, Guyana, and Suriname, with their larger land mass than the small island states, had large East Indian populations brought in as indentured laborers, needed because ex-slaves had access to vacant Crown land where they could squat and survive on subsistence farming and therefore avoided returning to work on plantations. For instance, of Trinidad's population growth between 1841 and 1881, 72,700 persons or 74 % was net indentured [Indian] immigrants (i.e., excluding indentured immigrants known to have returned to India).[69] In the smaller islands, the ex-slaves had little choice but to work for wages on the plantations, and with little bargaining power for such wages. Belize was not a plantation economy in colonial times. Rather, it was a settlement that grew out of periodic visits by loggers to exploit the rich forests and export lumber to Europe. While the mainland territories still have indigenous populations, the economies and large parts of the population were also created by European expansion and imperialism.

Peoples of European descent (hereafter called Whites) were a small percentage of the population in colonial times, but held all power, and this circumstance persists today. Barbados was the first to be colonized in the British West Indies, and the plantation system was highly developed and organized in that colony with a significant plantocracy class. In 1805, for instance, the total population of Barbados was 77,130, of which slaves were 60,000, free colored were 2,130, and whites were 15,000 (19.4 %). In contrast, Trinidad had not developed a significant plantation system at that point in time, and so in 1805 whites were only 8 % of the population.[70] By 1946,

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67 B. W. Higman, A Concise History of the Caribbean 97 (2010).

68 Carrie Gibson, Empire's Crossroads: A History of the Caribbean From Columbus to the Present Day 99–100 (Atlantic Monthly Press, 2014).

69 Jack Harewood, 1974 World Population Year: The Population of Trinidad and Tobago 5 (CICRED Series, 1975) (Table 1A).

70 *Ibid*. Note that Trinidad was a Spanish colony until it was captured by the English in 1797 during the Napoleonic Wars. The Spanish did little to develop the colony, but in 1783 by the proclamation of the Cedula of Population, French planters were allowed to settle in Trinidad provided they were

Whites consisted of 2.7 % of the population and by 1970, 1.2 % of the population of Trinidad and Tobago.[71] Yet, their economic power had not diminished, leading to a "Black Power Revolution" in Trinidad and Tobago in 1970, an uprising against the socio-economic strangle-hold of the Whites in Trinidad and Tobago.[72]

B. Instruments of Control and Repression

Belief systems of white superiority over blacks justified the enslavement of Africans. Policies to ban African cultural and religious practices disempowered the slaves even further. Slaves were dispersed to different plantations so as to separate tribes and later, families.[73] Carl Stone observed that:

> All societies that came under Western European colonization developed ethnic economic divisions of labour which were used to control and limit the role and power of the subordinate and the intermediary ethnic groups, to perpetuate the power and privilege of the dominant whites, and to entrench a rigid ethnic hierarchy that limit and regulate competition between groups. Order in colonial society was maintained by each ethnic group's knowing its place and its limits and by social and ideological doctrines which were used to legitimize ethnic inequality. Racism was therefore an integral part of all such colonial societies. The colonial state was used to maintain this racial hierarchy.[74]

Slaves maintained some elements of African culture in secret, and this was more the case in Trinidad where there were fewer slaves and a less organized plantation system, and in Jamaica with the Maroons, the runaway slave community, and particularly in Haiti, where many of the slaves were still African born at the time of the Revolution. But this was minimal except for Haiti, and there was a cultural vacuum in which imitation of white culture took hold, and together with conversion to Christianity, became the only ladder to upward mobility, along with the retraining of consumption patterns that shaped demand for consumables in both the short and long term. Best

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Catholic and declared loyalty to the Spanish Crown, and they were given land. French planters from Martinique, Guadaloupe, Grenada, St. Lucia, Dominica, St. Vincent, Nevis, and Haiti (all French colonies until captured by the British in the Napoleonic wars) migrated to Trinidad with their slaves. Note that this was the time of the Haitian Revolution and so a welcomed relief to the planters to be able to re-locate.

71 *Id*. at 97 (Table 4F).

72 *See* The Black Power Revolution 1970: A Retrospective (Selwyn Ryan & Taimoon Stewart eds., 1995).

73 *Id*. at 29.

74 Carl Stone, *Race and Economic Power in Jamaica*, *in* Garvey: His Work and Impact 243–64 (Rupert Lewis & Patrick Bryan eds., 1988).

and Levitt argue in their seminal research that the most important mechanism through which the processes of the system are allowed to unfold is the survival of the imprint of the original form of the plantation on the people: the shaped taste patterns, the inculcated imitative culture and the measures of status in them of the consumption norms.[75]

Whites still are the elites of these societies, socially and economically, and with great political influence. This is not surprising when put in the context of the barriers in these societies for upward mobility of the other races, post-slavery. Both in the 1880s and in the 1930s there were riots all over the West Indies, protesting the poverty and social conditions in which the non-White population lived. On both occasions, the British Parliament was forced to commission enquiries into the social conditions in the West Indies and the reports produced by the Royal Commissions revealed appalling health, housing, and economic conditions. The 1897 Report revealed that workers were barely able to survive on their wages, that disease caused by malnutrition was rampant, and that access to land for the workers was severely restricted to tiny garden plots.[76] According to Moyne Report of 1939, in parts of the Caribbean, pay had not increased above the shilling-a-day introduced after emancipation (1838). Conditions in housing, education, and health services were abysmally poor.[77] Indeed, this report was completed in 1939, but not published until 1945 because Britain had entered the Second World War and needed the support of the West Indian colonies, and feared that the report was too revealing of the deprivation of the masses and would be a disincentive to assisting the Empire.[78]

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75 Lloyd Best, *Outlines of a Model of Pure Plantation Economy*, 17 Soc. & Econ. Stud. 283–326 (1968).

76 Bonham C. Richardson, *Depression Riots and the Calling of the 1897 West India Royal Commission,* 66 NWIG: New West Indian Guide / Nieuwe West-Indische Gids 169–91 (1992).

77 Ben Bousquet & Colin Douglas, West Indian Women at War: British Racism in World War II 29-30 (London, Laurence & Wishart 1991).

78 The Moyne Report (cited in *Id.*). Richard Hart, a Jamaican Trade Unionist in the 1930s, gave the following account of the conditions in his writing, *Common Causes of Working Class Unrest* (Caribbean Labour Solidarity and the Socialist History Society, 2002):

> The principal causes of working class unrest and dissatisfaction were the same throughout the region: low wages; high unemployment and under-employment; arrogant racist attitudes of the colonial administrators and employers in their relations with black workers; lack of adequate or in most cases any representation; and, no established structure for the resolution of industrial disputes by collective bargaining. Another factor increasing general distress and dissatisfaction regionally was the world economic crisis which had started in the USA in 1929 and by the early 1930s was having a residual effect internationally. The fact that the grievances caused by these factors existed in all these colonies explains why, despite the lack of inter-colony contacts, the labour rebellions of the 1930s were an inter-colony phenomenon, sweeping like a wave across the region.

It is clear that in these conditions, opportunities for capital accumulation and savings for investment were closed to the non-White population. To compound this, access to loans from banks were blocked except for the well-established businesses owned by Whites. The lending policies of the British banks that were established overseas in the nineteenth and early twentieth centuries were highly selective and restrictive, engaging in a certain amount of discrimination, and their assessment of risk and creditworthiness were based on assumptions about ethnicity, including that people of non-European ancestry in general lacked sufficient monetary and commercial responsibility.[79] Blocked from formal channels of banking, the non-White population developed an informal savings-credit arrangement by which a core group of participants make regular contributions to a fund which is given in whole or in part, to each contributor in rotation.[80] In 1971-72, income distribution in Trinidad and Tobago was worse than it had been in 1957/58. Rather, than effecting re-distribution, the economic strategy of the industrialization model which was pursued had instead allowed the old commercial elite to retain, spread, and deepen its control over some [the most lucrative] area of the economy.[81]

Most CARICOM economies and societies are very different from those of Sub-Saharan Africa, despite the commonalities in the colonial experience of economic exploitation, cultural denigration, and structural inequality that shaped their current economic and social problems. Best and Levitt's thesis is that from inception of colonization, there was no hinterland in the Caribbean of traditional residentiary sectors; production for domestic consumption was marginalized because of the imperative to allocate resources and the most fertile land to export production. With this came the enduring trap of negative terms of trade, with prices both for exports and imports being determined in the metropole, and a dependency on earnings from

79 Kathleen Monteith, *Financing Agriculture and Trade: Barclays Bank (DCO) in the West Indies, 1926-1945*, *in* West Indian Business History: Enterprise and Entrepreneurship 125 (B.W. Higman & Kathleen E. A. Monteith eds., 2010).

80 Shirley Ardener, *The Comparative Study of Rotating Credit Associations*, 94 J. Royal Anthropological Inst. Great Britain & Ireland 201 (July–Dec. 1964) (quoted in Aviston Downs, *Black Economic Empowerment in Barbados,* 1937-1970 *The role of Non-Bank Financial Intermediaries*, *in* West Indian Business History: Enterprise and Entrepreneurship 152 (B.W. Higman & Kathleen E. A. Monteith eds., 2010)).

81 Jack Harewood & Ralph Henry, Inequality in Post-Colonial Society Trinidad and Tobago 1956-1981, 76 (1985). Recall the Black Power Revolution in Trinidad and Tobago in 1970.

commodity export to pay for consumables imported. Today, development policies still favor the export sector.[82]

The vulnerability of being price takers is accompanied by the international currency regime which designates currencies of the developed world as hard currencies exchangeable on the international currency markets and used for paying for goods and services procured internationally, while the currencies of developing countries are not interchangeable. Dependence on export earnings in hard currency becomes a life line for satisfying consumption needs. [83] It is also significant that most of these countries are small island states dependent on international shipping for imports, with the additional costs that entails.

IV. FOOTPRINTS OF THE COLONIAL PAST VISIBLE IN CARICOM ECONOMIES AND SOCIETIES

The imprint of the colonial experience is visible in the ethnic composition of the populations: 41 % of the population of Trinidad and Tobago and 44% of Guyana's population are of East Indian descent due to indentureship,[84] but the populations of the smaller islands are largely of African descent because there was no need to import labour: the ex-slaves had no option but to continue working on the plantations. The landscape of these countries bear the footprint of colonialism and the plantation economy: remnants of sugar plantations: sugar cane fields, sugar factories, sugar mills, and density of Indian population in those areas in Guyana and Trinidad. Today, the physical evidence of export orientation of these economies can also be seen in the earth scarred and degraded by bauxite, diamond, and gold mining and the large and mostly internationally owned hotels perched dangerously close to fragile beaches to allow for easy access for tourists. Transportation linkages with the outside world reflect the colonial past: it is easier to fly to Miami, Toronto, or London, than to fly Latin America, for instance, and even intra-CARICOM transport is deficient).[85]

82 Lloyd Best & Kari Levitt, *Externally Propelled Growth in the Caribbean: Selected Essays*, Mimeo (Dec. 1967).

83 Lloyd Best & Kari Levitt, Externally Propelled Growth in the Caribbean: Selected Essay (1967). These authors debunked the theories explaining Caribbean societies created by economists from the metropole, and developed an indigenous theoretical framework for understanding Caribbean societies. Now available online at newworldjournal.org.

84 *2020 World Population by Country*, World Population Review, https://worldpopulationreview.com/.

85 This skewed pattern of North-South transport linking former colonies to the metropole can be seen in some parts of Africa, making it easier to fly to Paris from Francophone Africa than to neighbouring Francophone countries. *See* https://allafrica.com/stories/201909130242.html.

Similarity exists between these countries and Sub-Saharan Africa of colonial imposition of commodity production for export to the metropole and import of consumption needs. The difference is the extremes found in the Caribbean, and the paucity of the domestic sector with extreme lack of food security. Like African countries, CARICOM countries continue to depend on commodity exports for their main earnings, with the accompanying vulnerability to fluctuating international prices that are completely out of their control: petroleum (Trinidad and Tobago), bauxite (Jamaica, Guyana, and Suriname), gold and diamond mining in Guyana and Suriname, and bananas and sugar in some countries.[86] The Windward Islands' economies were re-shaped by Britain to the production and export of bananas to that country in the aftermath of WW2 in order to provide nutrition for its population, and this trade continued under preferential trading arrangement (LOME Convention, now expired). Bananas are still a significant export sector, but tourism has become the mainstay of most member states of CARICOM: The Bahamas, Barbados and Jamaica in particular, but also the smaller islands of St. Lucia, St. Kitts, Nevis, Antigua and Barbuda and others. According to the Minister of Tourism of Dominica in a statement at the General Assembly of the Organization of American States, the tourism industry is the key economic driver and largest provider of jobs in the Caribbean after the public sector. Caribbean tourism broke new ground in 2016, surpassing 29 million arrivals for the first time and once again growing faster than the global average.[87]

Negative balance of payments figures in Table 1 above give testimony to the continuity of this dependency cultivated by colonialism, with exposure to persistent vulnerability to the vagaries of fluctuating international prices for commodities and rising prices for import of consumables. Trinidad and Tobago's positive balance reflected in Table 1 is solely dependent on the price of oil, and is now wiped out by the drastic fall in the price of oil.

Structural rigidities embedded in the colonial experience and unfavorable and inequitable conditions of international trade and market access continue to crowd out attempts to diversify the economy. The private sector is risk averse, with low savings (capital flight sucks away savings) and remain largely mercantilist, engaging in import and distribution. Where there is manufacturing, it is mostly turnkey

86 Today, tourism is the dominant sector in most of CARICOM's economies, but this diversification has not led to economic empowerment. Indeed, the industry retains many of the features of the extractive industries, as explained later in the text.

87 *Caribbean Seeks to Climate-Proof Tourism Industry*, CARICOM Community (June 30, 2017), https://caricom.org/caribbean-seeks-to-climate-proof-tourism-industry/.

operations, using imported capital and intermediate goods and contributing little value added, but creating a demand for foreign exchange to pay for import of inputs to production. However, these countries need to take responsibility for their continued dependence on commodity exports and lack of diversification because of continued shortsightedness and short-term planning on the part of governments. The five year term of governments based on the Westminster model has its shortcomings. It necessarily skews the government's focus to what can be visibly achieved in the short term to ensure re-election and keeps them locked into export-driven investments.

The result of this eternally propelled development model is that island countries of CARICOM have no hinterland upon which to rely for sustenance farming, as Sub-Saharan Africa does. Most of what is consumed, including food, is imported, there is little agriculture and available land for such usage, and therefore, these countries continue to rely on earnings of hard currency through export of commodities to pay for consumables that are imported. The continental states do have domestic agriculture and Belize, for instance, is largely self-sufficient for much of its food consumption.

A. **Tourism is No different**

This current shift to tourism in the Caribbean in the last few decades has not taken these countries out of the lowest level of value-added in the product chain. There is high presence of multinational enterprises (MNCs) in the tourism sector that are vertically integrated, not dissimilar to the MNCs in the major export industries in this region: mining: bauxite, gold; petroleum and petroleum by products, and those in Sub-Saharan Africa. International hotels and tour operators dominate the industry, and all-inclusive packages offered at hotels extract value added through backward and forward integration: hotel supplies brought in through upstream vertical integration, and provision of services including food captured through downstream vertical integration. Local Destination Management companies are contracted by the International Tour Operators to provide local tours, and these arrangements crowd out many local restaurants through selective arrangements with a few. Inherited capital from colonial times can be found in these Destination Management Companies as for instance, in St. Lucia, where one wealthy family has made forays beyond import and distribution to take advantage of new opportunities linked to the growth of tourism[88].

88 Taimoon Stewart, Competition Issues in Selected CARICOM Countries: An Empirical Examination 115–28 (2004).

These strategies deprive the local economy of gains to be had from the industry, including sale of local agricultural products where possible. Between 2008 and 2013, food and beverage imports represented in value 18 % of total imports, and 48 % of total consumer goods imported. And, 60 % of imported agricultural produce is consumed by the tourism sector, while only 10 % of local production is traded within the tourism sector.[89] Tourists in all-inclusive hotels have little incentive to visit local restaurants, use taxi services (shuttles are provided by the hotels to visit the town, for example), and take advantage of locally offered tours. Instead, the hotels all-inclusive package capture the tourists and the profits; and they source their inputs from abroad. Bookings through international booking websites exercise downward pressure on hotel prices, squeezing locally owned hotels. [90]

A study by Brida[91] reveals that cruise tourism yields little monetary gain and instead, destroys fragile ecosystems, with large cruise ships plying the waters in the Caribbean Sea and allegedly illegally dumping rubbish into the sea which finds its way to the once pristine beaches, and with the small islands having to deal with increased demand for waste disposal as a result of the presence of these one-day visiting tourists [in one day, for a few hours, there could be five cruise ships docked and thousands of tourists brought on land]. Yet, Brida argues that the monetary gains from purchases of cruise ship tourists are minimal. The distribution of income from the cruise industry is not equitable. Most ports obtain small contributions from the use of the port as a cruise destination, and cruise tourism provide few real jobs and business opportunities for local residents compared to stay over tourism. The author further points out that most cruise ships are registered in a country offering a 'flag of convenience' like Bahamas, Panama, or Liberia. As foreign corporations, cruise lines avoid taxation, labor laws, environmental standards, etc. Flags of convenience also restrict the rights of workers and are used to pay low wages. According to a BBC news article,[92] this strategy has left the cruise industry with no friends in the COVID-19

89 Clyde Mascoll, *The Promotion of Greater Inter-Sectoral Linkages in the Tourism Sector in Barbados*, IDB (2013).

90 Stewart, *supra* note 88.

91 Juan Gabriel Brida, *Cruise Tourism: economic, socio-cultural and environmental impacts*, 1 Int. J. Leisure & Tourism Marketing 205–26 (2010).

92 The cruise industry is taking a beating with the disasters occurring as a result of COVID-19, and return to normal is unlikely as people weigh the pleasure of cruising vs the danger of being in such a confined space. Also see article published by the BBC on April 13, 2020 on the impact of COVID-19 on the cruise industry which supports the view of the minimal contribution of cruise passengers to the local economy where they stop over. Jonty Bloom, *Will we ever take cruise holidays again?,* BBC News (Apr. 9, 2020), https://www.bbc.com/news/business-52182509.

crisis: they are not welcomed at the ports in the US, got no support from the support for business package approved by Congress and the Senate in the US, and tax breaks make no difference since they were not paying taxes.

Finally, a publication by the Cruise Industry shows total economic contribution in selected Caribbean islands in the 2017-2018 year, as follows: The Bahamas: US$406 million; Jamaica: US$245 million; St. Kitts: $149 million.[93] A calculation of percentage of total earnings from tourism in Table 1 below shows that cruise tourism's contribution is 9.3% of total tourism earnings in the Bahamas. This supports the view that earnings from cruise tourism is miniscule compared to 'stay over' visitors, and that the gains may not compensate for the environmental damage caused.

Unlike Africa, where in many countries, over 70 % of the workforce is employed in agriculture, in many of these Caribbean tourist destinations, such as The Bahamas, over 70 % of the workforce is employed in tourism or related activities, usually at low levels of service. According to the World Travel and Tourism Council Report,[94] The Caribbean is one of the most tourism-dependent regions in the world. Travel & Tourism is a key economic driver and foreign exchange earner. In 2018, this sector contributed 15.5 % of Caribbean GDP (the highest in the world) while in Sub-Saharan Africa, the contribution was 7.4 % of GDP. Travel and Tourism supported 13.5 % of all employment in the Caribbean in that year (the highest in the world), while in Sub Saharan Africa, it was 6.1 %.[95] Overall Travel & Tourism contributes 15.2 % of the [entire] Caribbean's GDP and 13 % of employment.[96] In 2019, Zambia, Travel and Tourism contribute 7 % of GDP and 7.2 % of total employment. In Uganda, Travel and Tourism contribute 5.6% of GDP and 5.8 % to total employment. In Senegal, Travel and Tourism accounted for 8.8 % of GDP and 9.1 % of total employment. These statistics are in stark contrast to the contribution of Travel and Tourism to GDP in The Bahamas in 2019: 43.3 % and 52.2% of total employment. In Barbados in 2019, Travel and Tourism contribution to GDP was 30.9 %, and to total employment was 33.4 %.[97] Table 2 below provides figures for 2017.

93 BREA, *Economic Contribution of Cruise Tourism to Destination Economies: A Survey Based Analysis of Passenger*, 1 Crew & Cruise Lines Spending 6 (2018).

94 World Travel & Tourism Council, *Caribbean Resilience and Recovery: Minimizing the Impact of 2017 Hurricane Season on the Caribbean Tourism Sector* 2 (2018) [hereinafter WTTC 2018].

95 World Travel & Tourism Council, *The Importance of Travel and Tourism in 2018* (2019).

96 WTTC 2018, *supra* note 94, at 7.

97 World Travel & Tourism Council, *2020 Annual Research: Key Highlights by Country* (2020).

Table 2: Contribution of Travel & Tourism in The Bahamas & Barbados, 2017

Country	*Direct Contribution to GDP US$ millions	Total Contribution to GDP US$ millions	Direct Employment In Tourism Sector	Total Employment in Tourism Sector	Earnings from Export of Tourism US$ billions	Capital Investment in Tourist Infrastructure US$ million
The Bahamas	1,726 19% of GDP	4,343 47.8% of GDP	52,400 26.2% of total jobs	111,500 55.7% of total jobs	2.7 73% of total export earnings	442.5 18.6 % of total investment
Barbados	608.3 or 13% of GDP	1,907.2 or 40.6% of GDP	17,500 or 13.5% total employment	52,700 or 40.6% total employment	1.3 or 68.2% of total exports	0.2 or 22.7 % total investment

*World Travel and Tourism Council (WTTC) Travel and Tourism Economic Impact 2018. All values are in constant 2017 prices and exchange rates. In 11 of the 21 countries, tourism [direct & indirect] supports more than 25% of the country's GDP p. 12. *Direct contribution of Travel and Tourism to GDP reflects spending within the country.*

Table 3: Contribution of Tourism to Economy 2019: Selected CARICOM and Sub-Saharan African Countries

Country	Total Gdp Contribution	Total Employment Contribution		Country	Total Gdp Contribution	Total Employment Contribution
Antigua/ Barbuda	42.7%	33.8%		Botswana	12.6%	10.9%
Bahamas (The)	43.3%	52.2%		Kenya	8.2%	8.5%
Barbados	30.9%	33.4%		Mauritius	18.8%	19.1%
Dominica	36.9%	38.7%		Tanzania	10.7%	11.1%
Jamaica	31.1%	32.8%		Zambia	7.0%	7.2%
St. Kitts/Nevis	28.2%	59.1%		Guyana	4.4%	4.7%
St. Vincent/ Grenadines	28.6%	42.5%		Suriname	2.6%	2.8%
St. Lucia	40.5%	78.1%		Trinidad and Tobago	7.8%	8.5%

WTTC 2020. Global Data 2019 Annual Research: Key Highlights

A sudden drop in tourism could be disastrous for employment, as happened in The Bahamas in the immediate aftermath of 9/11 when tourist arrivals from the US dropped drastically, hotel occupancy and a large part of the work force had to be sent home for the slow period.[98] Dependence on international forces beyond their control makes the sector extremely fragile. The current COVID-19 pandemic has tanked the tourism industry in the Caribbean according to STR's preliminary data of drop in hotel occupancy in the month of March 2020. In Barbados, hotel occupancy was over 90 % at the beginning of March 2020, and this fell to 1.5 % by March 28th. For the Caribbean as a whole, occupancy declined from 77 % on 11 March to 8.4 % on 25 March.[99] In most Caribbean countries, borders were closed by the last week of March and for the foreseeable future, hotels are closed, and cruise ships are banned. The prospect for recovery is dire. Tables 2 and 3 above demonstrate the extreme dependency on tourism in some of these economies and the fatal blow it has received as a result of the pandemic. Because of dependence on minerals and mining for the mainstay of their economies, Trinidad and Tobago, Guyana, and Suriname are comparable to Sub-Saharan African countries.

To compound the vulnerability caused by these exogenous factors, there are increasing frequency and ferocity of hurricanes caused by global warming and higher sea temperatures.[100] Hotel infrastructure is damaged or destroyed in a hurricane, airports are damaged and closed, and rising sea levels are eroding the very beaches to which tourists flock. While only Dominica in CARICOM was devastated in 2017, WTTC contends that islands not affected by the hurricane still suffered because of public perception [in the developed countries] that the whole Caribbean was impacted. The recent devastation of Abaco and Grand Bahama in The Bahamas in 2019 is a stark example of such vulnerability.[101]

98 Frank Comito, *Impact of Terrorism and Crime on Tourism is Far-Reaching*, Bahamas b2b News (Sept. 11, 2002), http://www.bahamasb2b.com/news/wmview.php?ArtID=110 ("What did hit home hard for many of us in The Bahamas is the reality that terrorism, like any criminal act, can sap the very economic livelihood out of people, businesses, industries and our nation. It is estimated that The Bahamas lost over $100 million in revenue as a result of September 11 and according to many business people, the U.S. recession aside, we have yet to recover fully from that dreadful act. ").
See also http://www.guyana.org/Speeches/ishmael_112801.html.

99 Smith Travel Research (STR), *Webinar on Impact of COVID-19 on Tourist Industry in Mexico and the Caribbean* (Apr. 3, 2020). For a summary of this Webinar, *see* https://str.com/data-insights-blog/covid-19-webinar-summary-5-key-points-our-mexico-and-caribbean-webinar-3-april.

100 WTTC 2018, *supra* note 94, at 6.

101 *Id.*

B. Domestic Market Structure: Inherited Wealth Dominates

CARICOM economies have high concentration levels, and this is a feature both of small size requiring economies of scale, and concentration of capital in the hands of the historically privileged. The constraints resulting from small size is increased by the need to import most consumables from the United States, Canada, and elsewhere, to island states, requiring airfreight or shipping. Only large orders would reduce the cost by bulk buying and shipping, and this leading to reliance on large firms to import and wholesale in the islands. These economies are still dominated by families with inherited wealth from the colonial period, with descendants of the merchant class of colonizers continuing to have control of the largest sectors of the domestic economies. Importation of consumables date back to the earliest colonial times, and the import/distribution business thrived and was controlled by the White mercantile class, inevitable since the majority of the population was enslaved. These Import Houses morphed into import/wholesale/distribution firms controlled by their descendants. In all the territories of the Caribbean, the seed capital that spawned the dominant firms in control of importation of consumables can be traced to family agencies and holdings dating back to the 1880s and earlier. Today, those businesses have diversified their operations, combined to form conglomerates, and are spreading throughout CARICOM. Two examples are the Trinidadian firms, ANSA McAL and Massy.

In Appendix 1 below, the genesis of these companies in the 19th century with ownership held by the white mercantile class, and their growth and evolution to today's dominance are traced. These two companies had first mover advantage in a juncture in history when whites controlled the economy and society with structural barriers to entry by non-whites, as shown earlier, and the links between the white colonizers back to the metropole were strong. They obtained agencies for major goods that were imported, and controlled trade. The families were able to build on this advantage of connections and goodwill that developed over the years, and solidify their hold on the economy through amalgamations, consolidation, and inter-marriage within their class and ethnicity[102], thus sustaining and growing their dominance over a period of a century and a half.

Today, ANSA McAL has 73 companies operating across the CARICOM region, in Trinidad and Tobago, St. Kitts/Nevis, Guyana, Grenada, Barbados, Jamaica, and its procurement and logistics provider, ANSA McAL (US) in Miami, vertically

102 It is interesting that the term "ethnicity" is used to refer to non-White groups. This creates the distinction of the Whites and the "Other".

integrated upstream by sourcing of goods and arranging importation logistics, and shipping through its subsidiary, Alstons Shipping Ltd. It operates in the following sectors: automotive, beverage (beer), construction, distribution, financial services, manufacturing, real estate, media, and retail. It employs 6000 staff, has daily customer connections of 250,000, and revenue in 2018 of US$940 million. It is now traded on the Trinidad and Tobago Stock Exchange.[103]

The Massy Group spans 14 countries in the Caribbean, has 66 companies in 9 locations, including the US, 12,250 employees, and revenue of TT$12 billion (approx. US$1.7 billion). The Group also offers financial services: mortgages, installment credit, demand loans, lease financing, remittance service. It sells automotive and industrial equipment, energy and industrial gases, information technology and communication, and distribution and retail. The Massy Stores are the biggest supermarkets in the region, and operating in 47 different locations in five CARICOM countries: Barbados, Guyana, St. Lucia, St. Vincent, and Trinidad & Tobago.

In the OECS countries, Barbados, and The Bahamas, among others, the descendants of the colonizers still dominate in the domestic economies and this can be traced and verified historically. Market access for smaller enterprises is necessarily narrowed and many are primarily engaged in retail, purchasing supplies from the major importers. The small business sector and employment in the tourism industry are in the lower levels of value added: taxi drivers, tour operators, cleaners, waiters, and bar servers. Some have captured business in water sports, serving the tourists. But this needs capital, and in the Bahamas, for instance, the ones who provide this service are largely family-owned White Bahamian businesses.[104]

The dominant players in most CARICOM economies are foreign investors and local Whites, descendants of the mercantile class of colonial times with structural barriers to entry of entrepreneurs (differences are explained in the Appendix). For the most part, non-Whites are represented in small and medium enterprises. This reality

103 Further information is found on the company's webpage.

104 This observation was gleaned by the author during interviews conducted in the Bahamas in October 2018 for a study led by Oxford Economics. The observation is completely the author's and not Oxford Economic's. The history of the Bahamas is very different from the rest of CARICOM. It was populated largely by White Planters and their slaves from the Southern US, mainly the Carolinas, in two waves of migration: the loyalists after the American Revolution, and those who were unwilling to accept the abolition of slavery after the civil war. These White Planters continued racial segregation similar to Southern states in the US until 1967 when a black government came into power for the first time. The Whites retained control of the economy, and still dominate the major sectors of the domestic economy. Bay Street is the main business street and they control this area and are referred to as "The Bay Street Boys".

poses challenges for the enforcement of competition law in CARICOM, given the small societies, the close connections between families in the business class, and the closeness of the business class to politicians.

V. COMPARISON OF COMPETITION REGIMES IN CARICOM AND SUB-SAHARAN AFRICA

A. The CARICOM Competition Regime

The Revised Treaty of Chaguaramas (RTC), Chapter 8, provides for competition and consumer protection policy in the Single Market, the establishment of a regional competition commission and that MS enact national competition law and set up national enforcement institutions. The CARIFORUM-EU Economic Partnership Agreement (EPA) also contains a chapter on competition which reiterates the obligations contained in the RTC, and provides for technical assistance to Signatory States to establish their competition regimes. Interestingly, the EPA chapter on competition identifies the regional competition commission as the institution with which the EU would deal, rather than national commissions, apart from the Dominican Republic and The Bahamas, which are not part of the CSME and therefore not under the jurisdiction of the regional commission.

In keeping with these obligations, the CARICOM Competition Commission (CCC) was set up in 2008 to enforce national competition laws solely in a cross border context within the CSME. The Caribbean Court of Justice (CCJ) is the final court of appeal in the CSME, and for appeals against decisions of the CCC. The CCC has a very small staff (one senior lawyer, one senior economist, an economist, a registrar, and an executive director who is also a lawyer with training and experience in the regulatory sector.[105]

The RTC's chapter on competition policy contains provisions on prohibitions of anticompetitive conducts, and requires that MS enact legislation to ensure that determinations of the CCC are made enforceable in their jurisdictions. It also requires MS Competition Commissions to cooperation with the CCC in investigations. Consistent with this view, is Rule 4 of the CCC's Rules of Procedure, which affords jurisdiction to investigate where there is suspicion of conduct that infringes national provisions implementing Article 177(1)(a)–(c).

105 *History*, CARICOM Competition Commission, http://www.caricomcompetitioncommission.com/en/about-us/history. Details of the composition of the current staff was acquired through communication with the Executive Director.

CARICOM's regional regime differs from the WAEMU competition regime in Francophone Africa, and also differs from COMESA's. The WAEMU Commission has far reaching powers to enforce competition law both at the national and regional levels. But there are many problems created by this extension of power to national jurisdictions, as discussed earlier. Indeed, CARICOM is currently discussion the feasibility of giving the CCC enforcement powers at the national level as a way of breaking the current stalemate in advancing enforcement in the region. However, the proposed change would allow for national jurisdictions that are already enforcing to maintain their national jurisdiction. In COMESA, the regional commission was given an explicit mandate to enforce the regional competition law, by the COMESA Competition Regulations of 2004 under Article 7 of the Regulations: Functions of the Commission 1: "*The Commission shall apply the provisions of these Regulations with regard to trade between MS and be responsible for promoting competition within the Common Market.*" The EU Commission has supranational legal authority to legislate through its Parliament and with a Commission authorized to enforce laws in the Community. In the EU, for instance, *"the direct effect enables individuals to immediately invoke a European provision before a national or European court independently of whether a national law exists.*" The direct effect is a jurisprudential creation of the CJEU in the Van Gend en Loos of February 5, 1963.[106] By contrast, the CARICOM is not a legal supranational entity. It is a Community created by Treaty with trade and cooperation modalities, and administered by a Secretariat. Chapter VIII of the RTC provide the provisions on Competition Policy for the region, but there is no additional legislation like in COMESA that clearly sets on the legal authority of the CCC. And, a direct effect provision by which there can be enforcement of the "federal" competition law even when there is no law in the Member State, as in the EU, is not included in the RTC.

B. National Competition Laws and Enforcement in CARICOM: Comparison with Sub-Saharan Africa

Like Sub-Saharan Africa (except South Africa), the competition regimes in CARICOM are in their infancy. Four MS have enforcement institutions: Jamaica, Barbados, and Guyana and Trinidad and Tobago. All operate with very small competition technical staff: the Jamaica Fair Trading Commission (JFTC) has eight; the Barbados Fair

106 Personal correspondence with Professor Frederic Jenny (Feb. 2020).

Trading Commission (BFTC) has three; the Guyana Competition and Consumer Commission (GCCAC) has two, and the Trinidad and Tobago Fair Trading Commission (TTFTC) has 2 (as at April 2020). Three of these MS are enforcing the competition law while the fourth, the TTFTC was unable to enforce because the law, the Trinidad and Tobago Fair Trading Act (TTFTA) was not fully proclaimed until very recently (early February 2020). At present, the TTFTC is preparing itself to begin enforcing of the law (constrained, however, by the COVID-19 lockdown).

The other 11 MS are in the process of developing laws and institutions. Belize, Suriname, The Bahamas, and the OECS countries all have draft competition laws. The process of drafting laws and taking it to parliament in all these states has been ongoing for at least a decade in these countries and there seems to be a lack of political will to support the development of competition regimes. This may stem from distraction by more pressing social and economic issues, but also because the political directorate may lack a full understanding that enforcement of competition law can actually alleviate some of these problems. With most of these economies decimated by the fall-out from closure due to COVID-19, establishing competition regimes is unlikely to shift to the front burner for some time to come.

OECS countries have agreed to have a single competition law that will be enacted in each MS, but the institutional dimension is still under discussion. Initially, the MS intended to set up a sub-regional authority, the OECS Competition Commission, to represent all members of the sub-region, and with agencies on the ground to receive complaints and assist in investigation. However, lack of resources has stalled this process, and there is at present a sub-committee of the CSME Regional Task Force for Competition which is considering the practicality of a single competition entity within the Community. [107] This would resolve the stagnation of efforts to establish national regimes in the rest of CARICOM and advance the process of enforcement of competition law in the region.

CARICOM has fledging institutions, but where the law is being enforced, good progress is being made, and the institutions are independent of political interference.[108]

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107 Fair Trading Commission, Annual Report 2018, 17 (2018), https://www.ftc.gov.bb/library/2018-ftc_annual_report.pdf.

108 According to Kovacic and Lopez-Galdos, their research suggests that it takes twenty to twenty-five years to gauge progress in competition regimes in a meaningful manner: to construct and set the system's institutional footings, to adopt and refine the initial statutory scheme, to obtain judicial interpretations of the law's substantive commands and procedural features, to build capacity within the competition agency, and to foster improvements in collateral bodies whose contributions are necessary to sustain an effective system. *See* William Kovacic & Marianela

But, the region is lagging in most of the countries because of the lack of political will to have laws enacted and institutions set up in the rest of CARICOM countries. It is the hope that these issues would be resolved in the near future and we can see the rest of the region meet the obligations of the RTC and CARIFORUM-EU EPA. There is currently a Sub-committee of the Task Force on Competition to consider the practicalities of a single competition entity within the Community.[109] This would extend the CCC's jurisdiction to cover domestic anticompetitive conducts in those territories without laws and institutions. This would at least take forward the active enforcement of competition law in the region.

C. Institutional Design

There is a mix of institutional designs in CARICOM. The Competition Commissions in the three functioning national regimes (Jamaica, Barbados, and Guyana) are mixed administrative and prosecutorial models, and are structurally independent, similar to the commissions in East Africa. In the case of Trinidad and Tobago, the institution is prosecutorial in design, with investigative reports submitted to the Court for determination. It does not have its own decision making power. The decisions of the Courts can be appealed in the Trinidad and Tobago Appeal Court, and further appealed to the Privy Council. The CCC is an independent institution, with investigative and adjudicative arms, the power to make determinations, and the power to fine. It is therefore pure administrative in design.

Like Senegal, the Ivory Coast, and Burkina Faso, the competition authorities are structurally independent but in practice, are closely linked to the administration.[110] The National Commissions all report to a government Ministry to which they must submit their annual report and any specific information that the Minister may require, and to which they submit their budget for approval and onward submission for Parliamentary approval. The CCC submits its work program to the Council for Trade and Economic Development of CARICOM for approval, and to the Community Council of Ministers for approval of its annual budget.

Lopez-Galdos, *The Lifecycles of Competition System: Observations on the Evolutionary Paths* 1–2 (King's College London Dickson Poon School of Law, Legal Studies Research Paper Series, Paper No. 2016-33, 2016).

109 BFTC 2018 Annual Report, at 17 (2018), https://www.ftc.gov.bb/library/2018-ftc_annual_report.pdf.

110 Fox & Bakhoum, *supra* note 1, at 47.

All Commissions in the region consists of the investigative and adjudicative arms, with an executive director presiding over the investigative arm, staff of the commissions undertaking investigations, and a Board of Commissioners with power to determine cases. A firewall exists between the two arms, to protect against breach of natural justice (more said on this later). There is the right to appeal the decisions of the commissions in the High Court, and further appeal to the national Appeal Court. The final appeal can be made to the Privy Council in the UK for most countries (having not adopted the CCJ). For four MS, the CCJ is the final Court of Appeal).[111] There is no regime that follows the South African model of having a Tribunal for adjudication separate from the Commission. Constraints on funding is a major deterrent to having such a model. However, this administrative designed is partly prosecutorial in Jamaica, Barbados, and Guyana because determinations by the Commissions are *not legally binding*. Therefore, firms can refuse to comply and appeal to the Courts, and the laws in the three jurisdictions stipulate that judges in the Supreme Court *must first satisfy themselves that there is a breach of the law,* thus leaving the final legally binding determination to the Courts.[112] But, the Judges in these countries have the benefit of the report on the determination of the Board of Commissioners.

In the case of Trinidad and Tobago, the Commission investigates and submits the report to the Court. The Board does not have the authority to make determinations. It is therefore a prosecutorial model. This institutional design presents problems since Judges need to have substantial understanding of the methodology used in analyzing competition cases, including the economics of competition and the ability to analyse economic evidence presented to the court. But High Court Judges in Trinidad and Tobago have no training in competition law or the economics of competition, and are ill prepared to preside over competition cases and make determinations. Nor is it possible to select a few of the 25 High Court Judges and provide intensive training to them, and with the intention that there will be specialized judges presiding over competition cases. Rather, judges are assigned to cases randomly. So, all twenty-five will need to be trained in competition law and the economics of competition, rather than four or five commissioners which already include economists in any event. In Trinidad and Tobago, there is a serious back log of court cases, so that even murder

111 As yet, most MS of the CSME have opted to keep the Privy Council as their final Court of Appeal. The only members that have adopted the CCJ as their final court of appeal are Belize, Barbados, Dominica, and Guyana. There is optimism that others will do so soon, and the CCJ is developing an impressive body of jurisprudence.

112 Gleaned in discussions with Marc Jones.

cases are not heard for years and cases are adjourned more than heard. This has serious implications for timely decisions to be made when time is of the essence for businesses.

D. Goals in Respective Laws

Despite the fact that competition law was introduced into Sub-Saharan African countries as part of Structural Adjustment Programs imposed by the International Financial institutions (except in Mauritius),[113] East/Southern African countries were able to design their laws with objectives that included protection of public interest and stated equity goals along with the standard goals of efficiency, consumer interest, and competitiveness. Some explicit goals include to expand economic opportunity and achieve a greater spread of ownership among historically disadvantaged persons (Namibia)[114], enhancing equality, protecting against too much concentration, and facilitating the emergence of small businesses. Fox and Bakhaum pointed out that while the goals combine efficiency and equity provisions, it is left to the court to decide on the tensions between them.[115]

By contrast, in CARICOM, only Jamaica introduced its competition law as a part of Structural Adjustment requirements. All other CARICOM countries adopted or are in the process of adopting competition laws in response to internal dynamics: that is, fulfilling the obligations undertaken in the Revised Treaty of Chaguaramas. Moreover, it is generally accepted that enactment and enforcement of competition law is a necessary accompaniment to market liberalization. Yet, the goals expressed in these laws are based on efficiency and consumer welfare imperatives, and do not contain equity clauses, except for one provision in the Barbados Fair Competition Act (BFCA): "An Act … (c) to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place …." The Jamaica Fair Competition Act (JFCA) (currently being revised) and TTFTA do not state goals,[116] and the goals in the Guyana Competition and Fair Trading Act (GCFTA) are limited to promotion of competition, prevention of anticompetitive conducts, and protection of consumer welfare. The goals expressed in the RTC Chapter 8, are very much based on EU law with efficiency and consumer welfare objectives, and the protection of the free flow of goods and services in the single market as the imperative. All laws in the

113 Fox & Bakhoum, *supra* note 1, at 64.

114 Fox & Bakhoum, *supra* note 1, at 72.

115 Fox & Bakhoum, *supra* note 1, at 71–72.

116 These are laws promulgated by Parliament, and not regulations, and yet, they are silent on goals.

CARICOM region mandate that the Commissions monitor the economies, undertake market studies, and engage in advocacy.[117] Unlike the laws in East/Southern Africa that require competition authorities to deal with all mergers that are notified and all complaints made to them,[118] the Commissions in CARICOM have discretionary power to prioritize investigations and choose the most important ones for follow up action.[119] JFCA Section 11(1) states: "At any stage of an investigation or inquiry under this Act, if the Commission is of the opinion that the matter is being investigated or subject to an inquiry does not justify further investigation or inquiry the Commission may discontinue the investigation or inquiry."

E. Exemptions from Competition Law

In West Africa, some national laws have exemptions or special rules for SOEs and give non-transparent protection to politically –connected businesses.[120] Exemptions from competition law are the standard ones in most CARICOM countries: those agreements that are for protection of employees; or collective bargaining on behalf of employers and employees; conducts undertaken for the protection of Intellectual Property Rights (IPRs); where conducts are authorized by the Commissioner; activities of professional associations designed to develop or enforce professional standards. SOEs are caught by the laws in CARICOM. Similar to Kenya's law, Trade Associations are caught by the laws in CARICOM. And, like E/S African, the competition laws of Barbados, Jamaica, and Guyana provide for authorizations: "[A] business may apply for authorization to enter into or carry out an agreement, or to engage in a business practice that, in the person's opinion, is an agreement or practice affected or prohibited thy this Act" (BFCA Section 29.1.; JFCA Section 29.1; GCFTA Section 35.1). The RTC Article 180 provides for Negative Clearance Rulings under which member states may apply to the Commission to clarify whether a business conduct is prohibited by paragraph 1 of Article 177. The TTFTA does not include authorization of conducts.

The TTFTA differs in that it includes complete exemption from the competition law of the financial sector (Securities Industry Act 1995 applies), and the telecommunications

117 RTC, Article 173.2; GCFTA, Section 6(1)–(2); JFCA, Section 5(1)–(2); BFCA, Section 5 (1)–(2); TTFTA, Sections 5 (1)–(2).

118 Fox & Bakhoum, *supra* note 1, at 114.

119 Similar provision is found in BFCA, Section 9 (1); TTFTA, Section 8 (5) and GCFTA, Section 17 (1). Interviews by the author of Agency heads revealed that the staff would evaluate complaints submitted and decide which are worthy of investigation and prioritize cases and which to dismiss.

120 Fox & Bakhoum, *supra* note 1, at 54–55.

sector (Telecommunications Authority Act 2001 applies), and while regulated industries are caught by the competition law, the Regulated Industries Commission (RIC) is given full jurisdiction to enforce the competition law, but is required to consult the Competition Commission where a merger or anticompetitive agreements falls within the purview of the Commission; but no mention is made of abuse of dominance. There are many pitfalls to these exemptions, not the least of which is that provisions in the Securities Industries Act and the Telecommunications Authority Act do not capture anticompetitive conducts fully as they are defined in competition law. And, there is also a problem with giving enforcement of the TTFTA to the RIC against firms in that sector because the staff may not have the specialized skills needed to apply the specialized methodologies used in investigating breaches of competition law and will need to be trained. This demand for training professionals in competition law is exacerbated by the need to also train twenty-five High Court Judges who have been assigned by the TTFTA with adjudicative power.

F. Prohibitions in Laws

Jamaica, Barbados, and Guyana included enforcement of consumer protection law under their competition commissions. At present, the JFTC is being reorganized to incorporate into the Commission other government agencies which enforced consumer protection law, thus unifying and rationalizing enforcement. Guyana and Barbados adopted this procedure from the beginning. The TTFTA does not include consumer protection provisions, but there is a separate consumer protection law enforced by the Consumer Affairs Ministry.

i. Prohibition of Anticompetitive Agreements

There are some differences between CARICOM's regimes and Francophone Africa where there is prohibition of abuse of economic dependence, that is, unfair use of bargaining power.[121] CARICOM laws do not contain such a provision, and would not consider this to be a competition issue. Another major difference between CARICOM's laws and that of Sub-Saharan West Africa is that price regulation is standard in these Francophone countries, and the competition laws allow for intervention to control prices where there are excessive prices in special circumstances such as calamity or

121 Fox & Bakhoum, *supra* note 1, at 45.

crisis or in clearly abnormal market in a given sectors.[122] There are no price control provisions in CARICOM's laws. While some price controls remain in the OECS countries, there are no competition laws in these countries at present. The draft OECS competition bill has no price control provisions, and clearly a rationalization between government policies and the law will have to be done once the law is enacted.

West African and East/South African laws contain prohibition of anticompetitive agreements which prevent, restrict, or distort competition, as do the laws in CARICOM, but Tanzania's law adds, only if the acting person intentionally or negligently acts in violation of the section[123] Generally, Trade Associations are caught in East/South Africa as is the case in CARICOM.

Hard core cartels are generally treated as per se illegal in E/S Africa as are resale price fixing agreements.[124] CARICOM's laws, like Kenya's, Namibia's, and Botswana's, also have two categories of anticompetitive agreements: hard core cartels, and other horizontal agreements and are also patterned after EU Law. Similarly, hard core cartels and resale price fixing are treated as per se illegal in CARICOM laws, except for the provision in the TTFTA which states:

> 17(1) An Agreement which –
> *(a)* fixes prices directly or indirectly *other than in circumstances where the agreement is reasonably necessary to protect the interests of the parties concerned and not detrimental to the interests of the public;* [emphasis mine].

Whereas it is accepted internationally that the most egregious of business crimes is price fixing, and per se illegality is applied as there is no reasonable defense for such conduct,[125] the TTFTA contains a proviso that allows firms to defend price fixing. This provision lays open a defense of price fixing that can put the TTFTC back on its heels, and give a field-day to lawyers defending firms.

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122 Fox & Bakhoum, *supra* note 1, at 36–40.

123 Fox & Bakhoum, *supra* note 1, at 79.

124 Fox & Bakhoum, *supra* note 1, at 65.

125 For instance, the US "…Supreme Court has accurately labeled cartels 'the supreme evil of antitrust.' *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 408 (2004). The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities properly regard cartel behavior as per se illegal and a 'hard core' violation of the competition laws." Address by Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy New York, New York, (Sept. 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

ii. Prohibition of Abuse of Dominance

Provisions prohibiting Abuse of Dominance are taken largely from EU law, both in Sub-Saharan Africa and CARICOM. SOEs are caught by the laws in CARICOM, as they are in Zambia, Tanzania, and Mauritius but are not caught in some laws in Sub-Saharan Africa, particularly in West Africa.[126]

Thresholds for establishing dominance of relevant markets are different in the various countries: Kenya's: 50%[127]; South Africa and Namibia have tiered thresholds: 45% of market, or 35% unless firms can prove that they have no market power; or less than 35 % if the Commission proves that they have market power. Mauritius has a 30%, or 70% when not more than three firms are involved while Zambia's threshold is also two tiered, but specifies 60% or more for three firms.[128]

In CARICOM, the RTC Chapter 8, the BFCA and the JFCA do not provide thresholds, but rely on the definition of dominance in the respective laws. JFTC Section 19 states:

> For the purposes of this Act, an enterprise holds a dominant position in a market if by itself or together with an interconnected company it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

The RTC specifies that an enterprise and its affiliates are treated as one enterprise. Similar definitions are found in other laws in CARICOM. The Guyana law specifies a 40 % threshold for initiation of an investigation. The TTFTA specifies 40 % or more of the market *or such percentage as the Minister may by Order prescribe*. This clause leaves open the possibility of regulatory capture, as there is no fallback scrutiny to this clause.

The TTFTA is different from the other laws in CARICOM in that it refers to a dominant position as a Monopoly, patterned after US Antitrust Law, and the efficiency defense for breach of the provisions refers only to goods and not services (most likely an error). However, the detailed provisions on dominance are similar to those in the rest of CARICOM and the EU law. All CARICOM laws, like Sub-Saharan laws, prohibit unfair purchase or selling prices or other anticompetitive practices, and Barbados' law goes further to state in Section 16(3)*(d)* "… prices that are excessive,

126 Fox & Bakhoum, *supra* note 1, at 54–55.
127 Fox & Bakhoum, *supra* note 1, at 69.
128 Fox & Bakhoum, *supra* note 1, at 77.

unreasonable, discriminatory or predatory." This follows the EU approach and not the US where there is no provision against excessive pricing.

The provisions allowing efficiency defense in CARICOM laws differ from that in E/S Africa in that the latter also allows public interest consideration to be taken into account, particularly effects on employment and small businesses benefits.[129] While the Barbados law has in its chapeau a provision to ensure that all enterprises, regardless of size, have the opportunity to participate equitably in the market place, this is not fleshed out in the defense provisions. There is a provision in Tanzania that places a proviso on conducts caught: that is, *only if the acting person intentionally or negligently acts in violation of this section*.[130] There is no such provision in CARICOM's laws.

Another interesting point is that the efficiency defense of anticompetitive agreements in all the regional laws, while based on TFEU 101(3), has a single word difference that profoundly changes the interpretation. In the linking of the three sub-paragraphs that itemizes conditions that allow for exemption, the regional laws use "or" instead of the EU's "and" which removes the cumulative requirement of the EU (all three conditions must be present). For example,

> BFCA Section 16. 4 - An enterprise shall not be treated as abusing a dominant position
>
> *(b)* if it is shown that its behavior was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;
>
> *(c)* the effect or likely effect of its behavior in the market is the result of the superior competitive performance; or
>
> *(d)* by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those right
>
> *(i)* has the effect of lessening competition substantially in a market; and
>
> *(ii)* impedes the transfer and dissemination of technology

This means that any one defense will suffice thus lowering the standard of proof. There is also a difference in that East African laws include industrial policy in its efficiency defense: if the conduct leads to the promotion of exports. In regard to *(c)*

129 Fox & Bakhoum, *supra* note 1, at 65.

130 Fox & Bakhoum, *supra* note 1, at 79.

above, the BFCA and the GCFTA are the only laws in CARICOM which have an explicit prohibition of *abuse* of intellectual property monopoly rights. Other laws simply exclude enforcement of IPR from actions caught under abuse of dominance provisions.

iii. Merger Control Regulation (MCR)

The laws in Francophone Africa do not contain MCR. While similarly, the laws of Jamaica, Guyana, and the regional provisions in the RTC do not contain MCR, in all three there are draft laws under consideration that include MCR. There is now recognition in this region of the relevance of MCR for these economies, despite small size. All the laws of East/South Sub-Saharan Africa contain MCR, and merger review that meets the threshold is mandatory.[131] Fox and Bakhoum pointed out all but Malawi and Mauritius require pre-merger notification.[132] The laws of E/S Africa weaves public interest provisions into its MCR, with specific provisions to protect employment and market access for small businesses of the black disadvantaged communities. For instance, Kenya's MCR takes into account whether the merger is likely to affect a particular industrial sector or region, employment, small firms ability to gain market access or be competitive, the ability of national industries to compete in international markets, along with the standard efficiency provisions.[133]

Barbados' law has MCR, with the definition of a merger including amalgamation and joint ventures resulting in two or more enterprises ceasing to be distinct entities. Notification is mandatory once the threshold for notification is met: if the enterprise or those with whom it intends to merger have no less than 40 % of the market. There are no explicit public interest provisions in the section on merger control comparable to those in the laws of Sub-Saharan West Africa, and those expressed in the chapeau of the BFCA (to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place) are not woven into the fabric of the specific provisions on merger analysis, though taken into account in investigative procedures. The provisions covers all sectors and economic actors including SOEs.

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131 Fox & Bakhoum, *supra* note 1, at 116.

132 Fox & Bakhoum, *supra* note 1, at 65. The CFTA of Malawi does not provide thresholds for merger notification and hence all mergers are notifiable, despite the fact that some may be of little or no significance. *See* Charlotte Wezi Mesikano-Malonda, *Malawi: Competition and Fair Trading Commission,* Global Competition Rev. (Dec. 18, 2015), https://globalcompetitionreview.com/insight/the-african-and-middle-eastern-antitrust-review-2016/1066973/malawi-competition-and-fair-trading-commission.

133 Fox & Bakhoum, *supra* note 1, at 71.

TTFTA contains MCR, with a definition of merger as the cessation of two or more enterprises from being distinct whether by purchase or lease of shares or assets, amalgamation, combinations, joint venture or any other means through which influence over the policy of another enterprise is acquire. TTFTA provides a monetary threshold: assets exceed TT$50 million (US$7.4 million approximately) and at least one of the enterprises carries on or intends to carry on business in Trinidad and Tobago. The danger of having a monetary value threshold is that it could prove to be too low as firms grows or if the value of the TT dollar falls due to government devaluing the currency. Note that the telecommunications and financial sector are exempt from MCR merger review under the TTFTA:

> Section 3. (1): This Act shall not apply to –
>
> *(g)* companies which fall within the purview of the Telecommunications Authority Act, 2001;
>
> *(h)* banks and non-bank financial institutions which fall within the purview of the Securities Industry Act, 1995;

While mergers in these sectors are reviewed by the relevant regulatory authority, the specific methodology on assessing effects on competition contained in competition law may not be present in the laws regulating the sectors.

VI. ENFORCEMENT OF LAWS IN CARICOM

There has been some success in enforcement of national laws in CARICOM, more on par with E/S Africa rather than Francophone where national commissions were stripped of the authority to enforce national laws. There are three national commissions enforcing national laws: JFTC, BFTC, and GCCAC, of which the Guyanese Commission is the youngest. TTFTC is still in the process of organizing itself to begin enforcement, having just fully proclaimed the law. The national commissions have the discretion to choose cases, but the CCC is constrained, and this is addressed later. The CCC enforces against cross border anticompetitive conducts.

A. Jamaica

The website of the JFTC[134] shows that it was established in 1993 and cases and enquiries listed on that website[135] indicate that in its first decade, the Commission dealt with

134 Fair Trading Commission, https://jftc.gov.jm/.

135 *Judgments,* Fair Trading Commission, https://jftc.gov.jm/enforcement/judgments/.

consumer protection issues much more than competition issues, largely because of the complaints that were registered. As in the case with new regimes, consumers did not sufficiently understand competition law issues. As such, of 12 cases taken to Court, all cases except three, discussed below, were brought under Section 37 of the JFCA which prohibits unfair competition and involved misleading advertisement.

Similarly, of the twenty-one Consent Agreements between the JFTC and firms, all but two were unfair trade and mostly false advertising cases.[136] Details available on the JFTC website shows that in the first competition investigation in 1994 the Commission succeeded in getting Cable and Wireless (the monopoly telecommunication company) to unbundle telephone equipment and installation from their service. The second was an amalgamation in 2016 between a radio station and newspaper company which the JFTC investigated of its own initiative. The staff concluded that the amalgamation agreement did not have as its purpose the substantial lessening of competition, but that the increased market power could in the future lead to abuse. However, it decided that the possible anticompetitive effects were outweighed by the public interest benefits, similar to East African enforcement. Because of this overemphasis on fair competition cases rather than antitrust, the Commission launched a targeted public education program, engaged in market studies, and this effort resulted in the receipt of more competition, rather than consumer complaints.

Of the twelve court cases,[137] the first two judgements (summarized here) were competition cases and judgements went against the JFTC. It's very first court case in 1995 was to challenge the Jamaica Law Association's practice to set legal fees. The Law Association went to court and secured a judgement that exempt them from the Fair Competition Act. The JFTC, in my view, tackled the organization most equipped to defend itself as its first case, rather than choosing a bread and butter issue that the populace could relate to, and that could be easily won. And, the second case was even more damaging. The JFTC sought to intervene in a conduct engaged in by the Jamaica Stock Exchange, but was immediately brought before the High Court by the Securities Commission, requesting a declaration that the Jamaica Stock Exchange is governed by the provisions of the Securities Act, and not the Fair Competition Act, and that the JFTC had acted ultra vires, and a further declaration that the JFTC was in breach of natural justice since there was no clear firewall between its investigative and adjudicative arms (though, de facto, the Commission operated with a firewall).

136 *Id.*
137 *Id.*

The High Court ruled in favor of the JFTC, but the ruling was appealed by the Jamaica Stock Exchange. The Appeal Court came back with a ruling in favor of the Jamaica Securities Commission, and directed the JFTC to address the issue of breach of natural justice by revising its law and reforming its institutional structure.[138] This was to have a crippling effect on the JFTC's work, but the Commission continued its work by using Consent Agreements and the Courts where necessary to tackle anticompetitive conducts.[139]

There was one major legal success obtained by the JFTC: a court ruling that allowed it to apply its provisions prohibiting anticompetitive agreements to investigate mergers. The case dates back to the 2011 acquisition by Digicel Jamaica Limited (Digicel) of Oceanic Digital Jamaica Limited (Claro) through a stock purchase agreement and transfer of Claro's license to Digicel. The Telecommunications Authority approved the merger. Note that the Minister responsible was the Prime Minister, and so approval came from him. The JFTC objected, stating that this acquisition could substantially reduce competition in the market, and asserted its right to investigate the merger for anticompetitive effects, citing the provision in its law prohibiting anticompetitive agreements. (Section 17 (1)) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.

Digicel and Claro took the case to the High Court questioning the JFTCs jurisdiction to examine and rule on this acquisition. The High Court ruled in favour of the Commission, but the two firms appealed the decision. The Jamaican Court of Appeal, in 2014, held that while the JFTC has jurisdiction in the telecommunications industry, it did not have jurisdiction over the acquisition by Digicel of Claro, which was approved by the relevant Minister under the Telecommunications Act. Not to be stopped, the JFTC took the case to the highest court of appeal for this jurisdiction, the Privy Council in the UK. And, in a major victory for the JFTC, in August 2017, the Privy Council agreed with the High Court's decision, stating that:

- even **without a merger control regulation** (MCR) provision as part of its law, and
- notwithstanding the **regulator's decision** (Telecommunication Authority) regarding the merger

138 *Id.*

139 Interview of the Executive Director of the JFTC by the author.

- the Competition Commission ***has the authority of oversee any sector or issue that can negatively impact competition in the relevant market*** and
- that the **provisions on anticompetitive agreements in the law can be applied** to acquisition agreements even in sectors overseen by a Regulator.

The JFCA has been revised and is with the Attorney General's office. Until it is passed in Parliament, the JFTC will have to continue enforcement through the Courts and through Consent Agreements with firms. [140]

B. Barbados

The Barbados Public Utilities Board, in existence since 1955, was responsible for regulating Utilities and Telecommunications. In 2001, a new Commission, The Barbados Fair Trading Commission (BFTC) was set up incorporating the Utilities Board, and creating two new arms, the Competition Division and the Consumer Protection Division. This Commission therefore has responsibility for regulation, competition and consumer protection, and they work in tandem, support each other, and have excellent relations. This is an example of good cooperation between regulatory authorities and competition authorities, often problematic in so many jurisdictions. The BFTC has been gradually and steadily building its expertise and experience. Total number of technical staff at the Commission is fourteen of which three are in the competition division. Despite this, it has been able to investigate and make decisions on several cases. Since its inception, it has investigated conducts and delivered reports to the offending firms, and in several cases, succeeded in making the offenders change their behavior. What is clear is that in the first years after the competition regime came into force, firms did not understand the implications of their conducts and were willing to change once they became aware that they were breaking the law. This augurs well for the regime, as it demonstrates a relatively good respect for the rule of law. And, similar to the leniency approach adopted by Kenya in the early years, the BFTC used a persuasive approach to enforcement to enable a culture of competition to take root.

An example of the success of this softer approach is, for instance, in 2007, the Barbados Bankers Association agreed to stop limiting their loan clients to a selected list of valuers, and accepting that clients can use other valuers that are approved by

140 *Id.*

the professional association which maintain high standards. Similarly, in 2008, Awarak Cement Ltd. agreed to stop price discrimination as between manufacturers and distributors and agreed to apply the same discount to both based on quantity purchased. And, both Pinnacle Feed Company and Archer Daniel Midlands (ADM), of the infamous Lysine Cartel, were investigated for excessive pricing, and both conceded to changing their pricing methodology and practice. In the ADM case, fluctuations of prices of inputs at the international level were not properly reflected in their final prices; rather they maintained their higher prices even when international prices fell. In 2011, Shipping Agents agreed that they had engaged in price fixing, confessed that they had no idea of the gravity of their action, and put in place individual pricing. Or when, also in 2011, Caribbean Broadcasting Corporation agreed to change its policy of not carrying advertisements of rivals, based on the findings of the BFTC that being the only terrestrial broadcaster in Barbados, its refusal distorts competition.[141]

The BFCA includes merger control regulation, and the BFTC has reviewed 20 mergers, of which 15 were allowed, 4 required remedies and one was disallowed, the reports of which are available on the BFTC website.[142] Summaries of some of those cases are provided here. One case, the proposed acquisition by Sol St. Lucia Ltd. of Barbados National Terminal Ltd. (BNTLC), was approved only with remedies to remove restrictive clauses from the agreement that would prevent new licenses from being issued and the construction of any new terminal for 15 years. In December 2017, Sol filed an appeal against the Commission's decision and the matter is still before the Court.[143] Two other mergers were reviewed in 2017 and 2018, one between a bottling company and a distribution company, and the other between two general insurance companies that had jumped the gun and merged without notifying the Commission as required under the merger regulations where the combined threshold is 40 % of the relevant market. The former was approved with remedies that were accepted. The latter was the Acquisition of Harmony General Insurance by Sagicor Ltd.[144] The merger was approved after a full investigation that showed that there

141 *Allegation: Refusal to Supply by Caribbean Broadcasting Corporation*, Fair Trading Commission, Barbados (Case opened Jan. 2010; Case closed Feb. 2011), https://www.ftc.gov.bb/index2.php?option=com_content&do_pdf=1 &id=225.

142 *Merger Determination*, Fair Trading Commission, https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=375&Itemid=119.

143 Press Release: BNTCL Merger Application Decision, Fair Trading Commission (Nov. 28, 2017), https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=336.

144 *Fair Trading Commission Merger Determinations*, Fair Trading Commission, (Dec. 9, 2019) https://www.ftc.gov.bb/index.php?option=com_content&task=view&id=373.

were no significant change in competition in the relevant market, and that there were sufficient firms operation in the relevant market to make it competitive. In any case, after full analysis, the combined market share did not meet the threshold of 40 % requiring notification. This experience calls into question the viability of using a market share threshold, since there are circumstances where there is no certainty that the proposed merger in question qualify for notification until after the rule of reason procedure is applied in an investigation. Of note, also, is that the BFTC did not apply the fine for jumping the gun, and this may have been because the firms complied once receiving a letter of objection from the BFTC, and cooperated in the investigation.

C. Guyana

The Guyana Competition and Consumer Affairs Commission (GCCAC)[145] is much younger than the JFTC and BFTC. It was established in 2011 and began enforcing the law. The staff of the Commission is extremely small, 15 members, of which 8 are consumer protection officer, 2 are in competition enforcement, and the others are support staff.[146] They have managed to successfully investigate one competition case, a cartel among five terminal operators fixing the haulage price for 20 foot and 40 foot containers. In January 2019, the terminal operators were ordered to terminate with immediate effect the agreement and the companies were ordered to pay G$3,843,000 (US$18,364) within six weeks of the date of the order. The Commission acknowledged that the Shipping Association was acting under orders of the terminal operators and had no independent interest, income or benefit, and so it was not fined. The Commission's decision was appealed by the terminal operators and is still in court. Six other cases were investigated, but they were all consumer protection cases.[147]

D. Regional Enforcement

The CCC has not had an investigation that has resulted in a decision, and this is largely because the CCC is constrained in its power: it was not given the power to investigate of its own accord, but must rely on MS or the Council for Trade and Economic Development of CARICOM (COTED) to request an investigation. No MS has requested an investigation since its inception. Article 176 authorizes

145 *Consumer & Competition Laws of Guyana,* Competition and Consumer Affairs Commission, https://ccac.gov.gy/consumer-competiton-laws/.

146 Interview by author with Director of Competition Division of the CCAC.

147 Complaint by JD Transport Services (Jan. 31, 2019), https://ccac.gov.gy/wp-content/uploads/2019/04/Draft-Decision-Complaint-by-JD-Transportation-Services-against-the-SAG-31-Jan-2019.pdf.

the CCC to request a national competition authority to undertake a preliminary examination of the business conduct of an enterprise whose conduct it believes to have cross regional anticompetitive effects. The national commission shall examine the matter and report back to the Commission. And where the Commission is not satisfied, it can undertake its own preliminary examination. But, to advance further with an investigation, jurisdiction between the MS and the CCC has to be agreed, and where no such agreement can be reached between the MS and CCC, COTED has to decide. To this point (April 2020) this provision has not been tested. It is convoluted, and has tied the hands of the Commission to investigate cross border anticompetitive conducts. The Commission is further hampered by the fact that the Treaty states that the Commission shall request a National Competition Authority to undertake a preliminary examination. At present, there are only four national competition authorities, so should the conduct involve the other MS, there are no competition authorities to which the request can be made. This is the reverse of the problem faced in Francophone Africa where the national commissions were powerless and the regional commission given all the power.[148]

There was one case investigated by the CCC at the request of COTED and this was abuse of dominance of the regional cement company, Trinidad Cement Ltd. (TCL). It was its first case, and it was at the preliminary stage of determining jurisdiction and whether an investigation was justified. It did not inform TCL that it was being investigated until an Enquiry was launched, and the company was asked to appear before the CCC. TCL immediately appealed the CCC's action in the CCJ, the Appellant body for decisions of the CCC, with the complaint that, among others, it had not been informed that it was being investigated whereas Article 175 of the Treaty states that: (5) Where the Commission decided to conduct the investigation, the Commission shall (a) notify the interested parties and COTED within 30 days.

The CCJ determined that 'interested parties' in the Treaty refers to signatories to the Treaty, and therefore MS, and not enterprises being investigated were to be notified. But, the CCC was required by the Court to revise its rules of procedure which "… did not deal expressly with the preliminary assessment which express the first juncture at which interested parties enjoy the procedural right to be consulted, to ensure compliance with the Treaty."[149] This case was never adjudicated because

148 Fox & Bakhoum, *supra* note 1, at 46.

149 *CCJ Dismisses TCL's Claim Against Competition Commission,* The Caribbean Court of Justice (Nov. 13, 2012), https://www.ccj.org/ccj-dismisses-tcls-claim-against-competition-commission/.

of delays in appointment of new commissioners. While the CCC has a draft revised Rules of Procedure, it is still to be formalized.[150]

Interestingly, empowered by the Privy Council decision in the Digicel/Claro merger case that was appealed by the JFTC, the CCC flexed its muscles and sought to intervene in an acquisition involving two of the largest banks in the region: by Republic Bank Financial Holdings (a local Trinidad and Tobago bank) of Scotiabank (Canadian) operations in nine Caribbean countries. The CCC expressed competition concerns in three CARICOM countries, St. Lucia, Grenada, and Guyana. Note that the commercial banking sector in CARICOM is highly concentrated, and that several of the largest banks are foreign owned. This is the first time that the CCC has exercised power to review mergers in the region, and the jurisdictional claim must have be based on the decision by the Privy Council that provisions prohibiting anticompetitive agreements that have an effect or are likely to have an effect on competition can be applied to merger agreements. The Revised Treaty of Chaguaramas, Chapter 8, articulating CARICOM's competition regime, does not include merger control regulation in its provisions. The CCC has done a review of the acquisitions and published a summary of its findings which confirmed its concerns for restriction of competition as a result of the acquisition. However, it did not undertake an investigation because it depends on member state governments or COTED to request an investigation, or to request national commissions to undertake a preliminary enquiry. St. Lucia and Grenada do not have national competition law or enforcement institutions, hence there was no applicable legal standard in those MS for evaluating the transaction.[151] The CCC did request of Guyana a preliminary investigation. However, the GCFTA does not include merger control regulation, and the Privy Council decision has not yet been adopted by Guyana's courts [given that the Privy Council is no longer the final Court of Appeal for Guyana]. If that ruling had been adopted, the transaction would have been substantively evaluated under Guyana's Competition and Fair Trading Act.[152]

Meanwhile, the acquisitions in 7 of the 9 territories have been finalized, including two of the countries in which the CCC expressed concerns, St. Lucia and Grenada.

150 Interview by author with Executive Director of the CCC.

151 Upon the review of the legal framework regarding its powers to monitor and investigate potentially anti-competitive conduct, the Commission concludes that while the acquisition fell within its cross-border jurisdiction, it is not in a position to investigate the transaction because of inadequate legislative and institutional frameworks in the Member States affected. *PRESS RELEASE: CARICOM Competition Commission (CCC) Establishes Steering Committee to Monitor Regional Action Plan for Competition and Consumer Agencies in CARICOM to Mitigate Effects of COVID-19*, http://www.caricomcompetitioncommission.com/en/news.

152 Interview with Senior Legal Counsel of the CCC by this author.

There was no competition concern in Antigua/Barbuda, but the government blocked the acquisition allowing a local bank to acquire Scotiabank's operations in that country. The Central Bank of the OECS approved the acquisitions in OECS countries. The acquisition in Guyana was disallowed by the Central Bank of Guyana, which found that it will increase Republic Bank's existing 35.4 % of the banking systems assets and 36.8 % of deposits to 51 % after the acquisition, leading to too much concentration.[153] Central Bank of Guyana did not publish the methodology or findings which provided the basis for their conclusion that the acquisition would lead to too much concentration. It would be very interesting to compare the methodology used by the Central Bank of Guyana to evaluate the effects of the acquisition, versus that used by competition commissions, and whether outcomes differ.

The CCC has undertaken several market studies in the past few years: The Impact of Competition in the Mobile Sector in Suriname; Economic Report on Beer Consumption in CARICOM (March 2017); Defining the Relevant Product Market: An Application of Price Tests to the Beer Market in Barbados; and, Competition in the Commercial Banking Sector in Guyana and Suriname (May 2019). The CCC is mandated to assist national authorities in developing their competition regimes (RTC Article 173.2 (c) & (d)). As such, the CCC has been undertaking workshops to improve the public's understanding of competition law, provide technical training to staff of commissions and senior public officials in countries without commissions, and moderates a regional network for competition commissions, patterned after the European Competition Network.

E. Fines Specified in the Laws

The study of Sub-Saharan Africa explored the fines that are specified in the various laws. Namibia, Zambia, Botswana, Mauritius, and Tanzania all provide a percentage of annual turnover, with varying time limits to the calculation (Botswana: a maximum of 3 years; Mauritius: no more than 5 years). Zimbabwe and Kenya both quantified fines in monetary terms (Kenya: not exceeding US$100,000; Zimbabwe: not exceeding $5,000). Some laws include imprisonment (Zambia, Zimbabwe), but this remedy has never been imposed.[154] Interestingly, in Mauritius, Botswana, and Tanzania, the laws allows fine only if the act was intentional or negligent.[155]

153 *Guyana Central Bank blanks sale of Scotia to Republic Bank*, Trinidad Guardian Newspaper (Nov. 4, 2019), http://www.guardian.co.tt/news/guyana-central-bank-blanks-sale-of-scotia-bank-to-republic-bank-6.2.945099.b0bef3cb4b

154 Compiled from information in Fox & Bakhoum, *supra* note 1, at 67–85.

155 Fox & Bakhoum, *supra* note 1, at 84.

In CARICOM laws, fines vary. The RTC does not specify amounts of fines applicable, though the CCC has the power to impose fines for breaches of the rules of competition. Guidelines for setting fines have been published, and the CCC will take into account the duration, seriousness, and effect of the conduct and impose fines not exceeding 10 % global revenue of the enterprise for the last financial year. Jamaica's law allows the Court to fine not exceeding one million Jamaican dollars (US$7,128). The law was enacted in 1993, and is been updated, and so one assumes that there is an upward adjustment to fines in the draft law. Barbados' law imposes liability of B$150,000 (US$75,000) or 6 months in prison or both for an individual and for a corporate entity, B$500,000 (US$250,000) or 6 months in prison or both or to 10 % of turnover of the enterprise for the financial year preceding the date of the commission of the offence, whichever is greater. The Guyanese law provides for fine of G$50 million (approximately US$240,000) and to one year in prison for failure to terminate an anticompetitive agreement or an abusive conduct. TT's law provides for fines up to up to TT$100,000 (US$14,700) for engaging in anticompetitive agreements, and failure to obey the Court's instruction to terminate the agreement. Interestingly, for abuse of monopoly power, an enterprise is given six months within which to cease the abusive practice and must submit to the Commission measures it will take and the timetable for giving effect to measures to remove the monopoly power it has on the market.[156] One can see a great disparity between the fines that can be imposed in Barbados and Guyana as opposed to Trinidad and Tobago. Yet, the largest firms in the region are in Trinidad and Tobago. No CARICOM country has imposed prison sentences so far.

The forgoing illustrates that much is still to be done to advance the competition regimes in the region, not the least of which is to harmonize laws, since this is the requirement of the RTC Article 173.2 (c), but at the moment, the four national laws in existence have differences that can hamper regional enforcement.

VII. ANALYTICAL FRAMEWORK ARTICULATED IN SUB-SAHARAN STUDY[157]

Fox and Bakhoum concluded their study on Sub Saharan Africa by proposing changes

156 This may be a drafting error since it seemingly requires a structural change in all instances of abuse.

157 Fox & Bakhoum, *supra* note 1, at Chapter VII.

that can be made in the countries. They framed the discussion by asking: what are the conditions necessary for a market system to function smoothly.

These authors categorized countries as (a) least developed, (b) more developed, (c) Brazil, Russia, India, China, South Africa, the so-called BRICS countries, and (d) developed countries, with the least developed experiencing serious corruption in government, poverty, inequality, unemployment, lack of socio-economic mobility, triumphs of vested interests, and dysfunction in democracy. The other three categories are measured by the extent they are able to counter these problems, with their ranking based on the level to which they could successfully remove the problematic factors. It is instructive to note that all these problems are present in all countries in the world, but the extent to which they could counter the problems and minimize them equals their level of development.[158]

Hence, while in the least developed, courts are dysfunctional and judges can be bribed, in the more developed, courts function better and judges are independent and honest and cannot be bribed, while in the developed countries, the judiciary is strong, well trained, honest and there is a high level of rule of law and transparency. Similarly, in the least developed, markets have to be created, while in the more developed, there is a fair level of functioning markets present, and in the BRICS, more sophisticated markets (but with a poor and disadvantaged population in South Africa that has to be raised out of poverty and provided with economic opportunities), and in the developed countries markets are healthy with deep incentives to innovate and strong pro-consumer and anti-corruption activism. In the least developed, the competition agenda is dominated by price control, while in the more developed, there is enforcement of competition law, but constrained by lack of human and financial resources, while in the developed countries, there is a deep human resource pool, and sufficient resources, and robust enforcement of competition law.

The research on Sub-Saharan Africa shows that, of the countries chosen for study by Fox and Bakhoum, several fall into the least developed category (as does Haiti in CARICOM). Findings are that governments in several of the countries studied are controlled by corrupt politicians that siphon off the wealth of the country and pursue policies that allow MNCs to continue to exploit the countries' resources. The authors, using the democracy index, identified five of the sixteen countries in Sub Saharan Africa that were chosen for study as authoritarian; seven as hybrid democracies and three as flawed democracies, that is, democracy functions but with problems (Senegal,

158 Fox & Bakhoum, *supra* note 1, at 206.

Botswana and Namibia). In all of Sub Saharan African countries studied, only Mauritius was deemed to have full democracy, while non in CARICOM is raised to that rank. It is interesting to note that the level of enabling environment present in these countries can be correlated to their level of functioning democracy.[159]

Fox and Bakhoum asked, what a [developing] nation wants from its market system and posited that countries want efficiency and development: inclusive growth.[160] They identified market restraints within the nation that inhibit such inclusive growth to include those generated by the State, including poor delivery of infrastructure, education, health services and opportunities for mobility, among others, and also, the concentration of economic power in the hands of a few families. MNCs operate in the economy with huge concessions granted by the governments, thereby depriving the local economies of surplus retention. These market restraints are compounded by scarce financial resources, a small pool of talent, cronyism, slow, inefficient courts with judges untrained in market and economic concepts, and sometimes corrupt, and the absence of rule of law.[161]

In this trajectory, CARICOM countries fall in the second category of more developed with all except Haiti qualifying as flawed democracies. Fox and Bakhoum observed the following characteristics in this category of countries: competition culture taking root, people appreciate how freeing up markets can help them, the competition agenda is not dominated by price control, there is more sophisticated competition law and policy observable and officers are gleaning lessons from more mature commissions and the international community. In this category, the regional body provides training, competition commissions submit to peer review at UNCTAD, and competition officers are more confident to interact with colleagues from international commissions. All of these conditions are observable in CARICOM countries, and the Commissions, both national and regional, interact frequently with the staff of the US FTC, in particular, and seek advice and guidance from them. There is a strong parallel between CARICOM countries and some of the more developed countries in East Africa. And, while they experience all the restraints of the least developed countries, they are more likely to challenge them.

Fox and Bakhoum also pointed to external sources that distort the functioning of markets, that is, the impact on these countries of MNCs cross border anticompetitive conducts, and the lack of ability of developing countries to discipline these companies

159 Fox & Bakhoum, *supra* note 1, at 34 & 56.

160 Fox & Bakhoum, *supra* note 1, at 208.

161 Fox & Bakhoum, *supra* note 1, at 208.

once they are outside their jurisdiction. International cartels are the most harmful of these conducts, and MNCs exploit the vacuum created by lack of competition laws or feeble enforcement, to operate with impunity in these countries while avoiding jurisdictions where there is strong enforcement. Unequal trading conditions further disadvantage the local economies.[162] These issues were addressed in the earlier description of CARICOM's economic profile, with the accompanying increased exposure to the harmful effects of anticompetitive cross border conducts by MNCs. And, finally, they critiqued the assumption upon which the efficiency and consumer welfare goals based on achieving aggregate efficiency, and without interrogating who benefits and who loses in such a methodology. The aggregation of surplus-gains masks the unequal flow both within national economies and in the world economy towards those who are better off.

The exogenous factors leading to dysfunctional markets and outward flow of capital in these countries are systemic rather than episodic, in that they are deeply embedded in the nature and level of incorporation of developing economies into the world-economy. The persistent unequal distribution of roles in the international division of labor (IDL) in the capitalist world-economy ensure that higher value added production of goods and services are reserved largely to the North, and sustained by their leadership in technology change, thereby reinforcing the direction of flow of surplus value. The form of leading productive enterprise is constantly evolving, so that higher value added products and services are constantly changing. For instance, manufacturing migrated to the developing world in the last few decades, and it seemed that at last, there was 'development' occurring. Alas, higher value added had shifted to services to support manufacturing (software, engineering design, and IT support in general), and to the service industry as a whole.[163] It is always a catch up game that developing countries are engaged in, thinking that they have found the key to a leap forward, only to find that that the landing place had shifted and that they are at the same level in the value-chain. The evidence from CARICOM economies presented in this paper showed the low level of value added at which these countries are integrated into the world-economy.

162 Fox & Bakhoum, *supra* note 1, at 213.

163 There could be a change and reversal of globalization of production as a result of the severe disruption of the supply chain for component parts caused by the closures in response to COVID-19.

I draw on contributions to a debate on the relationship between equity and growth. Contributors drew on the points offered by Acemoglu and Robison [164] that an essential ingredient for a well-functioning market system is a strong democracy which normally presupposes a large middle class which in turn relies on a fair amount of equity in distribution. Further, a market economy would only achieve equity-inclusive outcomes if they are introduced in an enabling environment: opportunity to everyone to do business, social benefit payment to those unable to work, or who suffer unemployment, until they find jobs, adequate education and training of people in order to prepare them for jobs, a proper health care system, a proper functioning administrative and judicial system, good infrastructure, and other public goods which are accessible for everyone, irrespective of their wealth. Most important is a well-functioning taxation system, which provides progressive taxation so that those who benefit most from the market will contribute most to government's budget: "social justice" should complement "market competition" and not replace it. And, delivery of social justice depends on a well-functioning government that creates this enabling environment in the interest of all sectors of a society.[165] This provides a good grid against which to measure countries' advancement towards inclusive growth.

The four categories offered by Fox and Bakhoum clearly demonstrate the shortcomings that are found in the least developed and more developed societies but these cannot be explained outside of the conditions created by the colonial experience, and resolutions of the problems have to take into account the continuing structures and processes of the IDL by which these economies are incorporated into the world-economy.

But there is much more to be explained in the pitiful state of some countries in Sub-Saharan Africa and of Haiti. One can draw more deeply on Acemoglu and Robinsons whose work traces the evolution of institutions through time and space to show that countries that evolved from extractive political and economic institutions to inclusive ones were able to achieve the equity-inclusive outcomes for the society as a whole with well-functioning market system and good democracy.

164 Daron Acemoglu & James A. Robinson, Why Nations Fail: The Origins of Power, Prosperity and Poverty (2012).

165 Taimoon Stewart, *Should Growth Policy be Blind to Equity? Should Competition Law and Policy be Blind to Equity? The Debate* (CUTS Int'l, rev. 2013), *available at* https://www.academia.edu/35904296/Should_Growth_Policy_be_Blind_to_Equity_Should_Competition_Law_Policy_be_Blind_to_Equity_The_Debate.

> Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. Economic institutions are then often structured by this elite to extract resources from the rest of society". Each depends on the other in this synergistic relationship."Inclusive political institutions, vesting power broadly, would tend to uproot economic institutions that expropriate the resources of the many, erect entry barriers, and suppress the functioning of markets so that only a few benefit."[166]

Acemouglu and Robinson posit that "Understanding how history and critical junctures shape the path of economic and political institutions enables us to have a more complete theory of the origins of difference in poverty and prosperity. In addition, it enables us to account for the lay of the land today and why, some nations make the transition to inclusive economic and political institutions while others do not."[167]

These authors trace the transformation of the institutions in Sub-Saharan West Africa to cater to the Atlantic slave trade, changing occasional tribal wars and secondary outcomes of domestic slavery to commodification of human beings that required wars to specifically capture people to be sold as slaves as the primary intent. This caused institutional change as societies organized around the slave industry and warfare waged with western arms and ammunition. With the abolition of the slave trade in 1807, and the simultaneously growing interest of Europe in African commodities, the slave trade with Europe was replaced by commodity trade in palm oil and kernels, peanuts, ivory, rubber and gum Arabic. The institutional power structure created by the slave trade was sustained by now redirecting slaves to work on plantations and mines in Sub-Saharan Africa. Approximately 30 per cent of the populations of Senegal, Mali, Burkina Faso, Niger, and Chad were enslaved in 1900. In Sierra Leone, slavery was abolished in 1928. In Liberia, it is estimated that 25 percent of the labour force were coerced, living and working in conditions close to slavery in 1960.[168]

These exploitative and extractive conditions persisted into the 20th century and can explain the poor performance of these countries by the indicators provided in the study by Fox and Bakhoum in which all the western Sub-Saharan countries have a low human development index, authoritarian or hybrid democracies, and extremely extractive political and economic institutions, benefiting the elite of the society.

166 Daron Acemoglu & James A. Robinson, Why Nations Fail: The Origins of Power, Prosperity and Poverty 81 (2012).

167 *Id.* at 101.

168 *Id.* at 256–57.

According to Acemoglu and Robinson, "In most cases in sub-Saharan Africa … the post-independence governments simply … repeated and intensified the abuses of their predecessors, often severely narrowing the distribution of political power, dismantling constraints, and undermining the already meager incentives that economic institutions provide for investment and economic progress."[169]

Acemoglu and Robinson showed that East Sub-Saharan Africa was not affected to any great extent by the Atlantic slave trade, but was a source of supply of slaves to the Middle East for centuries. Yet, their political institutions were not organized solely to satisfy the slave trade as it was in western Sub-Saharan Africa.[170] This, plus the difference in the colonial experience with British rule and the introduction of British institutions, helps to explain the better performance of east Sub-Saharan Africa. However, Botswana's history provides an enlightening contrast to the rest of Sub-Saharan Africa. In this area of Africa, originally Bechuanaland, a nascent set of pluralistic institutions had developed by the 19th century which included political centralization and collective decision making procedures which encouraged political participation and constrained chiefs. Moreover, it is the only African country that did not engage in slave trading nor experience slavery. And, through a clever diplomatic approach to the British Government in 1895, the three leading Twsana chiefs travelled to London to meet with Chamberlain to request that Cecil Rhodes be prohibited from expanding into Bechuanaland. They succeeded, conceding only a track of land through which a railway could transit, with no stops in Bechuanaland. And, so, this country stayed insulated from the extractive political and economic institutions of colonialism, and was able to retained and developed inclusive institutions, and to transition to a successful parliamentary democracy at independence. What saved it was its poverty and apparent lack of mineral wealth, and so the British paid little attention to it. Diamonds was discovered just prior to independence and kept secret until the country was safely out of the clutches of Britain. This explains the success of Botswana in contrast to the rest of Sub-Saharan Africa.[171]

VIII. RECOMMENDATIONS AND APPLICABILITY TO CARICOM

Fox and Bakhoum make very specific recommendations for drafting and enforcing competition laws for Sub Saharan countries, most of which are very relevant for

169 *Id.* at 112.
170 *Id.* at 251.
171 *Id.* at 404–09.

CARICOM countries. To address the problems raised in the study, the authors recommended identifying what blocks the most productive channels for economic opportunity and targeting reform to remove those blockages. They advised including prohibition of state restraints in those countries that do not have this provision in their competition laws. Provisions in all competition laws in CARICOM apply to SOEs. They recommend that intra-regional border restraints should be removed. Unlike Sub-Saharan Africa, there are no land borders between the countries in this Community except Guyana and Suriname. In regard to intra-regional trade, that is being addressed through the creation of the Single Market and progress is being made in its implementation.

A major limitation to competition authorities successfully challenging restraints is the distrust people have for markets, and the need to allay this distrust through litigation and advocacy for policy reform with successes well publicized, and strong, honest and determined leadership as the face of the Commission. To this point, CARICOM's Commissions are engaging in robust public education and training of technocrats, and leadership at the Commissions have been strong. Competition authorities in CARICOM have been undertaking market studies and so have been unmasking the blocks to economic opportunity, but much more targeted research can be done. In that regard, studies are needed that interrogate market structure with a historical perspective, to reveal the barriers to entry for the vast majority of the populations, and to examine to what extent do such barriers still exist. For instance, what are the barriers to credit for the middle and lower income peoples? How do SMEs get their capital? As Fox and Bakhoum asked, "What market restraints and abuses hurt the nation and its peoples the most?"[172] These Commissions can also benefit from the recommendation offered by the authors that commissions undertake advocacy based on groundwork, facts, analysis, and a sense of what is politically possible, and should involve scrutiny of regulations, SOEs, and national trade laws. Jamaica has had both successes and failures in litigation, but the Commission is well respected in the society. Barbados and Guyana are in their infancy with regard to litigation, but they are building strength incrementally.

Fox and Bakhoum proposed that competition regimes should remove exemption of the financial sector, as banks are notorious for crowding out the underprivileged by denying access to loans, and engaging in conducts that may be collusive.[173] The

172 *Id*. at 207.

173 *Id*. at 238–40.

only country that has such an exemption is Trinidad and Tobago, and concerns were raised in this paper since this country has the largest banks in the region which are expanding throughout the region, but the exemption poses problems for cross border investigations since the CCC needs cooperation with the TTFTC that itself has no jurisdiction over the banking sector, and the Financial Regulator has no legal basis to cooperate with the CCC. The prospects of this exemption being removed in the near future are unlikely.

Antitrust exemptions for firms in the regulated sector, according to Fox and Bakhoum, was unacceptable because this removes the best watchdog and increases the risk that regulated firms will capture the regulator.[174] We saw the success of the JFTC in getting the ruling from the Privy Council that the competition commission has the authority to oversee any sector or issue that can negatively impact on competition in the relevant market, including the regulated sectors. Barbados has shown the example of a very good working relationship between sector regulators and competition commission, and the competition law applies to the regulated sectors. The exemption of the regulated sectors (financial and telecommunications) in the TT law is problematic and needs to be addressed. So is the relegation of enforcement authority to the Utilities Regulator.

Similarly, Fox and Bakhoum advised against full exemption for IP monopoly holders conducts, and pointed to the robust enforcement against abuse of IP monopoly in the US and EU. For instance, the EU courts have adopted a rule of presumptive illegality for 'pay for delay' agreements which is sympathetic towards generic entry.[175] But, for developing countries, the more pervasive types of IP monopoly abuse can be found in licensing agreements such as tying clauses, or royalties charged beyond the life of the patent.[176] This issue was raised earlier in regard to CARICOM, and of the need to revise the RTC, Chapter 8, and the laws of Jamaica and TT to prohibit abuse of IP monopoly power.

There are some concrete proposals offered for drafting of legal provisions and for enforcement choices. They cautioned against use of technical and complex rules and regulations, opting rather for simple rules and standards fit for the capabilities of the commissions and the context of the markets. Fox and Bakhoum suggest specific legal provisions that are suited to the challenges faced by developing countries. For instance,

174 *Id.* at 238.

175 *Id.* at 238–39.

176 There is literature dating back to Edith Penrose's work in 1951, *The Economics of the International Patent System*, 12 J. Econ. His. 289-290 (1951), and others, documenting the abuse of IP power in developing countries. *See* a review of this literature in Taimoon Stewart, *The Functioning of Patent Monopoly Rights in Developing Economies*, 49 Soc. & Econ. Studies (2000).

resale price maintenance should be presumptively illegal and hard core cartels should be per se illegal or at least presumptively illegal.[177] These are already in CARICOM's laws, except for the TTFTA which provides a defense for price fixing, and which needs to be changed. They advised that countries should consider adopting standards that will open markets while giving due regard to dominant firm's actions that bring new or better products to market. Fox and Bakhoum advised that developing countries should not adopt complexity-creating statutory language, as this exposes reversal of decisions of the competition authorities by judges, as was the case against Mittal in South Africa, in which the court's interpreted the statutory language as requiring a more complex enquiry (proving effects).[178] Given the limited technical staff in the Commission in CARICOM, it would be wise for Commissions to review their laws and simplify where language may be interpreted to require complex enquiries.

There is a general recommendation by Fox and Bakhoum that countries use a simple approach to enforcement, rather than adopt the complex standards of proof in the US or EU, particularly proving effects, which makes a great demand on the resources and expertise of these small commissions. Instead, the Commissions could take the approach that some conducts are bad enough without having to prove harm. They also cautioned against adopting the "as efficient as" standard of proof which can be quite demanding on these small commissions in Sub-Saharan Africa and CARICOM. Fox and Bakhoum cautioned that in markets with entrenched monopolies [an enduring feature of CARICOM economies], capital markets work poorly and are not likely to correct itself, and challengers to monopolists may not be equally efficient. Instead, dominant firms could be required to justify their conduct by business needs or prove that the prohibition of the conduct would make consumers worse off. Commissions should target leveraging, foreclosure, and access violations to ensure more market access to those without power to compete on the merits, rather than more freedom for firms with power.

Market definition should lean towards pro-poor outcomes, as the South African Tribunal did. There is the danger that market definition may be applied too economistic and mechanistically without taking into account public interest in where the chips fall. While it may be argued that this is dangerous as it removes objectivity, and rightly so in the generality, Fox and Bakhoum argued that seeking fairness can be included in the analysis. CARICOM's enforcers may benefit by exploring outcomes from such

177 Fox & Bakhoum, *supra* note 1, at 242.

178 Fox & Bakhoum, *supra* note 1, at 246.

an approach, given severe scarcity of human resources, and markets controlled by entrenched monopolies.

Another recommendation is to promote collective action as a way for the poor to get access to the justice system. However, given the serious backlog of cases in the courts in CARICOM, it is questionable whether the poor would have the incentive to use collective action strategies, given how disillusioned the populace is with the length of time it takes for court hearings and action. Efficiently functioning courts are needed for this recommendation to work.

It is a global problem, the fact that Judges may not be versed in competition law, but this is more in the exception that the rule in the US, the EU and other mature jurisdictions. In developing countries, and certainly in CARICOM, there is great danger in having well-reasoned recommendations based on rigorous methodology required by competition law investigations overturned or dismissed in courts simply because the judge had little understanding or ability to assess the methodology through which the Commission arrived at its conclusion. This is a big problem for CARICOM national commissions, given that all final determinations rests with Judges, and only designating dedicated judges who are properly trained could resolve the issue. And, it's a bigger problem for the TTFTC because of reliance on courts to make all determinations, not just ones challenged in Court.

In regard to international restraints, Fox and Bakhoum's recommendations for solutions are laudable but it is questionable whether some can be realistically adoptable by the international community because of the blatant self-interest embedded in competition laws and procedures in developed countries' regimes. Firms that engaged in international anticompetitive conducts that harm developing countries are from the developed countries, and mostly from the US and EU, but their laws limit their Competition Commissions to only investigating conducts that affect the domestic market and consumers, and prohibit sharing of confidential information or evidence gathered in the course of an investigation. Fox and Bakhoum suggest that the "wise international regime would at least require nations to prohibit from doing to foreigners what they would not do to themselves": to prohibit hard core cartel activity that would harm anyone in the world, including export cartels, and offending countries should aid in discovery of evidence in their jurisdictions. This would require amending their laws to provide jurisdiction for the discovery of documents and testimony from suspects and others privy to the facts of the outbound cartels and provide for subpoena power. While this is a profound solution that would go a long way to helping developing countries counter harm to their economies caused by foreign

firms, it is highly unlikely to happen. Developed countries have so far not given an inch to developing countries in terms of taking responsibility for the actions of their firms that harm anyone but their own consumers and own economy. And, they are unmoved by the challenges faced by developing countries in investigating the firms from developed economies. As the authors themselves stated, developing countries want development, and developed countries want competitiveness in the world and global economic hegemony.[179]

Fox and Bakhoum recommended that developing countries have extraterritorial jurisdiction in their laws. The laws in CARICOM do not explicitly authorize extraterritoriality. Rather, the foreign firms have to have a presence in the domestic economy. But, this is an impotent power. The authors did recognize that loss of access to the large markets of the US and EU is persuasive for foreign firms to subject themselves to these jurisdiction. By contrast, the markets in Sub Saharan Africa and CARICOM are miniscule, and power asymmetry limits these competition authorities to exercise extraterritoriality in any case. This power asymmetry even impacts on their ability to investigate powerful MNCs operating within the economies, given the importance of the sectors in which they operate for generating export earnings and the reluctance on the part of the government to challenge these firms. Power asymmetry is clearly visible from the fact that the annual income of these MNCs far exceed the annual GDP of these countries.

Finally, Fox and Bakhoum advised competition authorities in developing countries to question western standards and to consider sympathetically standards that will open markets while giving due regard to dominant firms' acts that bring new or better products to markets. But, the "good work" being done by the ICN and OECD in bringing greater convergence to laws across all countries contradicts this effort. A survey done by the ICN in 2009 showed that 71 % of competition authorities in developing countries are actively working towards applying ICN recommended practices, and 96 % of commissions use ICN work products and materials. It is well known that western standards and practices overwhelmingly influence the work in the ICN. Therefore, the ICN, is, by subtle means, achieving convergence based on developed countries' standards. There are trade-offs. There is much merit from learning from the work of the ICN. But, there is the danger that developing countries commissions may not interrogate the materials sufficiently in the context of their own circumstances and tailor them to their specific needs.

179 Fox & Bakhoum, *supra* note 1, at 208.

This concern is supported by Fox and Bakhoum's own caution that MNCs would generally profit from common world rules and standards, and that developed countries are seeking convergence because divergence harm their firms by increasing cost of doing business. By contrast, developing countries have little to gain from a single approach to competition law and enforcement. It is the modus operandi of developed countries to strategize to have their laws universalized. This is evident in the WTO agreements of 1994, for instance, in the TRIPS agreement, Customs and Trade Facilitation, TRIMS, while all the while resisting changes in areas where it does not suit their interests: agricultural subsidies, anti-dumping rules. Where they cannot achieve their objectives in the WTO, they introduce WTO plus provisions in trade agreements, and through technical assistance that serve to universalize their legal standards.

There is one issue that could be fleshed out more and which is now raised. The study linked the current problems in the Sub-Saharan countries to colonial exploitation of mineral resources at the expense of domestic production, destruction of local governing systems and social institutions, and cultural invalidation, particularly in Francophone Africa. In defining the problematique today and proposed solutions to make markets work, however, Fox and Bakhoum do not sufficiently weave the threads back to the origins of problematique created by destruction of indigenous political, economic, and social systems. The current extractive political and economic systems are deeply grounded in the colonial experience, and unless there is a very targeted program to engender transformation towards inclusive institutions in pluralistic societies, then efforts at making markets work will be just tinkering with the system and will continue to fail. In the case of the societies that were transformed to create an industry of slave capture and trade, it is not going to be possible to find a way back to inclusiveness because for centuries, they were functioning as brutal extractive societies. Ways have to be found to start a process of transformation.

But there is another factor to take into account. It is the norms, mores, practices and beliefs of a people that forge social identity and upon which institutions, political structure, and governance are built. The European system of government and their institutions emerged out of Eurocentric epistemologies and experiences, and the theories and derived policies and instruments, including institutions, are organically linked to European culture and belief systems. They make sense in that context. However, non-Eurocentric belief systems were destroyed or invalidated in the colonies and a system of government and institutions disconnected from the visions, images, and values which these societies consider to be a true picture, or meaning of the preferred future

(development) were imposed. Social beliefs of non-European peoples survive, but are not given legitimacy; rather, they are dismissed as not of the "real world" meaning, the dominating knowledge.[180] This invalidation of culture, beliefs, and institutions has been internalized amongst the colonized and becomes self-reinforcing of internal sources of imperialism. The result is hybrid institutions and social systems; it is no wonder that they struggle to find stability in Sub Saharan Africa (and elsewhere in the former colonized world).[181] Addo argued that these images and visions, as they are interwoven by values, tend to be historically-culturally specific; and they provide the rationalizing sources from which are drawn legitimacies of epistemologies of social beliefs, and from which, in turn, are derived the conferred aura of validities that methodologies claim to have, as they relate to extracted goals, deduced theories, and applied policies, established structures and semiotic indicators to construct models of different development processes.[182]

Culture is what defines a people, and what holds them together. This is why developed countries celebrate their heroes, teach children a history that engenders pride and identity, and value social identity and cohesion.[183] By destroying identity and replacing organically grown institutions and ways of governing with alien ones, the colonial powers made it much more difficult for these countries to emerge from the destruction they experienced in colonial times. There are deep cultural retentions in Africa, and social movements aimed at renewal and regeneration of indigenous culture. There still exist functional tribal community leadership. Could an examination of the beliefs and cultural norms underlying community respect for such leadership, and where such leadership is exercised in the interest of the people, rather than in power and wealth grab, be a basis for engendering the needed change in dysfunctional political leadership? The Caribbean peoples face a more difficult problem, with cultures of ancestors destroyed, and Eurocentric values and culture dominating. But, there

180 James Gathii reinforces this point by interrogating the Eurocentric dominating knowledge from which international law was spawned and imposed upon developing countries, and the continuation of control by the legal fraternity of the developed world, with only marginal involvement of developing countries lawyers, even though expertise exist. Further, case law used in the developing world are largely from Eurocentric courts. Yet, there is a growing volume of case law in the developing world that can be drawn upon. James Thuo Gathii, *The Promise of International Law: A Third World View*, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law on June 25, 2020, at 3–5 (July 2020).

181 Herb Addo, Eurocentricity: A Critical Methodological Treatise on Developmentalism (St. Augustine: Institute of International Relations, UWI, 1989).

182 *Id.*

183 And, peoples in the colonies learned the stories of heroes from the mother country.

is also the unique opportunity of a new organic form emerging from the blending of cultures and beliefs. An opportunity, yes, but will it be allowed to take seed? The region faces too many challenges and can hardly come up for air before being hit by another disaster.

APPENDIX 1

Capital Investment Rooted in Privilege and Power in Colonial Times: The Making of Two of the Biggest Conglomerates in CARICOM

Where did the seed capital come from that built the empire of ANSA McAL and the Massy Group? According to Gerald Besson, historian, there were different categories of Whites in Trinidad in colonial times: the British administrative class; the French Creole, descendants of the French planters who migrated from Martinique and Guadeloupe to Trinidad at the time of the French Revolution; the English Planters; and the merchant class. He describes the last as dependent on brains energy and capital and were shrewd, upright and honest. He provides several family names of that mercantile white class whose descendants are easily recognizable in Trinidad today, among them Alston, Bryden, and McEnearney.[184]

The original company was Alston, set up in 1881 to buy and export cocoa. It expanded into saw mill and lumber department. Its shipping business originates in 1914, when it expanded its business to ship chandlery, cargo handling and being an agent for shipping lines. By 1921, the company imported English, French, American, and Indian food stuffs (to cater to the large East Indian population brought as Indentured labourers). It exported cocoa, sugar, coffee, coconuts and all kinds of local and Venezuelan produce. In 1936 it invested in Trinidad Clay Products limited, which produced mainly bricks for construction and is today a multimillion dollar enterprise. In 1959 it expanded to Barbados. And, in 1963, a year after Trinidad and Tobago's independence, it expanded into insurance to become one of the biggest insurance providers in the country. And, in 1969, it merged with Charles McEnearney and Co. Ltd., started in 1922, dealer in motor vehicles, also with subsidiary in Barbados, and consolidating with Stokes and Bynoe, founded in 1898 in Barbados. A further consolidation by purchase of A S Bryden and Sons Ltd, another colonial import and distribution firm, which is now a self-proclaimed major force in the distribution industry offering over 450 brands, according to its website. Meanwhile, Alstons set up the Caribbean Development Co. Ltd. in 1950 and started producing beer. Note that

184 Gerard A. Besson, The Caribbean History Archives (By Paria Publishing Co. Ltd), http://caribbeanhistoryarchives.blogspot.com/.

all this development took place prior to independence and all seed capital came from the white mercantile class in Trinidad and Tobago. Much more can be traced, but the point is made. McEnearney and Alstons merged in 1975, forming McEnearney Alstons Ltd. and rapidly expanded in other sectors, spurred on by the oil boom and wealth liquidity in Trinidad and Tobago.

The drastic fall in the price of oil in the early 1980s led to severe economic contraction in Trinidad and Tobago that brought the merged company to its knees with share prices dropping drastically. Interestingly, this opened a window for the entry of a player who was a self-made entrepreneur, Anthony Sabga, with no seed capital rooted in colonial power and wealth, a Christian Syrian immigrant whose family fled Syria in the 1920s to escape religious persecution. Sabga started in business as a boy in 1946 and through sheer will power, perseverance, determination to succeed, built an import and retail business from nothing, to become the major retailer of appliances in the country, and who expanded into cars, printing presses, and even began local production of appliances with license from manufacturers when the government blocked imports in order to stimulate import substitution production. When McEnearney Alstons was in deep trouble in 1986, Sabga stepped in and bought the company for TT$40 million in cash. We see here both the story of inherited wealth and first mover advantage of powerful companies in the region. But, we also see a rare case of entrepreneurial development through taking advantage of opportunities created by gaps left by the big firms: they did not cater sufficiently to the middle to lower income groups, and Sabga offered clever deals, and credit, advertising to target this group.

A similar exercise can be done by tracing the Massy Group's origin and expansion. Originating in the 1920s, the amalgamation of two firms in 1932, Neal Engineering and Massy Ltd., it specialized in machinery (tractors, cranes, compressors) and engineering services, including electrical. In the 1970s, the company expanded into IT and communications, setting up Complete Computer Systems. Firms were set up or acquired in Guyana, Jamaica, Antigua, Grenada, and Barbados over the years, and product range expanded to food processing, Supermarkets, copying services, office services, pharmaceuticals, consumer goods for wholesale and retail. In 1990, it acquired The Geddes Grant Group, which was originally established in 1901, and became the largest agents for manufactured goods, distributing to general merchants in the CARICOM region, with subsidiaries in Guyana, Barbados, Grenada, and St. Vincent and the Grenadines, and supplying supermarkets, groceries, pharmacies, hospitals, variety stores, wholesale and hardware stores, agricultural shops, hotels,

restaurants, and duty free outlets. In 2008, it acquired Barbados Shipping and Trading Company, completing upstream vertically integration. The company has 130 years of experience in General Insurance offered in 14 territories.

There are examples of break-out entrepreneurial successes by non-Whites. Syrians, Portuguese-Madeirans relied on their cultural knowledge and values to cave out spaces for themselves. These individuals took advantage of gaps in the supply chain established by the major import/distribution firms. Anthony Sabga is an example. Lower income groups did not have the savings to purchase non-essential goods such as furniture and appliances, and textiles for drapery and clothing. The Syrians filled that gap, by offering credit. They went from door to door in the early days selling cloth. Their cultural knowledge of textiles date back to the 2nd. Century BC from being part of trade on the Silk Route. These peddlers offered credit to the poor, unheard of before. And the poor used their pooled resources referred to earlier, to purchase such goods. Syrians now dominate the textile import and retail trade in CARICOM. Note that they were not part of the enslaved or indentured population, having arrived in Trinidad in the 1920's fleeing religious persecution in Syria and Lebanon.

But there are also successes among descendants of indentured laborers. The Portuguese-Madeirans produced wine for sale, again, skills deeply embedded in cultural knowledge. Some of these entrepreneurs were able to build large businesses, for instance, S. M. Jaleel, the largest soft drink producer in CARICOM. This endeavor started out as a cottage industry, with an individual Indo-Trinidadian making the drink in his house and peddling bottles in his neighborhood on his bicycle. It is interesting to note that windows of opportunities for entrepreneurial entry emerge in specific conditions at a particular time and place, and dependent on structure of market and barriers to economic and social mobility. The ability to use those opportunities depend on cultural values of saving and willingness to delay gratification, and drawing upon cultural knowledge.[185]

Interestingly, some wealth changed hands in Jamaica when wealthy whites and Chinese fled the island in the face of the threat of socialism posed by the Manley government in the 1970s and black families were able to make inroads into the business sector, either by buying them out cheaply, or filling the vacuum left by their migration. A similar flight of capitalists took place in Trinidad and Tobago, scared by the Black Power Revolution in 1970. The Chinese elites in particular fled to Canada

185 *See* Entrepreneurship in the Caribbean: Culture, Structure, Conjuncture (Selwyn Ryan & Taimoon Stewart eds., 1994).

and whites to Florida and Barbados. But, the economic boom that followed just two years later with the rise in the price of oil stemmed the outflow and business boomed for another decade.

Africa in the Economy of Francesco: Rethinking the Ethics of the International Financial Order at the Intersection of Tax Justice and Catholic Social Teaching

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In 2015, Pope Francis laid out his vision for an integral ecology in his Encyclical on Care for our Common Home Laudato Si', which flows from an understanding that everything is closely interrelated and that policy solutions to address climate change and poverty will need to be multidimensional and interdisciplinary. In the years since, integral ecology has broadened from a conversation focused on the environment to include a framework for radically rethinking the ethics of the international financial order, a program which has come to be known as the Economy of Francesco. Tax justice, as a concept of global redistributional justice examining means of reducing tax avoidance through the use of haven jurisdictions, is an area where the Catholic Church can be a dynamic, innovative conversation partner for those working to eliminate poverty in Africa. This Article situates Africa in the Economy of Francesco, exploring the intersection of tax justice and Catholic social teaching.

This Article provides a primer on the international tax system, highlighting the legal and ethical principles on which it is based. It then explores theories of taxation – how, where, and what to tax – and their implications for tax justice. The Economy of Francesco is then analyzed in detail, discussing Catholic social teaching on taxation and the economy from Vatican II up to the present. The Article concludes with a roadmap for African tax justice within the Economy of Francesco, proposing strategies for policy and advocacy which best leverage the continent's strengths before key international decision-making fora.

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Introduction

Tax avoidance and evasion by multinational corporations operating in the developing world results in a situation where approximately half of all the proceeds of world trade passes through tax haven jurisdictions in order to avoid paying tax on profits.[1] As a result of tax avoidance by large corporations and wealthy individuals, developing countries are estimated to lose revenues greater than annual aid flows.[2] Developing countries, particularly those in in sub-Saharan Africa, are therefore deprived of revenue which otherwise could be used for desperately needed infrastructure, social services, and other public goods. Tax justice, broadly speaking, is the concept of global redistributional justice which examines means of reducing tax avoidance through the use of haven jurisdictions and of increasing transparency in the current system.[3] Increased attention to issues of tax justice reflects a greater understanding of the centrality of taxation to the relationship between states in the global political economy.[4] Taxation, then, represents a new frontier in development ethics: an effort to reassess the obligations of rich societies and their citizens to poor societies, and to recognize "which agents and structures are to blame for the present state of global destitution and unequal opportunity."[5]

Reducing inequality is part and parcel of development efforts and are at the heart of the U.N.'s Sustainable Development Goals (SDGs), which are the guide for global development through 2030.[6] Likewise, the SDGs also place tax at the center of development. In 2015, SDG 17 (Strengthen the means of implementation and revitalise the global partnership for sustainable development) made its first target: "Strengthen domestic resource mobilisation, including through international support

1 Matti Konohen & Francine Mestrum, *Introducing the Tax Justice Network: Only the Little People Pay Taxes*, *in* Tax Justice: Putting Global Inequality on the Agenda xiii. (Marti Konohen & Francine Mestrum eds., 2008).

2 *Id.*

3 Matti Konohen & Francine Mestrum, *Introduction, in* Tax Justice: Putting Global Inequality on the Agenda 21 (Marti Konohen & Francine Mestrum eds., 2008).

4 Jeremy Leaman & Attiya Waris, *Why Tax Justice Matters in Global Economic Development, in* Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present 1 (Jeremy Leaman & Attiya Waris eds., 2013).

5 *See* David A. Crocker, *Development Ethics and Globalization,* 30 Philosophical Topics 9, 17 (2002).

6 *See* Thomas Pogge & Krishen Mehta, *The Moral Significance of Tax-Motivated Illicit Financial Outflows, in* Global Tax Fairness 1 (Thomas Pogge & Krishen Mehta eds., 2016). *See also* Xavier Casanovas, Tax Justice, A Global Struggle 8 (Cristianisme I Justícia, 2018).

to developing countries, to improve domestic capacity for tax and other revenue collection."[7] However, given the structural imbalances in the global financial system, even the Organisation for Economic Co-operation and Development (OECD) recognizes that low income countries are placed at a "distinct disadvantage" in making the most of their potential from "external challenges – such as aggressive tax avoidance by multinational enterprises."[8] Thus, "unilateral approaches to tax corporations whose operations span the globe are obsolete, and a multilateral approach is both essential and feasible."[9] Therefore, the question facing the Tax justice movement in Africa is not *whether* to ally itself with other progressive organizations or interests to achieve its policy goals, but with *who*. Perhaps surprisingly, the answer to that question is the Roman Catholic Church in the era of Pope Francis.

Francis is not the first modern pope to level heavy criticism at the inequalities inherent in the capitalistic global financial system,[10] nor is his critique outside of Catholic Social Doctrine or tradition.[11] However, where he differs from his predecessors is the manner in which he is willing to envision "a different kind of economy: one that brings life not death, one that is inclusive and not exclusive, humane and not

7 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goal 17: Partnerships for the Goals (Oct. 21, 2015), *available at* https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-17-partnerships-for-the-goals.html. *See* also OECD Centre for Tax Policy and Administration, *OECD Work on Tax and Development 2018-2019, at* 8–11 (2019).

8 *Id.* at 9.

9 Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals, in* Global Tax Fairness 113 (Thomas Pogge & Krishen Mehta eds., 2016).

10 *See* John Paul II, *Encyclical Letter on the Hundredth Anniversary of Rerum Novarum Centesimus Annus,* §42 (May 1, 1991), *available at* http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

> "Returning now to the initial question: can it perhaps be said that, after the failure of Communism, capitalism is the victorious social system, and that capitalism should be the goal of the countries now making efforts to rebuild their economy and society? Is this the model which ought to be proposed to the countries of the Third World which are searching for the path to true economic and civil progress? The answer is obviously complex. If by 'capitalism' is meant an economic systems which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a 'business economy,' 'market economy' or simply 'free economy.' But if by 'capitalism' is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative."

11 *See* Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church, §335 (Libreria Editrice Vaticana 2004).

dehumanizing, one that cares for the environment and does not despoil it,"[12] and to put the imprimatur of Catholic social teaching behind such an endeavor. He has gone so far as to convoke a conference in Assisi, now for November 2020, on the "Economy of Francesco" – what the Economist dubs "a papal anti-Davos" with the explicit aim of finding more sustainable ways of living that ease the burden on the poor, and with the implicit aim of exploring alternatives to free-market capitalism.[13] In fact, the "Economy of Francesco" should be seen not as a single conference event, but as a coherent body of Catholic Social Doctrine on development and the economy, with its roots in the documents of the Second Vatican Council, through the Medellín and Aparecida conferences, up to today. The Francis pontificate represents a Kairos moment in the Church, an opening for "epochal change," and a reaffirmation and recommitment to the spirit of Vatican II.[14] Francis's approach to social justice and the global financial system reflects his "simple but potent missionary commitment to engage the world as it is, a deeply practical pastoral option to pursue a realistic dialogue with modernity and all its various ideological offspring."[15] This marks a tremendous window of opportunity for the Tax justice movement to engage Catholic Social Teaching as an intellectual and moral partner for structural change in the international financial order. Especially now, as the dust settles from the wreckage that the Coronavirus has unleashed on the world economy, rocking the very foundations upon which capitalism and global finance have rest upon for the last hundred years, a unique liminal space may be opening up for bold action on the part of the Global South to stake their claim to a seat at the table where the New International Financial Order will take shape.[16] Pope Francis has actively encouraged this conversation and has facilitated bringing stakeholders from throughout the Global South together for

12 Francis, Letter Sent by The Holy Father for the Event "Economy of Francesco" (May 1, 2019), http://www.vatican.va/content/francesco/en/letters/2019/documents/papa-francesco_20190501_giovani-imprenditori.html.

13 Henry Tricks, *Pope Francis Hopes to Anoint a New Economic Model,* The Economist (2020), https://theworldin.economist.com/edition/2020/article/17495/pope-francis-hopes-anoint-new-economic-model.

14 Allan Figueroa Deck, Francis, Bishop of Rome: The Gospel for the Third Millennium 3–4 (2016).

15 *Id.* at 15.

16 *See* Dambisa Moyo, *3 Things to Make the World Immediately Better After Covid-19,* N.Y. Times (Jul. 31, 2020), https://www.nytimes.com/2020/07/31/opinion/coronavirus-economy.html.

collaboration through his creation of the Vatican's COVID-19 Commission through the Dicastery for Promoting Integral Human Development on March 30, 2020.[17]

Part I of this paper will set the stage, by describing the international tax system, how it came to be and how it works. A distinction will be made between tax *evasion* and tax *avoidance*, and why the two terms are not interchangeable for purposes of tax justice analysis. Further, I will examine the problem of transfer pricing and Base Erosion and Profit Sharing (BEPS), which serves as the hinge on which multinational corporations operating in the Global South generally, and Africa particularly, successfully avoid payment of tax in those jurisdictions where profit is generated or resources are extracted.

Part II will look at theories of taxation—how, where, and what to tax —which are emerging as a major point of contention among tax practitioners and policymakers, and a possible nexus where the interests of African governments and some richer countries may align. Part III will examine the Economy of Francesco, looking at the intersection of Tax justice with Catholic Social Teaching on the economy, highlighting that any discussion of tax justice in the post-pandemic world will have to take account of and deal with corruption among local elites. Part IV will propose a roadmap for African Tax Justice, providing ideas for policy and advocacy based on an appraisal of ways to leverage the continent's strengths in the international fora where key decisions are made.

I. SETTING THE STAGE: THE INTERNATIONAL TAX SYSTEM

A. What is Taxation? A Primer on an Ethics of Taxation

Taxation, for purposes of this paper, refers to the means by which governments finance their expenditures by imposing charges on individuals and corporate entities within their jurisdiction. A corporation is a legal entity, a fictive "person" under the law separate from its shareholders, created by statute, and for tax purposes is a separate taxpayer from its shareholders. For tax purposes then, a corporation is subject to tax in its own capacity for corporate-level events, specifically profits and capital gains. Two points are key for this discussion. First, a corporation is recognized as a person under the law – it can hold property in its own name, as well as sue and be sued in court. Second, and most importantly, a corporation and its shareholders are separate and

17 *See* Junno Arocho Esteves, Pope creates coronavirus commission to respond to pandemic, Crux (Apr. 16, 2020), https://cruxnow.com/vatican/2020/04/pope-creates-coronavirus-commission-to-respond-to-pandemic/.

distinct taxpayers – while a shareholder is certainly interested in what the corporation pays, that shareholder is generally not individually liable for the corporation's tax.

At the outset, one of the key issues facing a sophisticated discussion of ethics and taxation is that philosophers and lawyers are speaking two different languages, and the legal academy, especially, lacks the background to engage the philosophical arguments.[18] Philosophers too, have shown little interest in discussing the philosophy of taxation.[19] This lack of a broad literature discussing tax policy through a hermeneutic of philosophy opens a door for those with the training to provide an interdisciplinary approach to questions of ethics related to Tax justice.[20] As to issues of global distributive justice, the legal academy has noticed that political philosophers have insufficiently explored questions of the global allocation of tax revenue on development.[21] The question for tax scholars is how to "…do that work without feeling that they are simply second-rate philosophers, political scientists, or the like, as tax scholars have more generally feared with regard to their interdisciplinary ventures?"[22]

According to Daniel Halliday, lecturer in philosophy at the University of Melbourne, "[t]he fact that social scientists frequently bring considerations like inequality and harm into their work on tax reflects the fact that the domain of taxation,

18 *See* Diane Ring, *Critical Issues in Comparative & International Taxation: The Promise of International Tax Scholarship and its Implications for Research Design, Theory, and Methodology*, 55 St. Louis L.J. 307, 307 (2010) ("A review of modern international tax scholarship reveals that as the field has matured, international tax scholars have increasingly turned to other disciplines, especially social sciences, for their insights, ideas, and research to improve understanding of international tax policy. But this intersection with the social sciences [and the humanities] forces us to confront some distinct differences between the approach of the legal academy to research and scholarship and the approaches based in other fields. Many of the disciplines upon which international tax scholars rely explicitly discuss and examine questions of research, design, methodology, and analysis that are relatively foreign to the international tax scholar.").

19 *See* Daniel Halliday, *Justice and Taxation*, 8 Philosophy Compass 1111 (2013) ("[O]ne would expect moral and political philosophers to have an important contribution to make to the study of taxation. One of the most striking features of the philosophical literature on taxation, however, is how fragmentary it is. Taxation has not, at any rate, generated a philosophical debate centered around two or three general theories of how to make tax policy fit the requirements of justice. In this way, taxation contrasts quite sharply with other morally significant topics to do with state coercion, such as punishment. One can easily find book-length pieces of work defending the view that punishment has some very specific moral function. But philosophical work on tax is not like this at all.").

20 Ring, *supra* note 18, at 308 ("The importance of non-legal disciplines to the development of international tax policy, combined with the perceived inaccessibility of international tax to those working outside the field, renders international tax distinctive – if not unique…International tax scholars need to look beyond the traditional bounds of their field, but they cannot abdicate their territory to other disciplines.").

21 *See id.* at 323.

22 *See id.* at 324.

although fragmentary, is a *thoroughly moralised* territory.[23] Nevertheless, much of the "…often emotionally charged rhetoric tends to ignore the foundational question of *why*" multinational corporations should be subject to local taxation and have an ethical duty to pay tax levied by the legitimate authorities in the locations where they operate.[24] Tax justice is also a thoroughly moralized territory, pointedly asking why the international tax structure is the way that it is. Multinational corporations (MNCs) wield a tremendous amount of economic power in the developing world and the interests of their shareholders in maximizing profit and return on investment are often at odds with those of host governments.[25] While international tax, in general, is a major research topic in business, economics, law, history, sociology and other fields, remarkably little work has been interdisciplinary, despite cutting across so many disciplinary boundaries.[26] As Diane Ring notes, "[t]o maximize the relevance of their work, international tax scholars must embrace the expanded agenda and methodologies available to them without surrendering the distinctive sensitivity to the legal system and the real world that their own legal training has afforded them."[27]

B. How the International Tax System Came to Be and How it Works

Accepting Ring's challenge, maximizing the relevance of our work as international tax scholars calls us to understand how that system of taxation came to be, and our efficacy as critics of the ethics of that system require us to understand the construction of the pillars which support it.[28] The international tax system is a vestige of the post-World War I global order, the result of negotiations between the victorious powers that also led to the creation of the League of Nations. Although there had been a number of tax cooperation agreements among states prior to the twentieth century, the

23 *See* Halliday, *supra* note 19, at 1120 (italics added) ("Philosophers are well-placed to make contributions to new and emerging areas of inquiry and not [just] to topics that have the benefit of a well-defined philosophical literature.").

24 *See* David Elkins, *The Myth of Corporate Tax Residence,* 9 Colum. J. Tax L. 5, 8 (2017) (italics added).

25 John Christensen, *Taxing Transnational Corporations, in* Tax Justice: Putting Global Inequality on the Agenda 107 (Marti Konohen & Francine Mestrum eds., 2008) ("The past half-century has seen a massive shift of economic and political power from the state to companies. Transnational corporations (TNCs) bestride the globalized markets, wielding huge powers at national and international levels. The largest hundred corporations control 20 per cent of global foreign direct investment, and approximately 60 per cent of world trade occurs between subsidiaries of TNCs.").

26 Martin Zagler, *Introduction: International Tax Coordination – An Interdisciplinary Perspective on Virtues and Pitfalls, in* International Tax Coordination – An Interdisciplinary Perspective on Virtues and Pitfalls, 1, 5 (Martin Zagler ed., 2010).

27 Ring, *supra* note 18, at 329.

28 *Id.*

years immediately following World War I mark a watershed in the integration of the global economy that increased political pressure for a certain degree of international cooperation on tax issues.[29] Specifically, the increasing rates of direct taxation by states, particularly income taxes, as well as the exploding volume of international business meant that the problem of double taxation was becoming a source of tension in an ever more integrated global economy.[30]

Underlying the system of international taxation is the conundrum of double taxation, which according to Sir Cornelius Gregg, onetime Chairman of the British Board of Inland Revenue, "arises where you have the person in one country and his wealth in another, and *both* countries levy a toll on the wealth so that it has to bear two bites."[31] In the international arena the problem is the assertion of jurisdiction by more than one country to tax the *same* item of income.[32] Double taxation over this same item of income occurs given the fact that most countries exercise jurisdiction to tax on two separate bases: 1) as being the source of the income generated and 2) as the location of the residence of the recipient of the item of income.[33]

In short, what makes taxation *international*, and therefore distinctive vis-à-vis domestic taxation, is this relationship between source and residence country.[34] Charles Kingston offers insight into how "[s]ource and residence taxation interact. Source country A, for example, may grant income tax exemptions to attract investment from residence country B. The attraction, however, diminishes to the extent that B itself taxes the exempted income; and such interaction gives international taxation a coherence. In a coherent system, decisions connect: in international taxation, what

29 *See generally* Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action,* 31 Oxford J. Legal Stud. 679–707 (2011).

30 *See* David H. Rosenbloom & Stanley I. Langbein*, United States Tax Treaty Policy: An Overview,* 19 Colum. J. Transnat'l L. 359, 361 (1981).

31 Cornelius J. Gregg, *Double Taxation,* 33 Transactions of the Grotius Soc'y 77 (1947) (italics added).

32 Donald R. Whittaker, *An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy,* 8 N.C.J. Int'l L. & Com. Reg. 39, 40 (1982).

33 *See id.* at 40 ("A third jurisdictional base, exercised in the international arena primarily by the United States, is assertion of the right to tax because of the citizenship of the individual."). The United States taxes the worldwide income of "United States Persons" defined as citizens or residents of the United States as well as domestic corporations and partnerships. *See* 26 U.S.C. § 7701(a) (30).

34 *See* Charles I. Kingson, *The Coherence of International Taxation,* 81 Colum. L. Rev. 1151, 1152 (1981) ("This Article discusses the taxation of international income—income earned in one country but owned by a resident of another. The first country, called the source country, taxes because the income is earned there. The second, called the residence country, taxes because the owner lives or is managed there.").

one country decides will affect another."[35] Returning to Sir Cornelius and his "two bites" metaphor, "With low rates of tax two tax bites would not matter very much, but with high rates they might leave very little. It is then that the right of each country to bite and the size of bite becomes a vital issue."[36] Therefore double taxation becomes a problem when both the source and the residence country are levying tax at relatively high rates on the same income – precisely the problem that arose among the major global trading partners in the years during and following World War I.[37]

In the absence of a World Tax Organization, which would establish global rules for where and how an item of income is taxed, the problem of double taxation is addressed through bilateral tax treaties, which "tie their signatories into restrictions on if, how, and how much they can tax multinational companies and other cross-border economic activity, ostensibly to eliminate the barriers to such activity caused when countries' tax systems overlap."[38] Therefore, the "original and sole purpose" of the global tax regime as it developed in the years after 1918 is to mitigate international double taxation and therefore facilitate and streamline global trade and investment.[39] Despite the fact that the U.S. Senate rejected the Versailles Treaty and therefore was never a member of the League of Nations, the strength of the dollar ensured that American capital was the

35 *Id.* at 1153. *See also* Whittaker, *supra* note 32, at 41.

> "Generally, a country will assert source jurisdiction over items of income which arise within the country. Such source jurisdiction is generally of either of two types when asserted upon a non-resident's income. In one situation, the non-resident individual or entity is present in the tax jurisdiction in a significant and meaningful way-the non-resident may be engaged in business activity in the jurisdiction or performing personal services there. This type of source jurisdiction is a form of in personam jurisdiction which is asserted because of participation in the source country's economy. The assertion of jurisdiction reflects a cost- benefit principle and seems to be a fundamentally fair application of the power of taxation. In the second situation, the non-resident taxpayer has none of the personal connections with the taxing country as he does above, but still receives a specific item of income through the economy of the source country. The most common items of income in such a case would be royalties, interest or dividends. The source country would then assert in rem jurisdiction over the items of income and impose a tax regardless of the residency status of the recipient. This assertion of jurisdiction is more difficult to justify because there is not a clear-cut cost-benefit relationship: Rather, the justification of taxation seems to be that the distributing entity, the borrower of money, the corporation, or the licensee, were beneficiaries of government services and the income derived through them should thus be taxed."

36 Gregg, *supra* note 31, at 77.

37 *Id.* at 78.

38 Martin Hearson, *Measuring Tax Treaty Negotiation Outcomes: the ActionAid Tax Treaty Dataset* 7 (International Centre for Tax and Development, Working Paper No. 47, 2016).

39 Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance,* 18 Rev. Int'l Pol. Econ. 205 (May 2011).

main sustainer of the international economic system during the 1920s.[40] Therefore, despite not being a member of the League, the revitalized postwar global economy came to hinge on a relationship of financial interdependence between the United States and Europe.[41] As a result, despite having abstained from official League membership, a palpable American presence on the international stage, particularly on economic matters, was part of the intellectual and diplomatic climate of the 1920s.[42] This was the case when a 1923 report commissioned by the League's Financial Committee to address the problem of double taxation included a representative from the United States among its four members.[43]

Following the 1923 report, an additional report was generated by a Committee of Technical Experts, which as its name implies, delved into the more technical aspects of the merits of taxation based on either source or domicile, and was the first to systematically address the problem of tax evasion.[44] Finally, in 1927, the Technical Experts produced the first international draft model treaties to provide a framework for states to negotiate bilateral tax agreements.[45] These were based upon a compromise, as debated by the Technical Experts, between conflicts between capital importing and exporting countries, with the former favoring taxation based on the source principle and the latter the residence principle, since the respective allocation would yield the largest share of the international tax base to each.[46] The resulting solution, generally speaking, is that "…the primary (or exclusive) right to tax active business income is granted to the source country; the residence country, by contrast, has the primary (or exclusive) right to tax passive income, i.e., interest, dividends, or royalties."[47]

Most existing bilateral tax treaties today which are concluded on the basis of a model, such as the OECD Model Tax Convention or the United Nations Model, are the direct descendants of this first model treaty drafted by the League of Nations.[48]

40 Akira Iriye, The New Cambridge History of American Foreign Relations, Volume 3: The Globalizing of America, 1913–1945, 92 (2013).

41 *Id.* at 93.

42 *Id.* at 107–08.

43 *See* Rosenbloom & Langbein, *supra* note 30, at 361–62.

44 *Id.* at 364–65.

45 *Id.* at 365.

46 *See* Rixen, *supra* note 39, at 205.

47 *Id.* at 205–06.

48 OECD, *Fundamental Principles of Taxation*, *in* Addressing the Tax Challenges of the Digital Economy 36 (OECD Publishing, 2014). *See also* Veronika Daurer & Richard Krever, *Choosing between the UN and OECD Tax Policy Models: An African Case Study*, 22 Afr. J. Int'l & Comp. L. 1, 2 (2014) ("Country representatives commonly draw on two model treaties prepared by the OECD and UN respectively when negotiating tax treaties. The OECD treaty shifts more

Thus, "while there can be substantial variations between one tax treaty and another, double tax treaties generally follow a relatively uniform structure, which can be viewed as a list of provisions performing separate and distinct functions: (i) articles dealing with the scope and application of the tax treaty, (ii) articles addressing the conflict of taxing jurisdiction, (iii) articles providing for double taxation relief, (iv) articles concerned with the prevention of tax avoidance and fiscal evasion, and (v) articles addressing miscellaneous matters (e.g. administrative assistance)."[49]

In cases where a bilateral tax treaty gives priority to the taxing rights of the source jurisdiction, the state of residence or domicile is then required to provide relief from double taxation, usually in the form of exemptions and credits.[50] It bears repeating that the model tax conventions are simply that, models. From the very beginning, states were free to negotiate more advantageous deals depending on their economic advantage vis-à-vis their respective trading partner. At their heart, what the model conventions, and the resulting bilateral treaties they are based upon, achieve is "no more (nor less) than [to] disentangl[e] the transnational tax base and assign it to different jurisdictions."[51] Once the jurisdiction to tax has been established, states are free to apply their national laws to their respective share as they see fit; the international tax regime "merely regulates the *interfaces* of autonomous national tax systems and, in consequence, governments retain almost unlimited sovereignty over their share of the international tax base."[52]

In the absence of a bilateral tax treaty, double taxation remains a problem between two tax jurisdictions irrespective of whether the source or residence principles is applied. The extent to which this is mitigated or exacerbated rests on the shoulders of the national taxing authority. However, the (relatively) unlimited sovereignty of governments to tax as they see fit within their jurisdiction means that there are openings for states to structure their tax regimes in such a manner as to maximize their tax base

taxing powers to capital exporting countries while the UN treaty reserves more taxing powers for capital importing countries."). States are also free to draft their own model convention. *See* Allison Christians & Alexander Ezenagu, *Kill-Switches in the U.S. Model Tax Treaty,* 41 Brook. J. Int'l L. 1043, 1044–45 (2016) ("The United States, however, has long had its own Model Income Tax Convention, the newest version of which is formally referred to as the United States Model Income Tax Convention of February 17, 2016 ["U.S. Model"]… The U.S. Model is structurally very similar to the OECD and U.N. Models, yet stands alone as a conveyer of certain tax policy standards specific to the United States…").

49 OECD, *Fundamental Principles of Taxation, in* Addressing the Tax Challenges of the Digital Economy 36 (OECD Publishing, 2014).

50 *Id.* at 40.

51 Rixen, *supra* note 39, at 206.

52 *Id.*

in the absence of a bilateral treaty which might say otherwise – a point which we will return to later in the paper.

C. Tax Evasion v. Tax Avoidance

In the popular imagination, tax evasion and tax avoidance are interchangeable terms which refer to the concept of strategic tax behaviors, or tax planning strategies, "designed solely to minimize tax obligations, the legality of which is questionable."[53] However, for purposes of a tax justice analysis it is key to note that the terms are *not* fungible and refer to distinct behaviors with different ethical implications and potential legal consequences. Tax evasion can be defined as *intentionally illegal* behaviors, in direct violation of tax laws, designed to escape payment of tax.[54] Tax avoidance strategies, on the other hand, can be defined as those "illegitimate (but not necessarily illegal) behaviors reduced at reducing tax liability" which while they do not violate the letter of the law certainly violate its spirit.[55] Licit tax savings, or legitimate tax planning, serve as a third category of strategic tax behavior that employs commonly accepted tax behaviors to reduce the tax burden, but neither contradicts the letter nor the spirit of the law.[56]

First and foremost, it should be stressed that MNCs are scrupulous in their adherence to the tax laws; their veritable army of lawyers, accountants, and bankers is employed to ensure that they remain on this side of the law in any given jurisdiction.[57] Their scrupulosity is part and parcel of the complexity of the tax system itself: different national tax codes layered with regulations and opinions generated to counter aggressive avoidance strategies, coupled with bilateral treaties and the minutiae of

53 Reuven Avi-Yonah, Omri Marian & Nicola Sartori, Global Perspectives on Income Taxation Law 101 (2011).

54 *Id.*

55 *Id.*

56 *See id.* at 102 ("This tri-partition is not generally accepted by economists. Professor [Joel] Slemrod, for example, splits strategic tax behaviors into two categories: tax avoidance when the behaviors are legal and tax evasion when they are not.") (citations omitted).

57 Christensen, *supra* note 25, at 107–08.

> "The focus within boardrooms has shifted from product innovation to financial engineering and novel tax planning – a euphemism for aggressive tax avoidance. Battalions of accountants, lawyers and bankers devise complex structures to exploit loopholes in domestic tax legislations, while advancing the idea that tax avoidance is crucial to promoting corporate *efficiency.* The outcome has been the creation of a business culture in which distributions to society through tax payments are regarded as a corporate cost, to be minimized, and tax avoidance is seen as a major profit centre. Any company that chooses to act in an ethical way by paying taxes on profits when and where they are due is seen as inefficient and therefore ripe for takeover by a private equity buyer – almost certainly controlled through an offshore financial centre."

modern accounting practice.[58] This "legalized nature" of tax avoidance encourages the formation of industries of lobbyists and corporate tax specialists which ensures not only that the rules are complex, but that they are complied with in the letter, if not the spirit.[59]

However, the scrupulosity of MNC's in adhering to the letter of the law should not be interpreted as giving their avoidance strategies a moral imprimatur vis-à-vis those who are engaging in outright criminal tax evasion. It is a thin line between tax avoidance and evasion in many cases and the tendency in the West to avoid seeing tax avoidance as part of a corrupt nexus with tax evasion and money laundering means that attention is drawn away from passing moral judgment on questionable practices by MNCs.[60] The legality of avoidance strategies, as well as their characterization as such by the lawyers, accountants, and bankers who devise them, should not be accepted as evidence of their moral neutrality without question.

From a tax justice standpoint, there are conflicting interests between the public and an MNC's shareholders. While the public's concern is whether or not a firm pays its share of taxes, shareholders are interested in reducing taxes to increase shareholder value. Therefore, "[i]f a firm avoids taxes, it increases profitability, but the reduction in taxes may affect support for governmental infrastructure and/or social programs, hence the firm may be categorized as socially irresponsible."[61] This conundrum plays out in the literature via corporate attempts to draw a line between licit and illicit activities based on the business purpose doctrine.[62] Activities that have no business purpose and are aimed primarily, if not exclusively, at avoiding tax should be considered illicit and probably illegal.[63] The opposite holds true for those transactions that are motivated by real business considerations and have important, albeit secondary, tax advantages.[64]

58 Grahame R. Dowling, *The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?,* 124 J. Bus. Ethics 176 (2014) .

59 *Id.*

60 *See* Sara A. Dillon, *Global Corruption: International Law's Counterrevolution,* 45 N.C.J. Int'l L. 111, 113 (2020).

61 Fariz Huseynov & Bonnie K. Klamm, *Tax Avoidance, Tax Management and Corporate Social Responsibility,* 18 J. Corp. Fin. 807 (2012).

62 Avi-Yonah, *supra* note 53, at 102. *See generally* Gregory v. Helvering, 293 U.S. 464 (1935) (The business purpose doctrine is a tax related doctrine stating that a transaction must serve a bona fide business purpose to qualify for beneficial tax treatment. If the transaction has no substantial business purpose other than the avoidance or reduction of tax, the tax law will disregard the transaction and deny the benefit).

63 Avi-Yonah, *supra* note 53, at 102.

64 *Id.*

Tax justice, therefore, is concerned with the ways in which MNCs exploit the gaps in national tax and regulatory schemes both for purposes of tax avoidance and to avoid the disclosure of information regarding beneficial ownership of assets to taxing authorities.[65] MNCs skillfully navigate global tax rules, as they currently exist, to guarantee that they pay as little tax as possible, taking full advantage of national tax laws, regulations, and accounting principles to report profits and losses in those jurisdictions most advantageous to their bottom line. Granted, these corporations will s*tretch* the law as far as possible, but will put in considerable effort to avoid the consequences of violating, or evading, the tax law.

There is a further distinction between tax avoidance and tax *competition*, which is competition between governments to attract investment.[66] Tax competition is a no less important issue in a broader discussion of tax justice, but moves the focus of analysis from the corporate actors and their aggressive tax planning, to national governments and matters of taxing policy. If anything, including tax competition in the analysis yields a more difficult calculus with an additional, potentially unpredictable, variable.

D. BEPS and the Problem of Transfer Pricing

How does tax avoidance work in practice? How are MNCs able to so skillfully, and successfully, manipulate the existing legal framework of taxation to their sole advantage? The answer lies in transfer pricing and in a practice known as Base Erosion and Profit Sharing (BEPS), which has the attention of taxing authorities worldwide.

Any discussion of taxation will invariably incorporate a quantitative aspect in addition to any theoretical one as to who or what to tax. Therefore, we need a common framework so that we are not discussing numbers in the abstract, but comparing like terms in a consistent manner. That is the role that financial accounting plays in that it uses consensual terms to "present and explain the actions and behavior of commercial

65 Christensen, *supra* note 25, at 109.

66 *See* Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory,* 71 Tax L. Rev. 311, 312–313 (2018).

> "[T]he distinction between tax avoidance and tax competition is much less clear than is generally understood. Tax competition is competition among governments, while tax avoidance consists of efforts by taxpayers to avoid the taxes imposed by governments. However, tax avoidance today relies on tax competition since most international tax avoidance transactions are only valuable to taxpayers if the country on the other side of the transactions provides a low rate or preferential treatment. Countries are complicit in tax avoidance schemes - and taxpayers (often multinational corporations) are complicit in tax competition. Recent efforts to curtail tax avoidance therefore can be described as efforts to limit tax competition."

entities" in a coherent and efficient manner.[67] It does so by using agreed-upon terms that "embody economic and financial meaning."[68] The lack of global convergence between the accounting standards used between taxing jurisdictions results in a situation where what is reported on a multinational corporation's balance sheet may markedly differ between the United States, China, and the European Union. Not only does this result in a lack of transparency, but it inhibits the development of policy if the books do not match across jurisdictions and we wind up trying to compare financial apples and oranges.

This lack of accounting convergence across jurisdictions contributes to BEPS, which are "tax-avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations."[69] The "beating heart of BEPS planning – the *sine qua non* of the transactions that triggered the universal interest in BEPS" is aggressive transfer pricing.[70] Corporations exploit transfer pricing to create tax benefits by reporting profits to entities in tax havens that do not correspond with actual activities in those entities.[71] Transfer price is the price at which divisions of a company transact with each other, i.e., the price for labor, goods, and services across a vertically integrated enterprise. When related companies buy or sell commodities, services, or assets internally, a transfer price must be charged in order to allocate profits.[72] In principle, transfer pricing is supposed to be measured on the basis of an arms-length transaction: the goods and services transferred internally must be exchanged at the same price as would be charged to an unrelated firm.[73] However, given the lack of transparency and convergence between accounting regimes, multinational corporations are able to manipulate transfer pricing to avoid paying tax on trillions of dollars of foreign profit.[74] They do this by charging, and reporting, artificially low or inflated prices on the goods and services transferred to report minimal profits or excessive losses in high tax jurisdictions, and the lion's share of profit in tax havens – where *none* of the tangible taxable activity actually took place. For example, the bulk of the profit from extractive mining activities in South Africa, or cocoa production in

67 *See* Israel Klein, *A Change in Accounting, A Change in Law,* 42 Del. J. Corp. L. 51, 55 (2017).

68 *Id.* at 5–56.

69 *See* Jane Gravelle, Cong. Research Serv., R44900, Base Erosion and Profit Sharing (BEPS): OECD Tax Proposals 1 (2017) (citing http://www.oecd.org/tax/beps/).

70 *See* Yariv Brauner, *What the BEPS?*, 16 Fla. Tax Rev. 55, 95 (2014).

71 *See* Gregory Pun, *Base Erosion and Profit Shifting: How Corporations Use Transfer Pricing to Avoid Taxation,* 40 B.C. Int'l & Comp. L. Rev. 287, 288 (2017).

72 *See* Gravelle, *supra* note 69, at 13.

73 *Id.*

74 *See* Brauner, *supra* note 70, at 97.

the Ivory Coast, is manipulated through transfer pricing to be reported in a tax haven such as Jersey, Luxembourg, or the Cayman Islands. This results in a Tax justice issue since jurisdictions in the developing world generally lack the administrative resources to allow their tax authorities to trace the economic data and combat aggressive corporate BEPS schemes.[75]

However, despite lacking the internal resources to combat aggressive BEPS schemes on their own, developing countries stand to benefit from the fact that the manipulation of transfer pricing has the attention of the G-20 countries as they try to repatriate more tax revenue into their own national coffers and away from tax havens.[76] In October 2015, the OECD published a final list of 15 BEPS action items, the "BEPS Project," which was endorsed by the G-20 Finance Ministers in February 2016.[77] While most of the BEPS Project Action Items address areas of substantive law – rules and practices to reduce erosion of a country's tax base – the OECD realized that substantive rules alone would be insufficient to foster an efficient tax system.[78] Without increased transparency and disclosure in reporting requirements, substantive changes to tax codes would be stymied by aggressive transfer pricing.[79] Therefore, in Action 13, the OECD recommended a commitment by participating jurisdictions to "country-by-country" (CbC) reporting for multinational corporations.[80] Broadly speaking, what makes CbC reporting an improvement over current methods of financial disclosure, at least from the perspective of a taxing jurisdiction, is that it requires an enterprise to disclose the name of each country where it operates, as well as its subsidiaries and affiliates therein, the performance of each within that country, the tax assessed and paid in that country, and the cost and book value of its assets and liabilities in that country.[81] This is a marked improvement from a system which only mandates *entity-*

75 *See* Diane Ring, *Developing Countries in an Age of Transparency and Disclosure,* 2016 B.Y.U.L. Rev. 1767, 1796 (2016).

76 *See* Itai Grinberg, *The New International Tax Diplomacy*, 104 Geo. L.J. 1137, 1145 (2016).

77 *See* Gravelle, *supra* note 69, at 1.

78 *See* Ring, *supra* note 75, at 1770.

79 *Id.*

80 *See* Gravelle, *supra* note 69, at 22–23 ("This action item provides for a standardized approach to providing information to document multinationals' activities. The first is the provision of a master file that contains information on operations and transfer prices and is available to all tax administrations. The second is detailed transfer pricing information in a local file for each country that identifies related-party transactions and transfer pricing analyses. The third is a CbC report that will provide, for each jurisdiction, information on revenue, profit, taxes paid, employees, capital, retained earnings, and tangible assets. It also requires information on the business activities of each entity in the jurisdiction.").

81 *See* Brauner, s*upra* note 70, at 103–06.

by-entity reporting. Reporting by entity, as opposed to country, gives a company much greater space in which to mask tax avoidance and evasion through transfer pricing, as well as to hide the true extent of its operations and holdings within a jurisdiction.

Diane Ring notes several risks and limitations with the implementation of Action 13 from the perspective of the developing country.[82] One of the most interesting, from the perspective of development theory generally, is that as a country participates in the Action 13 plan and receives valuable information from the multinationals, "they are effectively stepping up their international tax enforcement efforts."[83] While that, in and of itself, is not problematic, the risk is that as local tax audit staff gain further experience in international tax issues, and multinationals and their accounting firms experience increased interaction with local authorities, those same multinationals may be inclined to hire away local tax personnel as their skill set improves and they become more attractive as candidates.[84] While that is not a reason not to participate in Action 13, it does highlight that a holistic, rather than piecemeal, approach to improving the quality and capacity of local tax authorities in the developing world is called for.

Transfer pricing is the quantitative gear at the center of a larger discussion of tax justice. PricewaterhouseCoopers itself acknowledges that if transfer pricing issues were properly dealt with, developing countries could collect over forty percent more in tax from multinational corporations than they already do.[85] However, properly addressing transfer pricing also calls for a holistic approach, particularly as financial accounting standards are concerned. For example, the U.S. Securities and Exchange Commission (SEC) largely requires filings to be in accord with Generally Accepted Accounting Principles (GAAP), while most other reporting jurisdictions of the world, including the European Union, use International Financial Reporting Standards (IFRS), or some variant thereof. The difference between the two is not trivial and the risk, even with CbC reporting, is that jurisdictions are still comparing financial apples to financial oranges – as mentioned above.

As with other areas in regard to the ethics of taxation, this too has flown under the academic radar. Israel Klein of Harvard Law School notes that the effect that financial accounting has had on both the U.S. legal system and legal systems worldwide has gone largely unnoticed by scholars.[86] Most of the literature has focused on the impact

82 *See generally* Ring, *supra* note 75, at 1812–25.
83 *See id*. at 1816.
84 *See id.*
85 *See* Pun, *supra* note 71, at 305–06.
86 *See* Klein, *supra* note 67, at 53.

of accounting standards and financial reporting on capital markets.[87] Klein suggests that the legal system endows the financial accounting system with a "quasi-legislative" capacity that allows changes made to the accounting parameters to have exogenous effects on the legal regimes that use those parameters.[88] If the relevant standards are set in Washington, New York, and London, it merits critique that those in the developing world lack a seat at that table where accounting convergence is being discussed.

The BEPS Project highlights a liminal space between the developed and the developing world in regard to a quantitative issue at the heart of Tax Justice: how are countries made privy to the financial data, already at the disposal of multinational corporations, of the true extent of those companies' holdings and activities within their borders? The weight and influence of the OECD countries may move the scale towards CbC reporting, but that alone will not be enough to counter the weight of other structural barriers to ensuring that jurisdictions in the Global South receive their fair share of tax assessed on activities taking place within their borders. As Diane Ring notes, "if the transparency and disclosure trend proves successful and enables participating jurisdictions to more effectively administer their tax systems, the failure to incorporate developing countries into the process could widen the gap between developed and developing countries, with notable distributional consequences."[89] Those distributional consequences would only serve to exacerbate the injustices already manifest in the global international tax regime

E. Setting the Rules: The OECD

Having established how the international tax system works, what interests it protects, and the fissures in the system which permit MNCs to exploit transfer pricing through BEPS to avoid tax on a global scale, who then sets the rules and where does a state actor need to be in order to effect changes in policy? The answer is disarmingly simple: the OECD.

The Organisation for Economic Co-operation and Development (OECD) is one of the institutions that can trace its lineage back to the family of international organizations that was born immediately after the Second World War, including the United Nations, the World Bank, the International Monetary Fund, NATO, and the

87 *Id.*
88 *Id.* at 55.
89 *See* Ring, *supra* note 75, at 1835.

Council of Europe.[90] It grew directly out of the Organization for European Economic Co-operation (OEEC) which was established in 1948 to oversee the Marshall Plan.[91] In its present form, the OECD may be traced back to a 1959 conference in Paris attended by the French and U.S. Presidents, the West German Chancellor, and the British Prime Minister, where it was proposed to reconstitute the OEEC to better focus on international development and coordination of trade policies, an effort which came to fruition with the signing of the OECD convention in December 1960.[92] Twenty countries signed the original OECD convention in 1960, with an additional sixteen becoming members since that date.[93] Neither China, nor India, nor any country in Africa, are members of the OECD.

The Committee on Fiscal Affairs, which is the main OECD body which deals with international tax reform efforts, functions effectively as an informal World Tax Organization, but its membership is limited to OECD members.[94] The Committee on Fiscal Affairs took on responsibility for consolidating pre-OECD versions of the model conventions and engages in technical elaboration and adaptation of the model, which serves as the basis for essentially all of the more than 2,000 bilateral tax treaties connecting about 180 countries.[95] The OECD Model Convention "represents the general consensus on international taxation; its principles, norms and rules also effectively constrain the policies that countries can pursue unilaterally vis-à-vis foreign tax revenues."[96] Therefore, having a seat at the OECD table is critical to having a voice not only on international tax policy generally, but more specifically, on the language of the Model Convention which most OECD members will use as a template in bilateral treaty negotiations.

However, membership in the OECD is a contentious issue, and has been since the foundation of the organization.[97] For most of its history, the OECD maintained an exclusive "club" structure which most of the countries of the world were not welcome

90 Timothy Bainbridge, *A Brief History of the OECD,* 221/222 The OECD Observer 111 (2000).

91 *Id.* at 112.

92 *Id.*

93 OECD, *List of OECD Member Countries – Ratification of the Convention on the OECD,* http://www.oecd.org/about/document/list-oecd-member-countries.htm.

94 *See generally* Arthur J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 Yale J. L. & Tech. 136 (2006).

95 Rixen, *supra* note 39, at 207.

96 *Id. (citing* Avi-Yonah, R.S., International Tax as International Law: An Analysis of the International Tax Regime (2016)).

97 *See Accession to the Organisation, OECD,* http://www.oecd.org/legal/accession-process.htm ("Becoming a Member of the OECD is not a simple formality but is the result of a rigourous review process. The OECD governing body [the Council], which comprises all the Members of

to join on account of lack of development and economic inferiority.[98] During the Cold War it was often referred to as the "economic counterpart" of NATO and often assumed confrontational postures toward the Soviet bloc.[99] The end of the Cold War has seen the OECD enter into accession discussions with a number of states, partially as an attempt to address the problem that economic governance on a global scale is exceedingly difficult if the major economic powers are not involved in your deliberations.[100] Notwithstanding the decline of its more generalized voice as a global economic voice, the OECD has pursued an active strategy to remain the focal point of the global regime complex for taxation, even expanding into new areas such as the nexus between taxation and development.[101] Therefore, as the global focal point of international tax policy, the OECD's restrictive and cumbersome membership policies are increasingly problematic.

II. A THEORY OF TAX JUSTICE: FRAMING THE DEBATE

After nearly a hundred years, the question of *where* to tax has reemerged as a point of contention in the international financial order, much of it driven by the digital economy and the ease by which products and services are bought and sold across borders in a way which was unimaginable a generation ago.[102] Source and residence as a basis for taxation were easy enough categories when the number of truly multinational corporations was few, and those same MNCs had not yet developed the transfer pricing schemes at the heart of the current tax avoidance paradigm, and telecommunications

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the Organisation, decides whether to open accession discussions with a country and fixes the terms, conditions and process for accession.").

98 Judith Clifton & Daniel Díaz-Fuentes, *From 'Club of the Rich' to "Globalisation à la carte'? Evaluating Reform at the OECD,* 2 Global Policy 303 (2011).

99 *Id.*

100 *Id.* at 307. *See also* Dries Lesage & Thijs Van de Graaf, *Thriving in Complexity? The OECD System's Role in Energy and Taxation,* 19 Global Governance 83 (2013).

> "Today it is fashionable to portray the Organisation for Economic Cooperation and Development (OECD) as an agency in crisis. There is no denying that, in a world where the geopolitical point of gravity is gradually shifting to the East, the OECD's exclusive Western membership looks increasingly anachronistic. Without the emerging powers aboard, the Paris based agency is losing centrality and, indeed relevance in global governance. At the same time, the OECD's role in global governance is also eroded by the rapid proliferation of institutions with partially overlapping mandates. The emergence of the Group of 20 (G-20) as the apex forum in global economic governance was definitely a game changer in this regard, to which the OECD and the rest of the international architecture are still adjusting at different speeds."

101 *Id.* at 90.

102 *See* Avi-Yonah, *supra* note 9, at 116–18.

had not yet advanced to the point to permit those MNCs to achieve BEPS. The digital economy, the ease by which goods and services are bought and sold across borders with a speed unimaginable a generation ago, places tremendous pressure in an aging tax paradigm which was not designed to accommodate the internet.

Digital platforms, i.e., those websites, apps, and applications which serve as the background of the modern economy, challenge the underlying principles of global tax in that they render the concept of physical presence in a market increasingly irrelevant.[103] The pressures they put on states to recover tax on the sizeable profits generated within their borders has pushed states, particularly OECD members, to envision new ways of taxing corporate income.[104]Beginning with France's Digital Services Tax in 2019, the United Kingdom, Spain, Italy, and the European Union generally, have tabled similar legislation.[105] The strain placed on the international tax order by the digital economy not only increases the pressure for a coordinated response among taxing jurisdictions, but opens up an intellectual space in which, to potentially rethink the pillars of the international tax order – a development far from irrelevant to an ethics of tax justice.

Likewise, the rise of China presents a tremendous challenge to the global international tax regime established and maintained by the OECD states.[106] China's strategic interests in this area are being shaped by its transformation from those of a capital importer and low value-added manufacturer to a capital exporter with high value-added industries and a large consumer market, belying the traditional dividing lines between capital-exporting OECD member states and capital-importing developing countries.[107] While it recognizes and has worked in collaboration with the OECD on its international tax agenda, most recently in regard to BEPS and tax transparency, China participates as an outside observer.[108] In the relatively short time since 1978 that China has been open to foreign investment, the Chinese government has learned and implemented best practices from developed countries and adopted sophisticated anti-tax avoidance measures, as well as found ways to engage the OECD

103 Marcel Olbert & Christoph Spengel, *International Taxation in the Digital Economy: Challenge Accepted?,* World Tax J. 4 (2017).

104 *Id.* at 4–5.

105 Wei Cui, *The Digital Services Tax on the Verge of Implementation,* 67 Canadian Tax J. 1136–39 (2019).

106 Martin Hearson & Wilson Pritchard, *China's Challenge to International Tax Rules and the Implications for Global Economic Governance,* 94 Int'l Affairs 1287 (2018).

107 *Id.* at 1288.

108 *See* OECD Global Relations Secretariat, Active with the Peoples Republic of China 37 (Paris: OECD, 2018).

as an outsider to let policymakers in Paris know the Chinese position on any reform under review.[109]

While cooperating with the OECD, China has not been afraid to stake out its own territory and point out that "[a]s a developing country, China faces a number of difficult challenges, to many of which ready answers have not been found from the OECD guidelines."[110] Where this has been most apparent is in China's support for "Location-Specific Advantages" (LSAs) which would recognize "that a portion of the 'super-profits' that arise by virtue of operating in China should accrue, for tax purposes to the Chinese subsidiary" in an international tax framework.[111] In effect, LSA proposes that tax be levied where the workers are located, a theory of taxation that supports developing countries that have a comparative advantage in manufacturing. Not surprisingly, LSAs are also favored by India for the same reasons.[112]

Due in no small part to the combined pressures of the digital economy and BEPS, frameworks for unitary taxation are also under consideration by the OECD. A unitary taxation approach recognizes that business activities carried out, or profits earned, by a MNC accrue to the MNC *as a whole* rather than to the separate divisions of it.[113] For taxing purposes, the MNC is then treated as a single entity.[114] Profits of the MNC as a whole are then apportioned among states based upon a formula to be agreed upon.[115] Unitary taxation takes CbC reporting one step further by actually treating the MNC described in the CbC report as a single entity for taxing purposes on a global level. States are then free to tax their allocation of the MNC's profit under their domestic tax laws, as they see fit.

How then do the strains and fissures in the international tax order, which has remained in place for the last hundred years, have a bearing on tax justice? It is precisely these cracks in the foundation of the system that provide an opportunity to rethink and develop a framework for international taxation in a world where the traditional

109 Shanshan Shi, *Coping with the Increasingly Stringent Global Anti-Tax Avoidance Environment: The Case of MNCs in China,* 43 Int'l Tax J. 29–31 (2017).

110 Hearson & Pritchard, *supra* note 106, at 1297.

111 *Id*. at 1298.

112 *See generally* Reji George & Y.V. Reddy, Corporate Tax in Emerging Countries: Some Aspects of India, 59 Int'l J. L & Management 357–66 (2015).

113 *See* Shubhankar Gupta, *Unitary Taxation: A Case for Developing Nations,* 7 Nirma U. L.J. 69, 77 (2018). *See also* George Turner, *Unitary Taxation – the new approach to corporate taxation and its critics,* Tax Watch UK (Nov. 15, 2019), https://www.taxwatchuk.org/labour_oecd_unitary_tax/.

114 *Id*. at 77.

115 *See* Sol Picciotto, *Towards Unitary Taxation: Combined Reporting and Formulary Apportionment, in* Global Tax Fairness 228–32 (Thomas Pogge & Krishen Mehta eds., 2016).

paradigm of taxing on the basis of source or domicile are no longer up to the job. Moreover, this is a conversation which is taking place at this moment, at the OECD, in front of the very body in a position to effectuate actual change.[116] The time is ripe for a paradigm shift in how MNCs are taxed on an international level.[117] Unless a tax justice perspective is voiced at the OECD table, the framework for the next hundred years could prove just as inequitable to the developing world as the one being laid to rest.

III. THE ECONOMY OF FRANCESCO: TAX JUSTICE AND CATHOLIC SOCIAL DOCTRINE

What then does Nairobi have to do with Jerusalem? Or Johannesburg, Lagos, Kinshasa, or Luanda? What does the Catholic Church have to offer to a broader discussion of tax justice for Africa? In fact, quite a bit. Not only is there a rich tradition within Catholic thought addressing the ethics of taxation, particularly as it implicates care for the poor, but in the Pope Francis era there has been a tremendous rearticulation of Catholic Social Doctrine, stemming from the Second Vatican Council, in regard to the ethics of economic development.[118] The result is what has become known as *The Economy of Francesco*.

Archbishop Emeritus of Philadelphia Charles Chaput, hardly Pope Francis's biggest fan among American bishops has this to say about him, "In matters of economic justice, Francis' concerns are the same as Benedict's and John Paul II's, and Pius XI's and Leo XIII's. He understands economic matters through the lens of Church teaching in the *Compendium of the Social Doctrine of the Church*. Like his predecessors, he defends human dignity in a world that consistently threatens it. But Francis stresses more directly than they did that human solidarity is a necessary dimension of human dignity.

116 *See* Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime,* 45 Brook. J. Int'l L. 1 (2019).

117 *See* Taxing Multinational Enterprises as Unitary Firms i (Sol Picciotto ed., 2017) ("The international tax system needs a paradigm shift. The rules devised over 80 years ago treat the different parts of a multinational enterprise as if they were independent entities, although they also give national tax authorities powers to adjust the accounts of these entities. This creates a perverse incentive for multinationals to create ever more complex groups in order to minimize taxes, exploiting the various definitions of the residence of legal persons and the source of income. While states may attempt to combat these strategies, they also compete to offer tax incentives, many of which facilitate such techniques to undermine other countries' taxes.").

118 *See generally* Charles E. Curran, *Just Taxation in the Roman Catholic Tradition*, 13 J. Religious Ethics 113–33 (1985). *See also* Robert M. Whaples, *The Economics of Pope Francis: an Introduction,* 21 The Independent Rev. 325–45 (2017).

We need both. Human dignity requires not just the protection of individuals, as in our prolife work, but an on-going commitment to the common good."[119]

While there is a definite continuity between Francis and his predecessors, it would be a mistake to see his vision of economic justice as offering nothing substantively new. Stewart Braun suggests that "…to read Francis as offering nothing new on matters of Catholic social and economic thought would be to bowdlerize his writings, separating them from his larger concerns. Even though Francis's message is consistent with his predecessors, there is a subtle shift of emphasis that needs to be elucidated. In particular, Francis appears to reinvigorate or reemphasize the importance of social and economic justice, pushing for a recognition of the impact of economic structures on human life. So while there is continuity, there is also development."[120]

The development in the Economy of Francesco, as illustrated by Archbishop Chaput, is Francis's emphasis on *human solidarity* as part and parcel of a protection of the dignity of the human person. "Consequently, Francis's approach is a good deal more radical than that of John Paul II, because he does not simply aim to rein in capitalism or warn of potential dangers, but rather to express the need for a reevaluation of our relationship with capitalism, at least as that system is currently constituted."[121] In fact, it is this call for a reevaluation of our relationship with capitalism, combined with Francis's emphasis on the nexus between human dignity and human solidarity, that opens up a rich space to articulate an ethics of tax justice based on Catholic Social Doctrine as it has developed under his papacy. The roots of that economic vision are as follows:

A. The Pope From the Global South – Solidarity with the Marginalized

When he was elected pope in 2013, Jorge Bergoglio was not only the first Latin American and the first Jesuit to become pope, he was also the first to be ordained a priest after the conclusion of Vatican II.[122] The date of his ordination, December 1969, is also a key benchmark in that it took place a year after the Second General Conference of the Latin American Episcopate (CELAM) in Medellín, Colombia.

119 Charles J. Chaput, *Pope Francis and Economic Justice,* 12 J. Catholic Social Thought 182 (2015).

120 S. Stewart Braun, *Pope Francis and Economic Democracy: Understanding Pope Francis's Radical (yet) Practical Approach to Political Economy,* 8 Theological Stud. 222 (2020).

121 *Id.* at 224.

122 Deck, *supra* note 14, at 7.

As a Jesuit provincial in the 1970s and the Archbishop of Buenos Aires through the 1990s and early 2000s, his life in ministry has been stamped by Medellín, liberation theology, and the question of what the world's peripheries can contribute to the larger Catholic social discourse. Medellín represents the only "continental reception of Vatican II carried out in a collegial and synodal manner,"[123] and was a direct response to the perception of the Latin American episcopate that underdevelopment is the direct result of systemic violence.[124] This serves as the superstructure onto which is grafted Francis's pastoral vision for the Global South and the intensity of his orientation towards praxis.

Pope Francis rejects the "great man" myth for himself, where "an anointed, otherworldly figure rises up to defeat overwhelming challenges with superhuman prowess."[125] However, he himself acknowledges that Latin America offers a "unique synthesis of faith, politics, and culture [which is] needed to be of service to the world at this time," and that he is both a product of and an embodiment of that synthesis in his own vocation story.[126] The significance of having a pope "from the ends of the earth," from the global periphery itself, particularly one arising out of the Latin American experience of the second half of the 20th century, should not be casually dismissed.[127] How this background makes Francis distinctive vis-à-vis his immediate predecessors is that it engenders an "absolute insistence on political participation and commitment to social justice" arising out of the experience of Latin America in the 1970s and 1980s, and provided him lessons about the limits of ideologies on the right or left.[128] To understand how Francis has developed Catholic social teaching on issues related to justice in the developing world, and the pastoral attention he has paid to Africa, it is necessary to begin with Vatican II and how the Latin American bishops committed themselves to the full implementation of the Council's reforms at Medellín.[129]

B. From Vatican II to the Economy of Francesco

123 Rafael Luciani, *Medellín Fifty Years Later: From Development to Liberation,* 79 Theological Stud. 566 (2018).

124 *Id.* at 570.

125 Austen Ivereigh, Wounded Shepherd: Pope Francis and His Struggle to Convert the Catholic Church 2 (2019).

126 *Id.* at 224.

127 Deck, *supra* note 14, at 123.

128 *Id.* at 124.

129 John Frederick Schwaller, The History of the Catholic Church in Latin America: From Conquest to Revolution and Beyond 246 (2011).

Promulgated on the last day of the Council (December 7, 1965), *Gaudium et Spes*, the Pastoral Constitution on the Church in the Modern World, was one of the four major constitutions of Vatican II and marked a major new contribution to Catholic social teaching by laying out well-developed theological grounds for the Church's concern "with all human struggles for life with dignity, with building up the solidarity of the human community, and with the humanization of all human activity and work."[130] Although the Church's involvement in social and political affairs is nothing new, nor had popes and bishops refrained from speaking out on social justice issues, *Gaudium et Spes* marked the potential for a more activist understanding of what it means for the Church to engage the world at large.[131] To accomplish all of this, the Church "has the duty in every age of examining the signs of the times and interpreting them in the light of the gospel, so that it can offer in a manner appropriate to each generation replies to the continual human questionings on the meaning of this life and the life to come and on how they are related."[132] Towards that end, of discerning the "signs of the times," the document notes the following:

> "Great numbers of people are acutely conscious of being deprived of the world's goods through injustice and unfair distribution and are vehemently demanding their share of them. Developing nations like the recently independent States are anxious to share in the political and economic benefits of modern civilization and to play their part freely in the world, but they are hampered by their economic dependence on the rapidly expanding richer nations and the ever widening gap between them. The hungry nations cry out to their affluent neighbors…" (*Gaudium et Spes*, §9.)[133]
>
> "God destined the earth and all it contains for all men and all peoples so that all created things would be shared fairly by all mankind under the guidance of justice tempered by charity…Therefore every man has the right to possess a sufficient amount of the earth's good for himself and his family. This has been the opinion of the Fathers and Doctors of the Church, who taught that

130 David Hollenback, *Commentary on Gaudium et Spes (Pastoral Constitution on the Church in the Modern World), in* Modern Catholic Social Teaching: Commentaries & Interpretations 266 (Kenneth R. Himes et al. eds., 2005).

131 *Id*. at 271.

132 *Pastoral Constitution on the Church in the Modern World Gaudium et Spes* §4 (Dec. 7, 1965), *in* Vatican II: The Essential Texts 196 (Norman Tanner ed., John Mahoney trans., 2012).

133 *Pastoral Constitution on the Church in the Modern World Gaudium et Spes* §9 (Dec. 7, 1965), *in* The Right to Development: Conciliar and Pontifical Texts (1960-1990) 27 (Giorgio Filibeck ed., 1991).

> men are bound to come to the aid of the poor and to do so not merely out of their superfluous goods…Faced with a world today where so many people are suffering from want, the Council asks individuals and governments to remember the saying of the Fathers: 'Feed the man dying of hunger, because if you do not feed him you are killing him,' and it urges them according to their ability to share and dispose of their goods to help others, above all giving them aid which will enable them to help and develop themselves." (*Gaudium et Spes*, §69.)[134]
>
> "The development of a nation depends on human and financial resources. The citizens of every nation must be prepared by education and professional training to undertake the various tasks of economic and social life. This involves the help of experts from abroad, who, while they are the bearers of assistance, should not behave as overlords but as helpers and fellow-workers…The establishment of an authentic economic order on a worldwide scale can come about only by abolishing profiteering, nationalistic ambitions, greed for political domination, schemes of military strategy, and intrigues for spreading and imposing ideologies." (*Gaudium et Spes*, §85.)[135]

Whereas the Latin American bishops at Medellín would seek to "discover a plan of God in the signs of the times," for the present-day transformation of Latin America and form a continent-wide reception of *Gaudium et Spes* and the Second Vatican Council, one piece of the puzzle remained for the elucidation of a new systematic theology of development.[136] In 1967, less than two years after the conclusion of the Council, Paul VI published an encyclical, *Populorum Progressio*, "On the Development of Peoples," which took *Gaudium et Spes* one step further and expressly articulated a connection between Christian faith and the economic justice.[137] There, Paul VI "took the term *development* in its social and economic sense and sought to link it intimately with a Christian understanding of the human person in community."[138] One of the later criticisms of the document was the fact that Paul VI used the term *development* in an "unanalyzed and uncritical" manner "…without first dispelling the notion that in its concrete historical manifestation it is the solution to endemic poverty when, in

134 *Id*. at 28–29.

135 *Id*. at 30.

136 Hollenback, *supra* note 130, at 287. *See* Luciani, *supra* note 123, at 566.

137 Allan Figueroa Deck, *Commentary on Populorum progression (On the Development of Peoples), in* Modern Catholic Social Teaching: Commentaries & Interpretations 292–93 (Kenneth R. Himes et al. eds., 2005).

138 *Id*. at 292.

fact, it is a major part of the problem."[139] Notwithstanding the criticism, *Populorum Progressio*, coming on the heels of Vatican II, expands on the Council documents and provides "Catholic social teaching's Magna Carta on development" laying the foundation for the preferential option for the poor which will be fully enunciated at Medellín.[140]

The "spirit of Medellín," which shapes Francis's apostolic and pastoral priorities, expands upon the heritage of Vatican II and *Populorum Progressio*, recognizes the role of structural violence in the Global South, yet "view[s] the poor and the marginalized as subjects of their own history and development, as actors and protagonists of the changes to come, and never as objects or instruments of anybody."[141] As it pertains to the evolution of Catholic social teaching on the global economy during his pontificate, his promotion of the agency of the poor and marginalized in the midst of structural violence provides a useful hermeneutic for Francis's pastoral and political priorities in the developing world. Moreover, that hermeneutic is augmented and refined by considering the role that Jorge Bergoglio played at CELAM's 2007 general conference in Aparecida, Brazil, only the third general conference since Medellín.[142] There, as Archbishop of Buenos Aires, he served as president of the committed responsible for producing Aparecida's closing document.[143] In fact, according to Austen Ivereigh, "Aparecida is essential to understand the evangelizing vision of the Francis pontificate."[144]

The Aparecida closing document recognized the following:

> "A new period in history is opening up, with challenges and demands, characterized by pervasive discontent which is spread by new social and political turbulence, by the expansion of a culture distant form or hostile to Christian tradition, any by the emergence of varied religious offerings which try to respond as best they can to the manifest thirst for God of our peoples." (*Aparecida document*, §10.)[145]

The document recognized an urgent need for a "pastoral and missionary conversion,"

139 *Id.* at 309.
140 *Id.* at 296.
141 Luciani, *supra* note 123, at 589.
142 Ivereigh, *supra* note 125, at 87.
143 Deck, *supra* note 14, at 4.
144 Ivereigh, *supra* note 125, at 153.
145 Episcopal Conference of Latin America, Fifth General Conference of the Latin American and Caribbean Bishops' Conferences at Aparecida Concluding Document §10 (May 29, 2007) [hereinafter *Aparecida Document],* https://www.celam.org/aparecida/Ingles.pdf.

in language with a Pentecostal urgency to it.[146] Aparecida was not satisfied with simply an accommodation to modernity, in the begrudging way that Vatican II had been interpreted by the broader Church in the John Paul II years, but for "an alternative modernity, built from the ground up, from the periphery, from those left behind."[147] It specifically referenced *Populorum Progressio* when it called for the "[pursuit] of an alternative development model, one that is comprehensive and communal, based on an ethics that includes responsibility for an authentic natural and human ecology, which is based on the gospel of justice, solidarity, and the universal destination of goods, and that overcomes its utilitarian and individualistic thrust, which fails to subject economic and technological powers to ethical criteria."[148] Rather than lamenting secularization in the broader culture, Aparecida "saw Christianity's loss of culture and political power as an opportunity to recover the gratuity of God's grace" through the paradox of allying itself with the poorest of the poor, those with the very least.[149] Bergoglio himself referred to the Aparecida document as a "grace event," unleashing pent up missionary potential in Latin America, and it would later serve as the blueprint for his papal agenda on social justice.[150]

In his first major letter as pope, *Evangelii Gaudium*, Pope Francis drew on the Aparecida Document and recognized that inequality spawns violence, "…[that] until exclusion and inequality in society and between peoples are reversed, it will be impossible to eliminate violence."[151] This violence is part and parcel of a "throw-away" culture where an economy of exclusion leads to a paradigm where human beings themselves are considered consumer goods to be used and then discarded.[152] In *Laudato Si´*, his encyclical on the environment, the first ever issued by a pope on that topic, Francis continued, "[w]hen nature is viewed solely as a source of profit and gain, this has serious consequences for society. This vision of 'might is right' has engendered immense inequality, injustice and acts of violence against the majority of humanity, since resources end up in the hands of the first comer or the most powerful: the winner takes all. Completely at odds with this model are the ideals of harmony,

146 Ivereigh, *supra* note 125, at 153.

147 *Id.* at 154.

148 *Aparecida Document,* §474(c).

149 Ivereigh, *supra* note 125, at 154.

150 *Id.* at 158.

151 Francis, Apostolic Exhortation on the Proclamation of the Gospel in Today's World *Evangelii Gaudium* §59 (Nov. 24, 2013) [hereinafter *Evangelii Gaudium*], http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html.

152 *Evangelii Gaudium,* §53.

justice, fraternity and peace as proposed by Jesus."[153] "[T]he common good calls for social peace, the stability and security provided by a certain order which cannot be achieved without particular concern for distributive justice; whenever this is violated, violence always ensues."[154] Here, in his exhortation on our collective responsibility as stewards of the environment, with specific reference to climate change, Francis invoked the spirit of Medellín, drawing a clear line between structural violence, political violence, and economic justice: a foundation for a new Catholic ethics of development.

Running through *Laudato Si'* is Francis's conviction that "everything is closely interrelated, and today's problems call for a vision capable of taking into account every aspect of the global crisis."[155] He argues that this calls for an *integral ecology* where it is essential to find "comprehensive solutions which consider the interactions within natural systems themselves and with social systems."[156] The crises we face are not separate, "one environmental and the other social, but rather one complex crisis which is both social and environmental."[157] While Francis's vision of integral ecology ostensibly began as a conversation on broadening our commitment to environmentalism and combating climate change, has in the last five years developed into a framework for radically rethinking the ethics of the global economy and pushing it towards greater respect for human dignity and the common good.

This vision of what integral ecology might mean in economic terms was first laid out in May 2018 when the Vatican's Congregation for the Doctrine of the Faith (CDF) and the Dicastery for Promoting Integral Human Development jointly published a groundbreaking document which for the first time addressed *moral* questions related to the global economic and financial system, and was specifically addressed to those in charge of the system, "those working in the fields of economy and finance."[158] The fact that this document was issued by the CDF, "whose competence extends to moral questions" and in the past has been known as both the Inquisition and the Holy Office

153 Francis, Encyclical Letter on Care for our Common Home *Laudato Si´* §82 (May 24, 2015) [hereinafter *Laudato Si´*], http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

154 *Laudato Si´*, §157.

155 *Laudato Si´*, §137.

156 *Laudato Si'*, §139.

157 *Id.*

158 Congregation for the Doctrine of the Faith and the Dicastery for Promoting Integral Human Development, Considerations for an Ethical Discernment Regarding Some Aspects of the Present Economic-Financial System *Oeconomicae et Pecuniariae Questiones* §1 (May 17, 2018) [hereinafter *Oeconomicae et Pecuniariae Questiones],* https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/05/17/180517a.html.

is a strong indication of the importance Francis places on the nexus of ethics and the global financial system.[159] The document calls for a synthesis of appropriate regulation of the market with "a clear ethical foundation that assures a well-being realized through the quality of human relationships rather than merely through economic mechanisms that by themselves cannot attain it."[160]

Although not as widely discussed a document as *Evangelii Gaudium* or *Laudato Si´*, *Oeconomicae et Pecuniariae Questiones* expands on the insights of both and brings them into the realm where practical policy suggestions can be made to stakeholders, and it represents the cutting-edge of Catholic Social Doctrine on the global economy. The key to remember, however, is that Catholic teaching on the economy, as well as on the ethics of development, is an integrated whole – it includes and expands on the documents of Vatican II, of Medellín, of Aparecida, and the encyclicals and statements of the Francis era. All of that tradition, stretching back to the "spirit of Medellín," draws the firm link between structural violence and underdevelopment. What Francis has done is expand that into a sharper critical analysis of the global financial system expanding the link between violence and underdevelopment to include the structure of the international financial system, thus breaking open the alternative development model called for in the Aparecida Document and bringing it up to date with a zeal and intensity channeling the "spirit" of Vatican II and Medellín.

C. Bringing it Together: Integral Ecology, the Economy of Francesco, and African Development

Everything is related; everything is connected. This maxim is the beating heart of Pope Francis's conception of integral ecology and the pillars on which the Economy of Francesco rests. While it is undoubtedly a global vision, as it emerges out of the intellectual milieu of Vatican II, Medellín, and Aparecida, it has something distinct to say to the African experience.[161]

159 *Oeconomicae et Pecuniariae Questiones,* §6.

160 *Oeconomicae et Pecuniariae Questiones,* §1.

161 *See* Daniel P. Castillo, *Integral Ecology as a Liberationist Concept,* 77 Theological Stud. 353, 370–71 ("Francis's call for the realization of an integral ecology that is capable of adequately hearing and responding to the cries of the earth and poor is nothing less than an exhortation for dramatic paradigm shifts within the structural and cultural dimensions of the globalization project. Indeed, since the structural and cultural dimensions of society are recursive, the implications of Francis's call for a bold cultural revolution extend far beyond the realm of culture. Simply put, in calling for an integral ecology, Francis is calling for the radical conversion of the entire global system.").

In September 2019, Francis undertook his second trip as pope to sub-Saharan Africa, visiting Mozambique, Madagascar, and Mauritius, where the focus of his agenda was poverty, the environment, foreign exploitation of resources and corruption.[162] Francis's pontificate has been marked by a consistent call for a more equitable distribution of wealth among the developed and developed world, and particularly with an eye to Africa, he has defended the rights of countries to control their natural resources. In a 2019 interview with Reuters the Pope said, "We must invest in Africa, but invest in an orderly way and create employment, not go there to exploit it,"[163] As the first pope from the Global South, Francis's attention to Africa is not an accident and arises from an insight that the Latin American experience, the body of work coming out of Medellín and Aparecida, can have something to say to the wider Global South. For Francis, promotion of the agency of the poor and marginalized in the midst of structural violence, provides a framework for understanding the development of Catholic Social Doctrine on the economy during his pontificate. This provides a foundation for his contribution to an ethics of Tax Justice in the Economy of Francesco which recognizes the pervasiveness of structural violence and colonial structures in the global tax regime and provides support to local stakeholders, "as actors and protagonists of the changes to come."[164]

What the Medellín tradition contributes to an ethics of tax justice for Africa is the recognition of structures of violence and the role that they have on the economy and development. The crisis of faith which the Church faces in Africa, according to Emmanuel Katongle of the University of Notre Dame, is "neither primarily nor predominantly cultural, but political."[165] More specifically, this crisis stems from "the ongoing phenomenon of political violence, which is traceable to the colonial heritage and [its] imagination of Africa's modernity."[166]

D. The Elephant in the Room: Grand Corruption and Tax Justice

If everything is connected, and everything interrelated, as Pope Francis's integral ecology suggests, then we would be horribly naïve to think that the injustices inherent in

162 Philip Pullela, *Environment, poverty, corruption on agenda for pope's Africa trip,* Reuters (Sept. 1, 2019), https://www.reuters.com/article/us-pope-africa-preview/environment-poverty-corruption-on-agenda-for-popes-africa-trip-idUSKCN1VM15N.

163 *Id.*

164 Luciani, *supra* note 123, at 589.

165 Emmanuel Katongle, *The Gospel as Politics in Africa,* 77 Theological Stud. 704 (2016).

166 *Id.*

the global financial order, particularly as they are manifested through the international tax system, are solely caused by a "pinstripe infrastructure of professional bankers, lawyers, and accountants" exiting in the Global North.[167] Local elites and government officials in the Global South not only aid and abet the avoidance strategies of their Northern counterparts, but in many cases profit themselves quite handsomely from grand corruption[168], which "mainly involves relatively senior government officials or private sector operatives closely involved with the politically powerful."[169] While for the purposes of this analysis I continue to maintain the distinction between tax *avoidance* and tax *evasion*, bringing grand corruption into the discussion highlights that in the real world the distinction may not be as black and white, where those engaging in criminal activity can be cleanly separated from those looking to stretch the law to its limits.[170] While that complicates the analysis and the conceptualization of policy responses, pretending that there is not at times a fluidity in the boundary between tax evasion and tax avoidance schemes leads us to fail to see the forest for the trees and address tax justice issues in an ineffectual piecemeal fashion.

For scholars from the North there is a particular squeamishness in discussing corruption in the developing world, as if we are bound to seem condescending, neocolonial, or just plain rude, by asking the question.[171] However, a critique of the ethics of the global financial order and its application to Africa, no matter where it emerges from, would be disingenuous if it did not raise the issue. In fact, Catholic Social Doctrine has long recognized that corruption is among the chief causes

167 *See* Christensen, *supra* note 25, at 128.

168 *See* John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27 Transnat'l L. & Contemp. Probs. 311, 326 (2018) ("The literature on corruption distinguishes between petty and grand corruption. While grand corruption refers to the illegal activities of high-ranking civil servants and politicians, which usually involve large sums of money, petty corruption involves the activities of low-level bureaucrats and smaller sums of money.").

169 Alvin Mosioma & Bob Awuor, *Breaking the Vicious Circle: Grand Corruption in Kenya, in* Tax Justice: Putting Global Inequality on the Agenda 177 (Marti Konohen & Francine Mestrum eds., 2008). *See also* Susan Rose-Ackerman, *"Grand" Corruption and the Ethics of Global Business*, 26 J. Banking & Fin. 1889, 1892 (2002) ("Grand corruption" can undermine the functioning of states and lower the efficiency of production. The struggle to appropriate the gains of public projects can have a destructive impact on a country's economic and political system. Corruption is a two-sided deal involving both venal officials and corrupt bribepayers, but outside investors and aid organizations often play an active role in maintaining corrupt systems.").

170 *See* Steven A. Bank, *When Did Tax Avoidance Become Respectable?,* 71 Tax L. Rev. 123, 123–24 (2017) ("In large part, the reaction can be attributed to the perceived difference between tax evasion and tax avoidance… Today, most observers have characterized the latest tax schemes as involving at least legal tax avoidance, if not fully legitimate tax planning..And it appears that only outright tax evasion is considered truly scandalous.").

171 *See* Jason.C. Sharman, The Despot's Guide to Wealth Management: On the International Campaign Against Grand Corruption 2 (2017).

of poverty and underdevelopment throughout the world. [172] In fact, "questions related to the debt crisis of many poor countries," is abetted by "corruption, poor administration of public monies or the improper utilization of loans received."[173] Therefore, as Pope Francis recognizes in *Oeconomicae et Pecuniariae Questiones*, while the social doctrine of the Church would be a "considerable help" in rethinking the ethics of the global economy in line with principles of integral ecology, that same doctrine speaks just as strongly to those engaged in grand corruption within the Global South as it does to the powerbrokers and policymakers in the North.[174]

IV. CLAIMING A PLACE AT THE TABLE: A ROADMAP FOR AFRICAN TAX JUSTICE

A. Tax Justice as a Human Rights Issue

Tax justice is first and foremost an international human rights issue. According to Thomas Pogge, although the first-line responsibility for poverty-related human rights deficits lies with the governments where those deficits persist, the vast majority of these governments are themselves poor and lack the infrastructure and resources to tackle tax avoidance and evasion by MNCs operating within their borders on their own.175 The key to addressing the human rights deficit that results from this activity is global financial transparency: the abolition of shell companies and anonymous accounts, the automatic exchange of tax information worldwide, and country-by-country reporting by MNCs of profits, losses and holdings in each jurisdiction where they operate.176 In the 21st century, "unilateral approaches to tax corporations whose operations span the globe are obsolete , and a multilateral approach is both essential and feasible."177 As human rights discourse increasingly examines the nexus between sustainable economic development in the Global South and the business practices of MNCs, there is space for the tax justice movement to claim a seat at the table and highlight the compelling need for global financial transparency to policymakers as a means of accelerating action on curbing corruption.178

172 *See* Compendium of the Social Doctrine of the Church, *supra* note 11, at §447.
173 *See* Compendium of the Social Doctrine of the Church, *supra* note 11, at §450.
174 *Oeconomicae et Pecuniariae Questiones,* §10.
175 *See* Pogge & Mehta, *supra* note 6, at 3–4.
176 *Id.* at 6.
177 *See* Avi-Yonah, s*upra* note 9, at 113.
178 *See* Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals,* 36 Wis. Int'l L.J. 298, 302

At this stage it may be tempting to ask what possible relation could there be between human rights and tax justice? How does the question of if and where MNCs pay tax measure up to access to clean drinking water, the right to due process, or the right not to be tortured by the police or the army? The response is that corporations today wield enormous power and increasingly engage in state-like activity in those areas of the world "where state power is weak or non-existent."[179] The end result is that while corporations are increasingly responsible through their shareholders, directors, managers, and agents for a myriad of human rights abuses, particularly in sub-Saharan Africa, individuals who are victims of these abuses have steadily been divested of judicial recourse against those very same corporate actors.[180] While there is a well-developed body of human rights law addressing duties, obligations and recourse when the perpetrator of abuse is a state actor, there is gap when it comes to remedying violations committed by *private* corporate actors. Therefore, corporate accountability for their business practices under local law, as well as financial transparency on an international level, are issues that touch directly on human rights discourse – particularly how to seek redress for corporate violations of human rights.

B. Claiming a Seat at Which Table? Africa at the OECD

By this point it should be manifestly clear that the beating heart of the international tax world is in Paris – if you are not at the OECD, either as part of a member state delegation or in a lobbying capacity, then you have absolutely no say in revisions to the OECD Model Convention, or any of the regulatory structure which it supports. The respective success of China and India in making their policy preferences known at the OECD, as well as being offered observer status before the Fiscal Affairs Committee, means that one does not have to be a full member of the OECD to have input on global tax policy in that forum.

Interestingly enough, a single African state, South Africa, also has observer status before the Fiscal Affairs Committee, as well as the African Tax Administration Forum

(2019).

179 *See* Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brooklyn J. Int'l L. 955, 961 (2008).

180 See Jacqueline Lainez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Policy and International Human Rights*, 45 Pepp. L. Rev. 685, 687–89 (2018).

(ATAF), which is a regional organization founded in 2009.[181] Given that a regional approach will likely yield the best fruit as far as placing a distinctly African stamp on international tax issues, it is an open question whether South Africa desires to serve in this capacity, or whether other states on the continent would yield their time at the microphone and allow Pretoria to speak for them.[182] In any event, moving from articulating theories of tax justice to actually effectuating policy requires an active and persistent voice at the OECD. Whether South Africa or the ATAF can legitimately serve as the regional representative remains an open question.

C. Engaging the Economy of Francesco: Moving from Doctrine to Praxis

However desirable, the goal is not simply for the those interested in tax justice for Africa to have a seat at the table; doctrine needs to move towards praxis. Catholic Social Doctrine serves the tax justice movement as a viable partner only to the extent that it can help motivate policymakers to implement substantive changes in the global tax system. Without denying the truth of the observation that approaches to effectuate change must be multilateral, there is no reason why it has to be exclusively in the public international sphere, i.e., at the level of the United Nations or the OECD.[183] Instead, individual corporations may be encouraged to change their behaviors though implementation of Corporate Social Responsibility (CSR) initiatives or Socially Responsible Investment (SRI) practices.[184] To an extent, impact investing may be seen as a subset of SRI, and while there is some debate on that point, the key takeaway from Pope Francis's promotion of Catholic principles of impact investing is that the Church is developing a praxis-oriented ethics of the global economy that can be put to the service of the Tax Justice Movement.[185] The fact that in the Francis years the

181 Lee-Ann Steenkamp, *An Analysis of the Applicability of the OECD Model Convention to Non-OECD Member Countries: The South African Case,* 10 J. Econ. & Fin. Sci. 87 (2017).

182 *See* Annet Wanyana Oguttu, *Developing South Africa as a Gateway for Foreign Investment in Africa: A Critique of South Africa's Headquarter Company Regime,* 36 South Afr.Yearbook Int'l L. 61–93 (2011).

183 Avi-Yonah, *supra* note 9, at 113.

184 *See* Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals,* 36 Wis. Int'l L.J. 298, 310–12, 348–49 (2019).

185 *See* Kevin Mahn, *The Changing Face of Socially Responsible Investing,* Forbes (Apr. 26, 2016), https://www.forbes.com/sites/advisor/2016/04/26/the-changing-face-of-socially-responsible-investing/#34e3f171736a ("Looking to the past, traditional socially responsible investing [*the "old SRI"*] represented an investment style that used both positive and negative screens to include or exclude companies in a portfolio based on social, moral, ethical and religious criteria…Looking to the future, sustainable, responsible and impact investing [*the "new SRI"*] offers what I believe to be a more dynamic approach to investing in this rapidly growing area. In response to some of the previously mentioned critiques of the old SRI, this type of investing involves more of a posi-

Vatican had held three biennial Conferences on Impact Investing is not trivial (2014, 2016, and 2018).[186] This is an opening that those interested in developing an ethics of tax justice and articulating policy solutions would be foolish to dismiss simply because it is coming from the Catholic Church. Recalling Daniel Halliday's point that, "[t]he fact that social scientists frequently bring considerations like inequality and harm into their work on tax reflects the fact that the domain of taxation, although fragmentary, is a *thoroughly moralised* territory.[187] As thoroughly moralized territory, the Tax Justice Movement may find a kindred spirit and fellow-traveler in the contribution to the discussion that can be made by the Roman Catholic Church in the Pope Francis era.

V. CONCLUSION

Vatican II affirmed in *Lumen Gentium*, the Dogmatic Constitution on the Church, that "The integral development of every person, every human community, and of all people, is the ultimate horizon of the common good that the Church, as the universal sacrament of salvation seeks to advance."[188] This integral development of every human person, in solidarity and community, is at the heart of the Economy of Francesco – Pope Francis's thoroughgoing critique of capitalism and the global financial order. Francis's pastoral and intellectual interest in economic justice, in marrying doctrine to praxis, separates him from his immediate predecessors in the Chair of Peter.

The ruptures opened up by the global pandemic have opened up a tremendous opportunity for a radical rethinking of the global financial order, a project that Pope Francis actively encourages through the Vatican's COVID-19 Commission. Certainly, one of the key areas where the established order may be challenged is international taxation and there is potentially a once-in-a-century opportunity for the Global South, particularly the people of Sub-Saharan Africa, to have direct input into that decision making process. Joining intellectual forces, and finding common cause, with Catholic Social Doctrine offers the Tax Justice Movement the opportunity to take full

tive, proactive and comprehensive review of a company to provide for a more robust picture of the company's operations and social, as well as economic, impact.").

186 *See Third Vatican Conference on Impact Investing: July 8–11*, 2018, VII Conference, https://www.viiconference.org ("The biennial series of Vatican Impact Investing Conferences is a vital, long-term global platform around Pope Francis's vision of '*putting the economy at the service of peoples.*'").

187 Halliday, *supra* note 19, at 1120.

188 Paul VI, Dogmatic Constitution on the Church *Lumen Gentium* §48 (Nov. 21, 1964), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html.

advantage of the moral imprimatur that comes with having the Church as a partner in dialogue. While sovereign debt issues have always taken center stage when discussion turns to Africa's place in the global economy, taxation's location at the beating heart of the international financial order means that tax justice remains apropos to any rethinking of sovereign debt.[189]

The questions of *where, how,* and *what* to tax are at their most basic, moral questions. There is a tendency to see issues of taxation as dry, arcane, or mind-numbingly dull, but as this paper has attempted to demonstrate, they are anything but that. International taxation also remains one of those areas where an inordinate amount of power is held in remarkably few hands – by the members of the OECD's Financial Affairs Committee. Tax justice recognizes that it is "quite unrealistic to hope that the problem [of the inability of poor countries to collect reasonable taxes from MNCs] can be meaningfully reduced through their morally motivated self-restraint."[190] Therefore it is incumbent upon those states in the Global South, those most directly affected by the policy decisions being made at the OECD as to the contours of the new international taxing order being wrought by changes forced by the pressures of the digital economy, to be the proverbial fly in the ointment and lobby for their own interests. As a global concept of redistributional justice, tax justice can benefit from what Catholic Social Teaching in the Pope Francis era has to contribute to that discourse – the vision of *The Economy of Francesco*, a paradigm for a radical new way of envisioning the global economy based upon the integral development of the human person in solidarity with one another.

189 *See* Dambisa Moyo, Dead Aid: Why Aid is not Working and how There is a Better Way for Africa 3–9 (Farrar, Strauss and Giroux, 2009).

190 Pogge & Mehta, *supra* note 6, at 5.

Investment Law and Treaty Reform In Africa: Fragments and Fragmentation

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Umoja ni nguvu, utengano ni udhaifu[1]
Swahili Proverb

This article reviews how African states have proceeded with foreign investment law and treaty reform since at least 2016. It highlights examples of reforms at the domestic, sub-regional, regional and global levels. It argues these reforms do not cohere around one approach and as such there is no distinctly African approach exemplified in these fragmented efforts. It notes that this may be because of the diversity of interests within, and between African states. This essay also discusses the reform efforts occurring at different levels – domestic, sub-regional and regional while also noting those in other regions and at the international level. The article includes a brief review of the Pan African Investment Code, (PAIC), that may very well form the basis of the African Continental Free Trade Agreement negotiations on investment. Ultimately, it welcomes the increased participation of African states in investment law reform but argues that African states can best advance their collective pan-African interest in harmony rather than disunity.

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1 Unity is strength, division is weakness.

Table of Contents

Introduction

This essay definitively shows how African states are proceeding with reforms of their foreign investment laws and treaties. From Algeria to Angola, Tunisia to Tanzania, states are reviewing and amending their investment laws and treaties.[1] Underpinning the reform is the classic tension between promotion and protection of investments. African states are engaged in a delicate dance between attracting foreign direct investment (FDI), on the one hand, and rebalancing rights and obligations between investors and states, on the other.[2]

These processes of reform are occurring at different levels – domestic, sub-regional, regional, and international.

Some commentators have referred to the continent-wide reform process as the "Africanisation" of international investment law.[3] By this, scholars mean that African states are taking control of the reform process and infusing it with an African approach to international investment law. This African approach is to be distinguished by its content, which on this argument reflects the interests of African states.[4]

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1 *See, e.g.*, Hamed El-Kady, *Mustaqeem De Gama, The Reform of the International Investment Regime: An African Perspective*, 34 ICSID Rev. –Foreign Inv. L.J. 482–95 (2019).

2 *See generally* Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration, Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 113 AJIL Unbound 33–37 (2019); Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 Lewis & Clark L. Rev. 361 (2013); Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 Minn. J. Int'l L. 321 (2012). On African states' right to regulate, see Talkmore Chidede, *The Right to Regulate in Africa's International Investment Law Regime*, 20 Oregon Rev. Int'l L. 437 (2019); Abdulqawi Yusuf, Balancing Rights and Obligations of States and Investors: Challenges Facing LDCs, Lecture at Cornell University (Oct. 23, 2017), https://www.cornell.edu/video/justice-abdulqawi-yusuf-challenges-facing-least-developed-countries; Donald McRae, *Balancing Rights and Obligations of States and Investors*, 111 Proceedings of the ASIL Annual Meeting 44–46 (2017); Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the State's Capacity to Regulate, in* Evolving International Investment Regime: Expectations, Realities, Options (&eds., 2011).

3 Makane Mbengue & Stephanie Schacherer, *The 'Africanization' of International Investment Law,* 18 J. World Trade Inv. 414 (2017); Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34 ICSID Rev. 455–81 (2019); Olabisi D Akinkugbe, *Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law*, 34 ICSID Rev. – Foreign Inv. L.J. 434–54 (2019).

4 *See*, *e.g.*, Meg Kinnear & Paul Jean Le Cannu, *Concluding Remarks: ICSID and African States Leading International Investment Law Reform*, 35 ICSID Rev. –Foreign Inv. L.J. 542 (2020); Gudrun Zagel, *IIAs and Sustainable Development: Are the African Approaches A Possible Way Out of the Global IIA Crises?*, AfronomicsLaw (Oct. 31, 2019), https://www.afronomicslaw.

My argument is that the ongoing reform processes do not reveal a distinctly African approach to reform. While there is increased participation of African states in the reform process at different levels, the participation does not cohere around one approach. Where there should be a coordinated approach guided by common principles and policy objectives, there is instead a fragmented ad hoc approach to reform. As a result, rather than designing a streamlined investment law framework that reflects African interests, African states are spinning an ever more complex web of interlocking rights and obligations.

The challenge in designing a coherent system may stem from the diversity of interests within, and between, African states. This challenge is perhaps best illustrated by the failure to agree on a binding Pan African Investment Code (PAIC).[5] The PAIC, an initiative of the African Union, which is often held up as an illustration of the "Africanisation" of investment law,[6] was conceived as a binding instrument, but is today a non-binding instrument. Critics of the PAIC also note that by adopting its provisions, African states would create two types of investor rights and obligations—one applicable to African investors, and another, more favourable, applicable to non-African investors. As Kidane says, it is difficult to see how this difference in treatment can be justified.[7]

The PAIC is likely to be the basis of the negotiations of the Investment Protocol of the African Continental Free Trade Agreement (AfCFTA) ("Investment Protocol").[8] The AfCFTA is a central pillar in Africa's regional integration project, and it follows that the Investment Protocol should encourage cross-border investment in Africa.9 Drafters of the Investment Protocol should be careful to overcome the shortcomings of the PAIC, especially the burden it places on African investors, and its provisions on dispute resolution.

The interaction between the Investment Protocol and existing laws and treaties should be a priority for policymakers. While the Investment Protocol can coexist with other investment laws and agreements, it should not burden states by multiplying their obligations. African policymakers may benefit from the experience of the European Union as it grapples to streamline its framework for international investment law, a

org/2019/10/31/international-investment-agreements-iias-and-sustainable-development-are-the-african-reform-approaches-a-possible-way-out-of-the-global-iia-crisis/.

5 See meeting documents at https://au.int/en/documents/20161231/pan-african-investment-code-paic.

6 *See* Mbengue, *supra* note 4.

7 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

8 U.N. Economic Commission for Africa, Next Steps for the Africa Continental Free Trade Area: Assessing Regional Integration in Africa | Aria IX, E.19.II.K.3 (2019), https://www.uneca.org/sites/default/files/PublicationFiles/aria9_en_fin_web.pdf

9 *See* Agreement Establishing the African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

process which has culminated in EU Member States signing an agreement to terminate intra-EU BITs.[10]

This paper sets out my findings based on a review of the investment law and treaty reforms by African states at the domestic, sub-regional, regional and global levels in the last few years. I conclude that even though there does not yet exist an African approach to reform of international investment law, African states should strive to identify their collective interests. My objective is not to provide a comprehensive review of the reform process, but rather to illustrate the process by highlighting a few examples at each level of reform. The paper highlights the reforms in Part I, makes some observations on the reforms in Part II, before drawing some brief conclusions.

I. INVESTMENT LAW AND TREATY REFORM IN AFRICA – A REVIEW

A. Domestic Reform

Algeria[11], Angola,[12] Burkina Faso,[13] Côte d'Ivoire,[14] Egypt,[15] Namibia,[16] South Africa,[17] and Tunisia[18] have all amended their domestic investment laws in the last five years. Tanzania has not amended its investment law, but has enacted a series of amendments in other laws related to investment and investor-state dispute resolution,

10 EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties, European Commission (May 5, 2020), https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en.

11 Promotion de l'investissement, Loi no2016–09 (Aug. 3, 2016) (Algeria) https://investmentpolicy.unctad.org/investment-laws/laws/204/algeria-promotion-de-i-investissement.

12 Private Investment Law, Law No. 10/18 (June 26, 2018) (Angola) https://investmentpolicy.unctad.org/investment-laws/laws/252/angola-private-investment-law.

13 Loi N° 038–2018/AN Portant Codes des Investissements au Burkina Faso (Oct. 30, 2018) (Burkina Faso) https://investmentpolicy.unctad.org/investment-laws/laws/276/burkina-faso-burkina-faso-investment-code-2018-.

14 Ordonnance N° 2018–646 du 1er août 2018 Portant Code des Investissements (Aug. 1, 2018) (Côte d'Ivoire) https://investmentpolicy.unctad.org/investment-laws/laws/284/c-te-d-ivoire-code-des-investissements-c-te-d-ivoire.

15 Investment Law No. 27 of 2017 (May 31, 2017) (Egypt) (unofficial UNCTAD translation) https://investmentpolicy.unctad.org/investmentlaws/laws/167/egypt-investment-law-.

16 Investment Promotion Act, Law No. 199 of 2016, Official Gazette No. 6110 (Aug. 31, 2016) (Namibia) https://investmentpolicy.unctad.org/investment-laws/laws/178/namibia-investment-promotion-act.

17 Protection of Investment Act 22 of 2015, GN 39514 of GG 606 (15 Dec. 2015) (S. Afr.) https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act.

18 Loi de l'investissement 2016, Loi n°2016–71 (Sept. 30, 2016) (Tunisia) https://investmentpolicy.unctad.org/investment-laws/laws/179/tunisia-loi-de-l-investissement.

that are illustrative of its approach to reform. The laws in this section are reviewed in alphabetical order of the name of the state. This part of the paper is not intended to be a comprehensive review of the laws. Instead, it highlights the salient features of each legal reform to facilitate comparison. I begin by examining domestic law reforms. Domestic laws may be considered a good indicator of a state's investment policy because they are unilateral, and not a product of negotiations at bilateral and multilateral levels, where the outcome may very well be compromise between the negotiating parties.

Algeria (2016)

The Algerian law of 2016 replaced a more restrictive regime, and clearly aims at promoting investment. It contains a broad definition of investment and a broad provision on fair and equitable treatment,[19] not a restrictive one as can be seen in newer generations of laws and treaties. While the law no longer contains a provision on national treatment, it does not prohibit investors from benefitting from a national treatment clause contained in another instrument, for example a bilateral investment treaty (BIT). The law provides for dispute resolution in Algerian domestic courts, unless there is an applicable bilateral or multilateral treaty providing for arbitration or conciliation, or the investor and state have agreed to *ad hoc* arbitration.[20] The 2016 law is applicable to both domestic and foreign investors, and does not contain any provisions on sustainable development.

Angola (2018)

Angola's private investment law of 2018 applies to both domestic and foreign investors, but precludes companies which are majority owned by the state, and sectors of the

19 Promotion de l'investissement, Loi n°2016–09, art. 21 (Aug. 3, 2016) (Algeria) ("Sous réserve des conventions bilatérales, régionales et multilatéral signées par l'État algérien, les personnes physiques et morales étrangères reçoivent un traitement juste et équitable au regard des droits et obligations attachés a leurs Investissements.").

20 *Id.* art. 24 ("Tout différend né entre l'investisseur étranger et l'État algérien, résultat du fait de l'investisseur ou d'une mesure prise par l'État algérien à l'encontre de celui-ci, sera soumis aux juridictions algériennes territorialement compétences, sauf conventions bilatérales ou multilatérales conclues par l'État algérien, relatives à la conciliation et à l'arbitrage ou accord avec l'investisseur stipulant une clause compromissoire permettant aux parties de convenir d'un compromise par arbitrage ad hoc.").

economy governed by special law.[21] Like the Algerian law it focuses on attracting investment, but goes further by specifying benefits to investors depending on priority sectors and regions.[22] So, while the law does not contain specific wording on sustainable development, it does provide for benefits and concessions for certain social and economic goals, such as growth and diversification of the economy and development of the most deprived areas of the country.[23] On dispute resolution, the Angolan law guarantees access to domestic courts and all forms of alternative dispute resolution.[24] The law contains substantive provisions on expropriation (with compensation),[25] and stipulates that investors must abide by domestic law,[26] but it does not contain other familiar provisions such as fair and equitable treatment or national treatment.

Burkina Faso (2018)

Burkina Faso enacted a new investment law in 2018. The Burkinabè law clearly states that its objective is to promote investments which contribute to economic and social development in Burkina Faso.[27] The law specifies the activities that it covers and those that it excludes.[28] Like the Angolan law, the activities include those related to development in remote regions. Investors can also access special privileges which are granted by the ministries of industry and finance — this leaves room for ministerial discretion and allows investors to negotiate privileges on a case-by-case basis. The Burkinabè law contains a broad provision on fair and equitable treatment, but restricts national treatment to commercial and intellectual property.[29] On dispute resolution, the Burkinabè law provides for international arbitration for foreign investors at the

21 Private Investment Law, Law No. 10/18, art. 2 (June 26, 2018) (Angola).

22 *Id.* arts. 28–29.

23 *Id.* art. 22.

24 *Id.* art. 15.

25 *Id.* art. 14.

26 *Id.* arts. 13, 17, 18.

27 Loi No 038–2018/AN Portant Codes des Investissements au Burkina Faso, art. 2 (Oct. 30, 2018) (Burkina Faso) ("Elle a pour objet la promotion des investissements productifs concourant au développement économique et social du Burkina Faso.").

28 *Id.* arts. 3–4.

29 *Id.* art. 12 ("Les entreprises étrangères bénéficient de la même protection que les entreprises burkinabè, en ce qui concerne les propriétés commerciales et la propriété intellectuelle. Elles jouissent d'un traitement juste et équitable, d'une sécurité et d'une protection constante, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en fait, la gestion, l'entretien, l'utilisation, la jouissance ou la liquidation de leurs Investissements.").

Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law (OHADA), or ICSID.[30]

Côte d'Ivoire (2018)

In Côte d'Ivoire, the 2018 investment law clearly states that its objective is to promote sustainable development through profitable and socially responsible investments. It goes further to include promotion of local content, regional development, and competitiveness as objectives.[31] The law contains several options for tax incentives, and other benefits to investments based on the region of the investment. The specific benefits and excluded categories of investments are to be defined by decree. The Ivorian law contains a broad definition of fair and equitable treatment, subject only to provisions in applicable bilateral and multilateral investment treaties.[32] The law also prohibits expropriation, except for public interest subject to fair and prior compensation.[33] Notably, the law contains a chapter on investor obligations, which stipulates that investors must respect laws and regulations in force on human rights, social responsibility, labour law, environmental protection, taxation and the fight against corruption and illegal activities.[34] Finally, the law provides for dispute resolution using the UNCITRAL Conciliation Rules or arbitration under the Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law (OHADA).[35]

30 *Id.* arts 3–4.

31 Ordonnance N° 2018–646 du 1er août 2018 Portant Code des Investissements, art. 3 (Aug. 1, 2018) (Côte d'Ivoire) (Le présent code a pour but de favoriser: le développement durable par des Investissements productifs et socialement responsables en Côte d'Ivoire, le développement régional, le contenu local, la compétitivité des entreprises.).

32 *Id.* art. 25 ("Sous réserve des conventions bilatérales, régionales et multilatérales signées par l'État, les personnes physiques et morales étrangères reçoivent un traitement juste et équitable au regard des droits et obligations attachés à leurs investissements.»).

33 *Id.* art. 33 (Aucun investisseur ne peut être privé de la propriété de ses investissements si ce n'est pour cause d'utilité publique et sous la condition d'une juste et préalable indemnisation.).

34 *Id.* art. 33 (L'investisseur doit respecter les lois et règlements en vigueur relatifs notamment aux droits de la personne, au droit du travail, à la responsabilité sociétale, à la protection de l'environnement, à la fiscalité et à la lutte contre la corruption et les activités illicite.).

35 *Id.* art. 50.
"Tout différend entre l'État de Côte d'Ivoire et l'investisseur de l'interprétation ou de l'application des dispositions du présent code est réglé selon les modalités suivantes:
Les parties s'efforceront de résoudre par des négociations amiables, les divergences de point de vue et les différends auxquels pourront donner lieu, entre elles, l'interprétations ou l'exécution du présent code. Lorsque les parties concluent un accord de transaction, ledit accord tient lieu de loi à leur égard et elles s'engagent à l'exécuter de bonne foi et dans les meilleurs délais.

Egypt (2017)

The Egyptian law dates to 2017 — after the revolution — and applies to both domestic and foreign investors. It seeks to promote investment that leads to comprehensive and sustainable development.[36] The law provides certain investment guarantees to foreign investors including fair and just treatment, national treatment, and non-discrimination and non-arbitrariness in decisions — the wording of these guarantees remain broad and vague.[37] The law contains a chapter on social responsibility of the investor which provides that the investor may dedicate a tax-deductible portion of its profits — not exceeding 10% — towards projects that contribute to the goal of comprehensive sustainable development.[38] The law contains detailed provisions on

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A défaut de parvenir à un règlement amiables dans un délai qui ne peut excéder douze mois, le règlement de la Commission des Nations Unies pour le droit commercial international sur la conciliation s'applique.

Toutefois, les parties peuvent convenir de soumettre leur différend en règlement au Centre d'Arbitrage de la Cour Commune de Justice et Arbitrage d l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

L'investisseur doit au moment de l'obtention de l'agrément remettre à l'agence chargée de la promotion des investissements une lettre d'engagement portant sur les modalités de règlement de litige qu'il choisit. Cet engagement vaut renonciation au recours à tout autre centre d'arbitrage pour le règlement du litige qui l'oppose à l'État.»

36 Investment Law No. 27 of 2017, art. 2 (May 31, 2017) (Egypt) (unofficial UNCTAD translation) ("Investment in the Arab Republic of Egypt aims at improving the national economic growth rates and the domestic production rates, as well as provision of employment opportunities, promotion of exports, and boosting of competitiveness which contribute to achieving the comprehensive and sustainable development.").

37 *Id.* art. 3 ("All the investments established within the Arab Republic of Egypt shall receive fair and just treatment. The State shall ensure to the foreign investor the same treatment given to the national investor. Under a decree issued by the Cabinet of Ministers, an exception can be made granting the foreign investors a preferential treatment in application of the principle of reciprocity. The invested funds shall not be governed by any arbitrary procedures or discriminatory decisions.").

38 *Id.* art. 3.

"Toward achieving the goals of the comprehensive and sustainable development, the Investor may dedicate a percentage of his annual profits to create a social development system, outside of his Investment Project, by participating in the following fields, in whole or in part:

1. Take the necessary action to protect and enhance the environment;
2. Provide services or programs in the areas of healthcare, social care, or cultural care, or other development areas;
3. Support the technical education or the funding of research, studies, and the awareness campaigns aiming at developing and improving the production, in agreement with any of the universities or scientific research institutions; and
4. Training and scientific research.

The amounts spent by an Investor on any of the fields provided for in the previous paragraph shall not exceed 10% of his annual profits after excluding the costs and expenses which are deductible in accordance with Paragraph (8) of Article (23) of the Income Tax Law promulgated by Law No. 91 of 2005. In coordination with the concerned ministries, the Competent Minister may

dispute resolution, and a foreign investor has several options for dispute resolution including, amicable settlement of the dispute through negotiation, a Grievance Committee, a Ministerial Committee on investment dispute resolution, a Ministerial committee on investment contracts dispute resolution, or through arbitration or mediation as agreed between the investor and the state. The parties may also wish to make use of an arbitration and mediation centre created by law, with its seat in Cairo.[39]

Namibia (2016)

The title of the Namibian law — *Namibia Investment Promotion Act 2016* — intimates the objective of the law, which is to promote, not protect, investment. Its stated aims include to provide an effective dispute resolution mechanism involving investment, and to promote sustainable economic development through domestic and foreign investment.[40] The law contains some investor obligations, including that investors must comply with Namibia law at all times.[41] The law foresees its incompatibility with other obligations that Namibia may have, and stipulates that act may not apply where there exists a BIT or other investment agreement.[42] Finally on dispute resolution, a foreign investor may choose mediation and the minister responsible for investment would designate a mediator. Alternatively, the foreign investor may make use of domestic courts. The law grants exclusive jurisdiction to the domestic courts, but the minister and investor may agree in writing to arbitration under the Namibian Arbitration Act 1965.

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create a list of the best Investment Projects that conduct social development activities, whether by the geographic area or sector or other criteria, and announce this list to the public. In all cases, it is prohibited to use the projects, programs, or services delivered under the social responsibility umbrella to pursue political, party-related, or religious purposes or which entail discrimination among the citizens. The Executive Regulations of this Law indicates the controls and rules necessary to enforce the social responsibility system."

39 *Id.* arts 82–91.

40 Investment Promotion Act, Law No. 199 of 2016, Official Gazette No. 6110, Preambular Paragraph, Section 2 (Aug. 31, 2016) (Namibia) ("To provide for the promotion of sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy; to provide for reservation of certain economic sectors and business activities to certain categories of investors; to provide for dispute resolution mechanisms involving investment; and to provide for incidental matters.").

41 *Id.* at Section 18.

42 *Id.* at Section 20.

South Africa (2015)

The title of the South African Act — *South African Protection of Investment Act 2015* — contrasts with the title of the Namibian Act, although its provisions focus on both protection and promotion. The act was enacted after the South African government reviewed its trade and investment policies and announced that it would terminate its BIT programme and withdraw ISDS from investors, replacing it with domestic dispute resolution. The law focuses on the relationship between the South African Constitution and the promotion and protection of investors and investments. In it preamble, the law references the goal of achieving a balance of rights and obligations that apply to all investors, the need to promote rights enshrined in the South African Constitution, the importance of investment in sustainable development, the obligation to take measures to protect and advance persons or categories of persons historically disadvantaged due to discrimination, the government's right to regulate, and the government's commitment in international law to protect human rights, fundamental freedoms and people's resources.[43]

That protection of investment must comply with the Constitution and that the state has a right to regulate are emphasised in the Act.[44] Instead of fair and equitable treatment, the act provides for fair administrative treatment — which is also referenced in the SADC Model BIT as we will see below — by which the government is obliged to ensure that administrative, legislative and judicial processes are not arbitrary and do not deny administrative or procedural justice.[45] Investments must be created in compliance with South African laws, and the Act states that it does not create a right for an investor to establish an investment. The Act provides for national treatment, but only in like circumstances, and specifies certain exceptions, such as deriving benefits from tax agreements, or government procurement services.[46] Foreign investors have a right to security for their investments in accordance with the minimum standard under international law.[47] On dispute resolution, the foreign investor may have recourse to mediation and domestic courts and tribunals. Once the investor has

43 Protection of Investment Act 22 of 2015, GN 39514 of GG 606, Preambular Paragraphs (15 Dec. 2015) (S. Afr.).

44 *Id.* at Section 4. ("The purpose of this Act is to: a. protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; b. affirm the Republic's sovereign right to regulate investments in the public interest; and c. confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.").

45 *Id.* at Section 6.

46 *Id.* at Section 8.

47 *Id.* at Section 9.

exhausted local remedies, the state may consent to state-state arbitration with the home state of the investor.[48]

Tunisia (2016)

In Tunisia, the objective of the law clearly links investment and sustainable development.[49] The law contains a broad provision for national treatment,[50] and while the provision refers to 'like circumstances,' it does not specify any conditions to evaluate what those circumstance might be, in contrast to the South African law. The law contains obligations on the investor to comply with domestic laws in force, including laws on transparency, health, labour, competition, environment, and protection of natural resources.[51] On dispute resolution, the law provides for conciliation using the UNCITRAL Rules for conciliation — this is similar to the Ivorian law. If conciliation does not result in the resolution of the dispute then the investors and state may agree to international arbitration. If the dispute has an international character, the parties may agree to international arbitration via an arbitration agreement under the Tunisian investment law. Otherwise, the dispute will be resolved by the domestic courts.

Tanzania (2017 onwards)

Finally, we look at the special case of Tanzania. While Tanzania has not enacted a new investment law, it has enacted new laws to proclaim its permanent sovereignty over its natural resources. These laws have an impact on ISDS because they alter

48 *Id.* at Section 13(5).

49 Loi de l'investissement 2016, Loi n°2016–71, art. 1 (Sept. 30, 2016) (Tunisia).
«La présente loi a pour objectif la promotion de l'investissement et l'encouragement de la création d'entreprises et de leur développement selon les priorités de l'économie nationale, notamment à travers: l'augmentation de la valeur ajoutée, de la compétitivité et de la capacité d'exportation de l'économie nationale et de son contenu technologique aux niveaux régional et international, ainsi que le développement des secteurs prioritaires; la création d'emplois et la promotion de la compétence des ressources humaines; la réalisation d'un développement régional intégré et équilibré; la réalisation d'un développement durable.»

50 *Id.* art. 7 («Dans des situations comparables, l'investisseur étranger jouit d'un traitement national non moins favorable à l'investisseur tunisien en ce qui concerne les droits et les obligations prévus par la présente loi.»).

51 *Id.* art. 10 («L'investisseur doit respecter la législation en vigueur relative notamment à la concurrence, la transparence, la santé, le travail, la sécurité sociale, la protection de l'environnement, la protection des ressources naturelles, la fiscalité et l'aménagement territorial et de l'urbanisme. Il doit en outre fournir toutes les informations demandées dans le cadre de l'application des dispositions de la présente loi tout en garantissant la fiabilité, l'exactitude et l'exhaustivité des informations fournies.»).

the balance between investor and state obligations and take away the option of international arbitration for disputes that involve Tanzanian natural resources. The first act is the Natural Wealth and Resources (Permanent Sovereignty) Act No 5 of 2017 by which Tanzania asserts its sovereignty over its natural resources and stipulates that the resources should be exploited for the benefit of the Tanzanian people. The law states that the authority for this permanent sovereignty lies in international law and the Tanzanian constitution and includes the text of the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources as its First Schedule, and the Charter of the Economic Rights and Duties of States as its Second Schedule.[52]

The act includes a section on the protection of permanent sovereignty which stipulates that '*permanent sovereignty over natural resources shall not be the subject of proceedings in any foreign court or tribunal.*'[53] It goes on to say that disputes arising from natural wealth and resources '*shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.*'[54] The Act also grants the National Assembly the power to review agreements or arrangements related to natural wealth and resources.[55]

The second act is the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act.[56] It asserts Tanzania's permanent sovereignty over its natural resources, and reiterates the power of the National Assembly to review contracts related to natural wealth and resources and ensure they have been '*concluded in good faith and fairly and, at all times, observe the interests of the People and the United Republic*.'[57] Should the National Assembly find that certain provisions of the agreement or arrangement are unconscionable, it may advise the Government to re-negotiate the agreement or arrangement. In turn the Government shall serve notice of intent to negotiate. The types of terms that can be deemed unconscionable include those that restrict the state's right to exercise permanent sovereignty over its wealth, natural resources and economic activity,[58] and those that subject the state

52 U.N. GAOR, 29th Sess., Supp. No. 31 at 50, U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974).
53 The Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017, Section 11(1) (July 7, 2017) (Tanz.).
54 *Id.* at Section 11(2).
55 *Id.* at Section 12.
56 The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No. 6 of 2017 (July 7, 2017) (Tanzania).
57 *Id.* at Section 4(2).
58 *Id.* at Section 6(2)(a).

to the jurisdiction of foreign laws and fora.[59] If the state and the other party cannot agree on renegotiating the terms, they shall cease to have effect and shall be treated as if they had been expunges.[60]

The third act is the Written Laws (Miscellaneous Amendments) Act[61] which amends the Tanzanian Mining and Petroleum laws to give the Tanzanian government greater control and oversight over natural resources. It amends Section 47 Petroleum Act and Section X Mining Act to stipulate that agreements shall observe certain principles, including, favouring the interest of the nation, and, sustainability and care for the environment.[62]

The fourth act is the Public Private Partnership Amendment Act[63] which eliminates international arbitration and provides that any disputes that arise in the course of the agreement shall be settled by negotiation or '*in the case of mediation or arbitration, be adjudicated by judicial bodes or other organs established in the United Republic and in accordance with the laws of Tanzania*.'[64]

The reforms in Tanzania have extended to its BIT programme, which will be discussed in the section below.

B. Bilateral Reform

A review of ten of the latest BITs signed by African countries[65] available in either English or French on the UNCTAD Investment Policy Hub reveals that while there has been a change in some of the language in the treaties as a reaction to criticism of earlier generations of treaties, the changes have not been coherent even within states.

While there are generally references to sustainable development, they usually appear in the preambular paragraphs and are not reproduced in the substantive

59 *Id.* at Section 6(2)(i).

60 *Id.* at Section 7.

61 The Written Laws (Miscellaneous Amendments) Act, No. 2 of 2017 (Mar. 3, 2017) (Tanzania). *See also* Special Bill Supplement, No. 4 (June 28, 2017) (Tanzania).

62 The Written Laws (Miscellaneous Amendments) Act, No. 2 of 2017, Section 30 (Mar. 3, 2017) (Tanzania). *See also* Special Bill Supplement, No. 4 (June 28, 2017) (Tanzania).

63 The Public Private Partnership (Amendment) Act, No. 9 of 2018 (Sept. 25, 2018) (Tanzania).

64 *Id.* at Section 14.

65 Japan–Morocco BIT 2020; Brazil–Morocco BIT 2019; Burkina Faso–Turkey BIT 2019; Cabo Verde–Hungary BIT 2017; Morocco–Congo BIT 2018; Brazil–Ethiopia BIT 2018; Mali–UAE BIT 2018; Mali–Turkey BIT 2018; Rwanda–UAE BIT 2017; Burundi–Turkey BIT 2017.

provisions.[66] One of the treaties contains a reference to the rebalancing of rights and obligations in its preamble.[67] Most of the preambular paragraphs in the treaties contain provisions on a state's right to regulate with specific reference to safeguarding public health, the environment and labour.[68] These concerns are repeated in the substantive provisions which stipulate that the encouragement of investment should not lead to a relaxation of health, safety, environmental and labour standards.[69]

Classic provisions on national treatment, most favoured nation treatment, and fair and equitable treatment are recurring. Sometimes there are restrictions so that national treatment only applies in 'like circumstances', with an indication of what those might be.[70] At least one treaty excludes national treatment.[71] On MFN, several treaties restrict access to dispute resolution mechanisms in other investment treaties.[72] The FET clause has been restricted in various ways, including by equating it to the minimum standard under customary international law,[73] by providing a list of measures that may constitute a breach of FET,[74] and by defining FET as access to justice through tribunals and laws.[75] One treaty leaves out FET altogether,[76] and two treaties mention FET in the preambular paragraph.[77]

Only two treaties contain provisions on anti-corruption,[78] and the two treaties

66 *See, e.g.*, Cabo Verde–Hungary BIT, Preambular Paragraph; Congo–Morocco BIT, Preambular Paragraph; Brazil–Ethiopia BIT, Preambular Paragraph; Rwanda–UAE BIT, Preambular Paragraph.

67 Rwanda–UAE BIT, Preambular Paragraph.

68 *See, e.g.*, Japan–Morocco BIT, Preambular Paragraph; Burkina Faso–Turkey BIT, Preambular Paragraph; Cabo Verde–Hungary BIT, Preambular Paragraph; Burundi–Turkey BIT, Preambular Paragraph.

69 *See, e.g.*, Japan–Morocco BIT, art. 19; Burkina Faso–Turkey BIT, art. 5; Cabo Verde–Hungary, art. 2; Brazil–Ethiopia BIT, art. 16; Mali–UAE BIT, art. 18; Mali–Turkey BIT, art. 5; Rwanda–UAE BIT, art. 9.

70 Japan–Morocco BIT, art. 3; Brazil–Morocco BIT, art. 5; Burkina Faso–Turkey BIT, art. 4; Cabo Verde–Hungary BIT, art. 4; Congo–Morocco BIT, art. 3; Brazil–Ethiopia BIT, art. 5; Rwanda–UAE BIT, art. 5; Burundi–Turkey BIT, art. 4.

71 Mali–UAE BIT.

72 Japan–Morocco BIT, art. 3; Brazil–Morocco BIT, art. 5; Burkina Faso–Turkey BIT, art. 4; Cabo Verde–Hungary BIT, art.4; Congo–Morocco BIT, art. 3; Brazil–Ethiopia BIT, art. 6; Mali–Turkey BIT, art. 4.

73 Japan–Morocco BIT, art. 4 (includes definition of customary international law); Burkina Faso–Turkey BIT, art.3; Rwanda-UAE BIT, art. 6.

74 Cabo Verde–Hungary BIT (parties may review content of obligation to provide FET); Rwanda–UAE BIT, art. 4.

75 Mali–UAE BIT, art. 3.

76 Brazil–Morocco BIT.

77 Mali–Turkey BIT, Preambular Paragraph; Burundi–Turkey BIT, Preambular Paragraph.

78 Japan–Morocco BIT, art. 7; Brazil–Ethiopia BIT, art. 15.

with Brazil contain a reference to corporate social responsibility, which is linked to sustainable development, respect for human rights, and adhering to voluntary international standards.[79]

On dispute resolution, most of the treaties provide a menu of options for investors that include international arbitration. The provisions provide for amicable settlement, leading to a choice between domestic courts and international arbitration at ICSID, or *ad hoc* arbitration using UNCITRAL Rules.[80] At least one treaty lists local arbitration institutions as options.[81] At least two treaties stipulate time limits for making claims,[82] and one provides that a non-disputing contracting party may make submissions on the interpretation of the treaty.[83] One treaty reiterates that arbitrators should be independent.[84]

The two treaties with Brazil do not allow investors access to ISDS. Instead they provide elaborate mechanisms for the amicable settlement of disputes between the parties through conciliation, mediation and negotiation, which can be escalated to state-state arbitration should they be unsuccessful.[85]

These examples do not reveal any uniformity in the approach that African states take in negotiating new BITs. Rather, they reveal a diversity of approaches between and even within states, as observed in the three Morocco and two Mali BITs. An example of potential internal investment policy incoherence is provided by Burkina Faso, which appears to have concluded its BIT with Turkey after terminating its BIT with the Netherlands, but without developing an investment policy in the interim — at least not one that it made public. The point here is not that Burkina Faso should not conclude any more BITs, but rather that after it has identified the potential pitfalls with the provisions in BITs — as it had with its BIT with the Netherlands — it should only conclude additional BITs after a developing an investment policy.

As noted in the previous section, Tanzania' reforms have extended to its BITs. In September 2018, Tanzania notified the Netherlands that it intended to terminate the Netherlands-Tanzania BIT.[86] The termination clause in the treaty stipulated

79 Brazil–Morocco BIT, art. 13; Brazil–Ethiopia Article, art. 14.

80 Cabo Verde–Hungary BIT, art. 9; Congo–Morocco BIT, art. 9; Mali–UAE BIT, art. 11; Mali–Turkey BIT, art. 10; Burundi–Turkey BIT, art. 12.

81 Burkina Faso–Turkey BIT, art. 10.

82 Japan–Morocco BIT, art. 16; Cabo Verde–Hungary BIT, art. 9.

83 Japan–Morocco BIT, art. 16.

84 Cabo Verde–Hungary BIT, art. 9.

85 Brazil–Morocco BIT, art. 19–20; Brazil Ethiopia BIT, art. 23–24.

86 Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom

that if either party intended to terminate the BIT, it had to do so 6 months before the expiry date of 1 April 2019, otherwise the BIT would tacitly renew for another ten years.[87] The Netherlands-Tanzania BIT had a 15-year survival, or sunset clause, so Dutch investors have protection under the old treaty until 1 April 2034.[88] Some commentators view Tanzania's termination of its BIT with the Netherlands as a triumph for the state, and for civil society, which had been at the forefront of the campaign to terminate the treaty.[89] If one considers the onerous termination provisions, and the broad rights granted to investors in the treaty, it is obvious why terminating the BIT would be attractive. But, that picture is incomplete. Tanzania terminated the treaty in a context where the Netherlands had started negotiations with Tanzania, Burkina Faso, Uganda and Nigeria on the basis of a new progressive Dutch Model BIT that *inter alia* rebalances rights between investors and states and contains provisions on sustainable development. Tanzania eschewed the opportunity to negotiate a new BIT with more favourable terms, in favour of guaranteeing the status quo for another fifteen years. It is difficult to see how this can be viewed as a positive outcome for the state.

Tanzania is not the only African country to terminate its BIT with the Netherlands. South Africa[90] and Burkina Faso[91] have also done so. But, of the three countries, only South Africa has done so after a review of its bilateral investment treaty framework.[92]

C. Sub-regional and Regional Reform

of the Netherlands and the United Republic of Tanzania, July 31, 2001 [hereinafter Netherlands–Tanzania BIT].

87 Netherlands-Tanzania BIT, art. 14(2).

88 Netherlands-Tanzania BIT, art. 14(3), See also Tanzania Faces a New ICSID Claim under Terminated Netherlands BIT, Kluwer Arbitration Blog (June 21, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/?doing_wp_cron=1594601503.9595611095428466796875 5.

89 *See, e.g.,* James Thuo Gathii, *Understanding Tanzania's Termination of Its BIT With the Netherlands in Context,* AfronomicsLaw (Apr. 1, 2019), https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of its-bit-with-the-netherlands-in-context/?fbclid=IwAR1TM0qjNg7wOQ2Q4RcEREC_r8sUIVD-NBk_cenOmXIktWiNx0EDjzcyZztw.

90 Terminated April 30, 2014. Netherlands–South Africa BIT, art. 14(3), Sept. 5, 1995 (containing a "survival" or "sunset" clause for 15 years).

91 Terminated January 1, 2019. Burkina Faso–Netherlands BIT, art. 14(3), Oct. 11, 2000 (also containing a "survival" or "sunset" clause for 15 years).

92 South Africa has terminated its BITs with Argentina, Austria, Belgium–Luxembourg Economic Union, Denmark, France, Germany, Italy, Spain, Switzerland and the United Kingdom. *See* South African Department of Trade and Industry, Government Position Paper on Bilateral Investment Treaty Policy Framework Review (Pretoria, June 2009), http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf.

There is great divergence in the reform at the sub-regional and regional levels in Africa. Although some sub-regions have taken inspiration from others — the East African Community has drawn on the work of South African Development Community — reform at the regional level remains fragmented. This section highlights the reforms at the African Union (AU), East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Economic Community for West African States (ECOWAS), and Southern African Development Community (SADC).

The reforms by the regional economic organisations (RECs) aim to address the concerns raised by member states on rebalancing the rights and obligations between investors and states, linking investment to sustainable development, tightening the broad definitions of provisions like FET, and restricting, or removing, access to investor-state dispute resolution.

African Union Pan African Investment Code (PAIC)

AU member states adopted the Pan African Investment Code (PAIC) in 2017. Initially intended as a binding instrument, it was adopted as a non-binding instrument as states could not reach consensus on its provisions. The PAIC can be considered as the first pan-African expression of investment policy. [93] As stated in the introduction to this paper, the PAIC has been hailed as an illustration of the "Africanisation" of international investment law in Africa, but its critics, including this author, are concerned that it creates a two-track system of investor protection that disadvantages African investors.[94]

The PAIC was drafted in the context of pre-existing rights and obligations expressed in other laws and treaties across the continent, and member states were concerned about how this new instrument would related to existing agreements. The solution was a provision that explicitly states that the PAIC would not interfere with the rights and obligations of member states arising from other investment obligations.[95]

The text of the PAIC reveals that its drafters were ambitious in their quest to reshape international investment law in Africa, for example in restricting protection

93 Adopted in October 2017 by the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration of the African Union.

94 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

95 African Union, Pan African Investment Code, art. 3 (Oct. 2017) [hereinafter PAIC].

to investments and investors that contribute to sustainable development.[96] The PAIC repeates references to sustainable development in its preambular paragraphs and throughout its text.

The PAIC excludes the FET on the basis of the controversy of its content and uncertainty in its interpretation.[97]The FET provision has been the source of great controversy in its interpretation, especially where it has been broadly drafted.[98] In this context, elimination of FET from the PAIC seems progressive. But, if one considers that investors should still be entitled to protection that is the equivalent to the minimum standard under international law, it is not immediately clear why the PAIC attempts to exclude this protection for African investors. As other commentators have noted elsewhere,[99] it is possible to clarify the interpretation of the FET standard by equating it to the minimum standard under customary international law, or providing an interpretation of the FET in the text of the instrument.

The PAIC deals with another problematic provision, MFN, by specifying that it does not extend to access to dispute settlement provisions in other treaties.[100] It also contains provisions on national treatment, but with exceptions.[101]

A unique feature of the PAIC is its chapter on 'development related issues',[102] which contains performance requirements, and a list of investment sectors that are open for liberalisation.[103] The PAIC also contains a comprehensive chapter on investor obligations.[104] These include a framework for corporate governance, socio-political obligations, bribery, corporate social responsibility, obligations as to the use of natural resources, and business ethics and human rights.[105]

96 PAIC, art. 1.

97 Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34 ICSID Rev. 455, 472 (2019).

98 *See generally* Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008); Fair and Equitable Treatment Standard in International Law (OECD Working Papers on International Investment, 2004/03, 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

99 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

100 PAIC, art. 8.

101 PAIC, art. 9–10.

102 PAIC, chpt. 3.

103 PAIC, art. 17-18.

104 PAIC, chpt. 4.

105 PAIC, arts. 19–24.

The PAIC also contains a chapter on "investment related issues",[106] which include *inter alia* competition law and policy, transfer of technology, environment and technology and labour issues. Notable in these provisions is one which encourages investors to bear the costs of climate change adaptation and mitigation.[107]

Finally, the PAIC's contains a chapter on dispute settlement which contains provisions on both state-state dispute settlement, and investor-state dispute settlement.[108] The availability of investor-state dispute resolution is conditioned on a state's domestic policies. Where investor-state dispute settlement is agreed upon by the state, it may be provided in accordance with another existing agreement, or in accordance with the PAIC.[109] Dispute resolution under the PAIC, the investor and state shall seek to resolve the dispute through negotiations and consultations. If no agreement is reached within 6 months, the parties may seek to resolve their disputes through arbitration subject to the applicable laws of the host state or mutual agreement of the disputing parties, and the exhaustion of local remedies. If the parties go to arbitration, it should be at an African centre under the UNCITRAL Rules.[110] The PAIC explicitly allows for counterclaims by states.[111]

COMESA Investment Agreement

In 2007, COMESA member states adopted a common agreement for the COMESA Investment Area, but none of the states have ratified it.[112] In 2017, COMESA revised the agreement in a quest to align it with the PAIC. In its preamble, the COMESA Investment Agreement affirms the importance of both sustainable economic growth through intra-COMESA trade and investment flows, and sustainable development. It also includes a provision which stipulates that members must accede to the New York Convention, the ICSID Convention, the MIGA Convention, the African Trade Insurance Agency, and any other multilateral agreement designed to promote or protect investment.[113]

106 PAIC, chpt. 5.
107 PAIC, art. 30(2).
108 PAIC, chpt. 6.
109 PAIC, art. 42.
110 PAIC, art. 42.
111 PAIC, art. 43.
112 Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area (May 23, 2007) [hereinafter COMESA Investment Agreement].
113 COMESA Investment Agreement, art. 6.

The COMESA Agreement explicitly states that it sets out to balance rights and obligations between states,[114] and contains obligations for investors to comply with the host state's domestic law.[115] FET is equated to customary international law and includes a prohibition on denial of justice.[116] The agreement also includes provisions providing national treatment and most favoured nation treatment.[117]

Finally, the COMESA Investment Agreement includes dispute resolution provisions that allow for ISDS. The dispute resolution process starts with an attempt at negotiation or mediation.[118] The investor then has a choice between domestic courts, the COMESA Court of Justice or international arbitration under ICSID Rules, the ICSID Additional Facility Rules, the UNCITRAL Rules, or the rules of any other arbitral institution agreed to by the parties. The COMESA Agreement also contains a fork-in-the-road provision, and stipulates that procedural and substantive hearings shall be open to the public. Under the agreement, a respondent state may make a counterclaim or request a set-off.[119]

East African Community (EAC) Draft Model BIT

The East African Community (EAC) has a draft Model Investment Treaty ("EAC Model Treaty") dating to February 2016, which is intended to guide negotiations between EAC member states and third states.[120] In its preamble, the EAC Model Treaty declares that investment can contribute to sustainable development and that parties seek to promote investment that enhances sustainable development. The model treaty affirms the state's right to regulate, and explicitly states that it seeks to rebalance the rights and obligations between states and investors. The model treaty goes on to say that treaty objectives can be met without compromising public interest objectives like health, safety and environment measures. The model treaty states its objectives in a separate section, which are identified as promoting investment that supports employment generation, technology and skills transfer and contribute to poverty reduction in a sustainable way.

114 COMESA Investment Agreement, art. 11.
115 COMESA Investment Agreement, art. 13.
116 COMESA Investment Agreement, art. 14.
117 COMESA Investment Agreement, art. 17–19.
118 COMESA Investment Agreement, art. 26.
119 COMESA Investment Agreement, art. 28.
120 The treaty text draws on the SADC Model BIT 2012, the COMESA Common Investment Area Agreement and the Indian Model BIT. The draft also acknowledges input from the International Institute for Sustainable Development (IISD).

The substantive provisions of the EAC Model Treaty reflect the ambitions in its Preamble. The national treatment provision precludes the pre-establishment phase, and allows a state to deny national treatment to investors in particular sectors. The same principles apply to the MFN provision which precludes access to provisions in other international agreements.

The EAC Model Treaty contains a provision that sets out a host state's obligation to provide good governance, including by ensuring that administrative, legislative, and judicial processes are not arbitrary and do not deny investors due process. The provision also refers to the 'level of development of the State party' as a qualifier for the state's obligations, but does not clarify why this relativism should appear here.

Other notable provisions are a requirement for investors to comply with domestic law,[121] an obligation against corruption,[122] and a requirement to provide information, including about affiliates, ownership and governance.[123] The model treaty also includes a provision on liability of the investor in its home state for actions or omissions in the host state,[124] and provisions on transparency of contracts and payment.[125] The model treaty goes further to include a provisions that affirm the state's right to regulate,[126] and the right to pursue development goals.[127]

The EAC Model BIT contains an ISDS provision, but states that the preferred option is not to include ISDS.[128] The ISDS provision encourages investors and states to resolve their disputes amicably, including through mediation. Arbitration is only available to investors where an investor can demonstrate that it has exhausted local remedies or, in the alternative, that there are no viable local remedies available. An investor also has to waive recourse to other methods of dispute resolution, and consent to arbitration in writing. The provision also contains a limitation period of three years from the time when the investor became aware of the dispute. The detailed ISDS provision in the EAC Model BIT also provides for *inter alia* amicus briefs, expert

121 East African Community, Model Bilateral Investment Treaty, art. 10 (Feb. 2016) [hereinafter EAC Model BIT].
122 EAC Model BIT, art. 11.
123 EAC Model BIT, art. 12.
124 EAC Model BIT, art. 13.
125 EAC Model BIT, art. 14.
126 EAC Model BIT, art. 15.
127 EAC Model BIT, art. 16.
128 EAC Model BIT, art. 23.

reports, transparency, an appeal mechanism, submissions by the non-disputing state party, and consolidation.[129]

ECOWAS Supplementary Act

In West Africa, the Economic Community of West African States (ECOWAS) has a Supplementary Act on Investments[130] ("Supplementary Act"). The Supplementary Act is a binding instrument that applies to investments within the ECOWAS region. The act explicitly links investment to sustainable development. It contains provisions on national treatment,[131] in like circumstances, with identical conditions as those contained in the SADC Model BIT. The act also contains an MFN clause,[132] with exceptions such as for benefits accruing from agreements on taxation.

The Supplementary Act provides for 'minimum regional standards' which are linked to the minimum standard under customary international law. It includes fair and equitable treatment and, notably, reasonable protection and security under domestic law.[133] The Supplementary Act also contains a chapter on obligations and duties of the investors and investments which includes, compliance with domestic laws and obligations,[134] pre-establishment impact assessment (environmental and social impact),[135] anti-corruption,[136] post-establishment obligations,[137] corporate governance and practices,[138] corporate social responsibility,[139] and investor liability.[140] The Act also contains a provision entitled 'relation of investor's liability to dispute

129 EAC Model BIT, art. 24.

130 Economic Community of West African States, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS (signed Dec. 19, 2008) (entered into force Jan. 19, 2009) [hereinafter ECOWAS Supplementary Act].

131 ECOWAS Supplementary Act, art. 5.

132 ECOWAS Supplementary Act, art. 6.

133 ECOWAS Supplementary Act, art. 7.

134 ECOWAS Supplementary Act, art. 11.

135 ECOWAS Supplementary Act, art. 12.

136 ECOWAS Supplementary Act, art. 13.

137 ECOWAS Supplementary Act (including compliance with health and social welfare rules, upholding human rights, and complying with the ILO Declaration on Fundamental Principles and Rights of Work, 1988).

138 ECOWAS Supplementary Act, art.15.

139 ECOWAS Supplementary Act, art. 16.

140 ECOWAS Supplementary Act, art. 17.

settlement,' which sets out the consequences of breaching investor obligations, and provides that a state may make a counterclaim.[141]

The Supplementary Act goes on to set out a host state's obligations and rights, including procedural fairness,[142] maintenance of environmental and other standards,[143] minimum standards for environmental, labour, and human rights protection,[144] performance requirements,[145] and access to investor information.[146] The Supplementary Act also has a Chapter on home state rights and obligations,[147] which notably include an obligation for the home state to provide for investor liability in the home state,[148] and a list of offences that shall be considered criminal and subject to criminal enforcement and sanctions.[149]

The ECOWAS Supplementary Act is binding on parties, and member states are required to ensure that all their future agreements are consistent with the Act.[150]

Finally on dispute resolution, the Act provides for arbitration, where amicable dispute resolution has failed. The investor may submit the dispute to arbitration, to a national court, any national machinery for the settlement of investment disputes, or the relevant court of the Member States. If there is a disagreement on the method of dispute settlement to be adopted, then the dispute is referred to the ECOWAS Court of Justice.[151]

South African Development Community Model BIT

SADC Model BIT 2012[152] was drafted as an attempt to harmonise the investment policies and laws of members states. The draft is comprehensive and includes a

141 ECOWAS Supplementary Act, art. 18.
142 ECOWAS Supplementary Act, art. 19.
143 ECOWAS Supplementary Act, art. 15.
144 ECOWAS Supplementary Act, art. 15.
145 ECOWAS Supplementary Act, art. 24.
146 ECOWAS Supplementary Act, art. 26.
147 ECOWAS Supplementary Act, chpt. VI.
148 ECOWAS Supplementary Act, art. 29.
149 ECOWAS Supplementary Act, art. 30.
150 ECOWAS Supplementary Act, arts. 31–32.
151 ECOWAS Supplementary Act, art. 33.
152 Southern African Development Community, SADC Model Bilateral Investment Treaty Template (July 2012) [hereinafter SADC Model BIT]. Drafted by representatives from Malawi, Mauritius, Namibia, South Africa and Zimbabwe. Representatives from Angola, Botswana, Mozambique and the Seychelles attended the final drafting meeting. Support from IISD. Funded by EU and the GIZ on behalf of the German Government.

commentary that explains the different draft provisions. In its preamble, it links investment to sustainable development and affirms the state's right to regulate, and the particular need for developing countries to exercise this right, and notes that it seeks to balance rights and obligations between investors and states.[153] The model also contains a standalone article on the state's right to regulate which, it notes, derives from customary international law and other principles of general international law. This right to regulate, it is stipulated, shall be understood as embodying the balance of rights between investors and states.[154]

The SADC Model BIT also contains a provision on national treatment, which it calls 'non-discrimination, in like circumstances. Like circumstances are to be determined on a case by case basis, considering elements such as the measure concerned and the sector of the investment.[155] The model excludes Most Favoured Nation treatment because it can lead to "unintended multilateralization." However, should states wish to include an MFN clause, the model offers language that could be used – the language suggested does not restrict the MFN clause to non-dispute settlement provisions, as has been seen elsewhere.

The Model offers a choice between a provision on fair and equitable treatment (FET) and one on fair administrative treatment (FAT).[156] The FET option links the treatment to customary international law. It restricts the provision by stipulating that for an investor to claim a breach of FET, it must demonstrate "an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognise its insufficiency."[157] The FAT focusses on administrative, legislative and judicial processes and stipulates that they should not be arbitrary or deny administrative and procedural justice or due process to an investor.[158]

The Model also contains a chapter on the rights and obligations on investors and states, which include a common obligation against corruption,[159] compliance

153 SADC Model BIT, Preambular Paragraphs.
154 SADC Model BIT, art. 20.
155 SADC Model BIT, art. 4.
156 SADC Model BIT, art. 5.
157 SADC Model BIT, art. 5.
158 SADC Model BIT, art. 5.
159 SADC Model BIT, art. 10.

with domestic law,[160] environmental and social impact assessment,[161] environmental management and improvement,[162] minimum standards for human rights, environment and labour,[163] corporate governance standards,[164] investor liability,[165] transparency of contracts and payments,[166] relation to dispute settlement,[167] right to regulate,[168] right to pursue development goals,[169] and obligations of states on environment and labour standards.[170]

Finally, the SADC Model BIT contains a detailed provision on dispute resolution. The provision provides for attempts at amicable settlement, mediation, and conditions which must be met before an investor can make a claim in arbitration. The conditions include a six-month cooling-off period, a fork-in-the-road provision, and a time limit for making a claim. The provision offers a menu of options for arbitration which include ICSID Rules, UNCITRAL Rules, and regional arbitration centres. The provision also excludes arbitration where the investor has a contract or authorisation containing a choice of forum clause.

Organisation for Islamic Cooperation (OIC) Investment Protocol

The Organisation for Islamic Cooperation (OIC) has recently announced that it has developed a protocol to the OIC Investment Agreement[171] to govern dispute resolution between its member states. While the OIC is not an African regional organisation, twenty-seven African countries are member states.[172] The new protocol would replace the current *ad hoc* dispute resolution mechanism provided for by OIC Investment

160 SADC Model BIT, art. 11.
161 SADC Model BIT, art. 13.
162 SADC Model BIT, art. 14.
163 SADC Model BIT, art. 15.
164 SADC Model BIT, art. 16.
165 SADC Model BIT, art. 17.
166 SADC Model BIT, art. 18.
167 SADC Model BIT, art. 19.
168 SADC Model BIT, art. 20.
169 SADC Model BIT, art. 21.
170 SADC Model BIT, art. 22.
171 Organisation of Islamic Cooperation, Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (June 5, 1981).
172 Twenty-seven African states are members of the OIC: Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, and Uganda.

Agreement. The aim of the protocol is to limit access to ISDS, and it stipulates that investors would have to exhaust local remedies before gaining access to state-state dispute settlement. And only if the state-state mechanism failed would investors gain access ISDS. The ISDS system itself would have two instances — a first instance and an appellate mechanism.[173] More will be known about the protocol when it is made public, but it is included here to illustrate another layer of complexity for those African states that are members of the OIC.

D. International Reform

African states are also involved in reform processes involving non-African states. There are two such processes — procedural reform through the United Nations system at UNCITRAL, and the revision of the ICSID Rules. The UNCITRAL reform process may last a few more years, but the ICSID process is nearly at an end. African states are not actively engaging in these processes, which may largely stem from a lack of capacity. It may also be that the interlocking web of rights and obligations that African states are subject to, coupled with an incomplete knowledge of those obligations are, impedes African states from fully participating in these processes.

i. ISDS Reform at UNCITRAL

At its 50th Session in July 2017,[174] the UNCITRAL Commission gave Working Group III a broad mandate to work on the possible reform of procedural aspects of the ISDS system. The discussions were to be government led, consensus-based, and fully transparent.[175] The reform topics for discussion include, appellate and multilateral court mechanisms, a code of conduct for arbitrators,[176] third party funding, establishment of an advisory centre, selection and appointment of ISDS tribunal members, dispute prevention and mitigation, security for costs and frivolous claims, and a multilateral instrument on ISDS reform.

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173 The OIC Investment Protocol is not yet publicly available, and it is unclear whether it also contains amendments to the substantive provisions of the OIC Investment Agreement. One of the drafters of the Protocol spoke at a conference where he outlined the main features of the OIC, and it is from these remarks that this information has been drawn. Yusuf Kumtepe & Riccardo Loschi, *Investment Dispute Settlement Body of the Organisation of Islamic Cooperation: A Dead End for Claims under the OIC Investment Agreement?*, Kluwer Arbitration Blog (Dec. 29, 2019).

174 Report of the United Nations Commission on International Trade Law (UNCITRAL) at Its Fiftieth Session, U.N. Doc. A/72/17 (2017).

175 *Id.* at para. 264.

176 On May 1, 2020, the secretariats of ICSID and UNCITRAL jointly released a draft Code of Conduct for public comment. The text of the draft can be found at https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

UNCITRAL ("the Commission"), which is supported by a Secretariat in Vienna, carries out its work in annual working sessions alternating between Vienna and New York. Its work is based on the recommendations it receives from the various working groups. It is composed of 60 member states, each serving for a six-year term.[177] There are currently fourteen African states that are members of Commission.[178]

Since its first session in 2017, Working Group III has held five sessions alternating between Vienna and New York, with an extra session held in January 2020. Attendance by African states — members of the Commission and observer states — has increased between the 34th Session when only nine states attended, and the Resumed 38th Session when twenty one states attended.[179] Except for generally widespread support for the establishment of an advisory centre, it is not possible to discern a common position between the African states.

Only three African states have submitted working papers — Mali,[180] Morocco,[181] and South Africa.[182] A summary of their submissions is instructive. Mali highlights the challenges faced by developing states because of the imbalance between states which are always the recipients of foreign investment. It notes that this creates an imbalance in the treaties which should be rebalanced. The submission also highlights that developing states lack expertise and preparation and when defending claims, and this could be resolved by developing internal strategies for negotiation and training.

177 G.A. Res. 2205 (XXI), Establishing United Nations Commission on International Trade Law (Dec. 17, 1966).

178 Current African states membership of the Commission (expiry of term in parenthesis): Algeria (2025), Burundi (2022), Cameroon (2025), Côte d'Ivoire (2025), Ghana (2025), Kenya (2022), Lesotho (2022), Libya (2022), Mali (2025), Mauritius (2022), Nigeria (2022), South Africa (2025), Uganda (2022), and Zimbabwe (2025). African states membership at the thirty-fourth session (expiry of term in parenthesis): Burundi (2022), Cameroon (2019), Côte d'Ivoire (2019), Kenya (2022), Lesotho (2022), Liberia (2019), Libya (2022), Mauritania (2019), Mauritius (2022), Namibia (2019), Nigeria (2022), Sierra Leone (2019), Uganda (2022), and Zambia (2019). Algeria, Ghana, South Africa, and Zimbabwe replaced Liberia, Mauritania, Namibia, and Zambia in 2019.

179 Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session, U.N. Doc. A/CN.9/930/Rev.1, at II (Dec. 19, 2017); Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Resumed Thirty-Eighth Session, U.N. Doc. A/CN.9/1004/Add.1, at II (Jan. 28, 2020).

180 Government of Mali, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.181 (Sept. 17, 2019).

181 Government of Morocco, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 1, 2019).

182 Government of South Africa, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019).

Mali also raises concerns about the language used in arbitration, the conduct of the arbitrators and the costs and duration of arbitration.

Morocco outlines the reforms that it has made in its model BIT to rebalance rights and obligations between states. The reforms include provisions for states to make counterclaims, and summary dismissal of frivolous claims. As it notes, Morocco has also introduced limits on the type of disputes that may be submitted to ISDS as well as time limits for making the claims. It also highlights issues that it believes should be discussed in Working Group III, including the cost of arbitration, scrutiny of awards, and the availability of an appellate mechanism.

South Africa for its part, uses its submission to focus on the link between investment and sustainable development. It offers several reform solutions and reiterates its view that states should re-think the ISDS system, including whether it is necessary. It proposes an alternative to the creation of an ISDS system that focuses on sustainable development and calls for an expansion of the discussion in Working Group III to include substantive issues.

These submissions have been made by the individual states without support or coordination with other African states. To date, there have been no efforts to coordinate positions and submissions from African states at Working Group III, except for an invitation-only event that is organised by the Organisation for the Francophonie (OIF), to which only Francophone African states are invited.

The OIF collaborated with the Government of the Republic of Guinea and UNCITRAL to organise a regional inter-sessional meeting[183] from 25–26 September 2019 in Conakry, Guinea. The objective of the meeting was to familiarise African states with the work of Working Group III and highlight the reform options being discussed. It was also meant to provide an opportunity for African states to share their experiences with ISDS and identify their priorities for reform.[184] The session was attended by representatives from twenty nine African states,[185] Belgium, Canada, France and the United States.

183 There have been two previous regional inter-sessional meetings: (1) First Inter-sessional Meeting, September 10–12, 2018 (Incheon, Republic of Korea), and (2) Second Inter-sessional Meeting, February 13–14, 2019 (Santo Domingo, Dominican Republic).

184 Government of Guinea, Summary of the Inter-Sessional regional meeting on Investor-State Dispute Settlement (ISDS) Reform, U.N. Doc. A/CN.9/WG.III/WP.183 (Oct. 4, 2019).

185 Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Eswatini, Gabon, Gambia,

The African Union did not attend the first four sessions of Working Group III. It has since attended the 38th Session and the Resumed 38th Session in Vienna but has not yet made any interventions.

Various other observer organisations from Africa have also attended Working Group III.[186] To date, they have not been part of any co-ordinating effort between African States. The Commonwealth Secretariat is also an observer state in Working Group III, but unlike its homologue, the OIF, it has not embarked on any co-ordination efforts between African states.[187]

In sum, it is not possible to discern any coordination between African states at UNCITRAL Working Group III, despite the efforts at coordination at the inter-sessional meeting in Conakry, Guinea. It is not known how long the reform process at UNCITRAL will take, but it could be up to five years if previous work programmes are of any indication.

ii. ICSID Rules Amendment Project

On 3 August 2018, the International Centre for the Settlement of Investment Disputes (ICSID) announced a series of proposed changes to its rules and invited public comment. ICSID noted that the proposed changes amendments were designed *inter alia* simplify the rules by improving drafting and language, to reduce time and cost by introducing electronic filing, to require disclosure of third-party funding. The proposed amendments would also give access to ICSID arbitration to regional economic integration organisations through the ICSID Additional Facility and Rules. Notably, the proposed amendments also include a set of rules on mediation.

Almost all African states are ICSID contracting states (signed and ratified). The exceptions are Angola, Eritrea, Ethiopia (signatory state), Equatorial Guinea, Guinea Bissau (signatory state), Libya, Namibia (signatory state), and South Africa.

ICSID Member states were invited to give comments on the ICSID Rule

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Ghana, Guinea, Libya, Mali, Morocco, Mauritania, Mauritius, Namibia, Nigeria, Rwanda, Senegal, Tunisia, Zambia, and Zimbabwe.

186 The list of observer organisations can be found for each Working Group Session at https://uncitral.un.org/en/working_groups/3/investor-state.

187 Elsewhere, the Commonwealth Secretariat has been involved in an annual forum for developing country investment negotiators convened by the International Institute for Sustainable Development (IISD). Other partners at this annual forum include the West African Economic and Monetary Union (UEMOA), the Common Market of Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the United Nations Economic Commission for Africa (UNECA).

Amendment process. Only eight African states provided comments on the first version of the amendments Algeria, Democratic Republic of Congo, Mauritius, Morocco, Nigeria, Somalia, Togo, and Tunisia. The African Union also gave comments. No African states or the African Union gave comments on the second version of the rules.[188]

The African Union (AU) expressed its support for extending the ICSID Additional Facility Rules to regional economic international organisations (REIOs) and reiterated the need for diversity in the nomination of arbitrators. It did not appear from its submission, that the AU had coordinated with its member states before making its submission.

African states generally supported the introduction of mediation rules, but states varied in their interventions. Mauritius responded only to say that it was in agreement with the proposals. The DRC urged ICSID to propose rules against claims by vulture funds. Nigeria urged ICSID to consider longer timeframes to allow developing states to gather relevant documents. It noted that it would provide further comments on other issues but did not make any further written submissions. Somalia expressed its support for electronic filing, shared its concerns about third party funding, and welcomed the amendment to permit a standalone application for security for costs – not linked to provisional measures. Togo noted that there may be good reasons not to disclose the identity of a third-party funder, and that disclosure should therefore not be systematic.

The written contribution of African states to the ICSID Rule Amendment process has been limited in scope and depth and is illustrative of a wider challenge in engaging with ISDS reform as is evident in the UNCITRAL Reform process.

II. WHITHER ISDS REFORM IN AFRICA?

Five observations can be drawn from the foregoing overview of the reform processes. First, while it is possible to identify some recurring themes in the reforms across the different investment law instruments reviewed in Part I — such as reference to sustainable development, state's right to regulate, rebalancing of rights and obligations between investors and states, including through allowing counterclaims — there are no reforms that can be classified as uniquely African.

188 All submissions are available at https://icsid.worldbank.org/en/amendments.

Second, except for South Africa, and perhaps Egypt, reforms at the national level do not appear to be driven by clearly defined investment policies in their reform efforts. They act in an *ad hoc* uncoordinated manner, which only thickens the complex web of rights and obligations that bind African states. This approach may be convenient in the short term, but is unsustainable and inefficient in the medium to long term.

Third, where African states have been assertive in rebalancing the rights and obligations between investors and states, they have not considered the impact this may have on African investors and intra-Africa investment. If some of the proposed reforms, such as those in the PAIC, were to be implemented, non-African investors would be treated more favourably than African investors in Africa.

Fourth, in a context where African states are already disadvantaged by a shortage of expertise in international investment law, there appears to be no attention paid to the burden borne by African states as a result of negotiating and implementing reform at different levels. States are simultaneously amending their domestic laws, negotiating BITs, negotiating investment provisions of RECs, negotiating the Investment Protocol and participating in global reform efforts. All this without a clearly defined internal policies or negotiation strategies.

Fifth, while African states are active in reforming domestic, sub-regional, and regional instruments, they are relatively passive at the global level.[189]

CONCLUSIONS

It is difficult not to celebrate the increased participation of African states in the reform of investment laws and treaties, especially in the context of their passive role in the past. It is this increase in participation that has led to the celebration of the "Africanisation" of international investment law, and the transition of African states from 'rule takers' to 'rule makers'. However, the review of these reforms at the national, bilateral, and multilateral — I am less optimistic that there is something uniquely African in these reforms.

We can draw an analogy with the world of classical music. If African states are the members of a symphony orchestra, we can imagine them with their instruments in hand, each playing from a sheet of music. Each musician plays well, but she is playing

189 *See*, e.g., Hamed El-Kady & Mustaqeem De Gama, *The Reform of the International Investment Regime: An African Perspective*, 34 ICSID Rev. – Foreign Inv. L.J. 482–95 (2019).

alone and the piece has been composed for a full orchestra. Occasionally, the wind instruments play together, and every so often, the percussion instruments appear to be playing together even though that is not the intention of the players. It does not take long to realise that it is only when the whole orchestra starts playing in harmony, led by a conductor, that the beautiful music delights the audience.

Similarly, while I applaud African states for carrying out reforms on their own, or in sub-regional groupings, the goal of a true harmonisation of investment law across Africa — as intended by the Investment Protocol will only be possible when all states participate in the process. Otherwise, there can only be fragments and fragmentation. Indeed, just as an individual musician has to practice on their own before joining the rest of the orchestra, so too must African states identify their individual interests before participating in the definition of collective pan-African interests.

Like in an orchestra, African states can find harmony in diversity. Unless collective interests can be defined, the ambitious regional integration project, with the AfCFTA as a key pillar, cannot be realised.

Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol

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This article breaks new ground by advancing the first comprehensive mapping and analysis of the fragmented intellectual property (IP) architecture in Africa in light of the pending African Continental Free Trade Area (AfCFTA) IP Protocol. I argue that the AfCFTA IP Protocol presents a timely, albeit arduous, opportunity for Africa to reconstruct its broken IP architecture by aligning the conflicting sub-regional IP regimes with the development-oriented aspirations that animate the African Union's IP agenda. This will drive the design and delivery of IP systems suited to the contexts, conditions and collective interests of Africa. In appreciating Africa's agricultural resources, traditional knowledge and cultural legacies, I argue that the AfCFTA IP Protocol negotiators ought to prioritise geographical indications, plant variety protection, traditional knowledge and traditional cultural expressions, which embody Africa's innovative and creative strengths. While the African Union (AU) has policy frameworks on these subjects, there are variations in the sub-regional organisations' uptake patterns.Sub-regional organisations are increasingly embracing the Continental Strategy for Geographical Indications in Africa 2018 - 2023. Conversely, no sub-regional organisation has introduced a plant variety protection system styled on the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000. Moreover, the sub-regional regimes adopt distinct governance structures. The Organisation Africaine de la Propriété Intellectuelle (OAPI) operates a uniform system, whereas the African Regional Intellectual Property Organisation (ARIPO) operates a flexible system. The AU's ambitious attempt to resolve the policy incoherence and inconsistency through the Pan African Intellectual Property Organisation (PAIPO)- a single Pan-African IP organisation to harmonise IP and stimulate social and economic development in Africa - is inchoate. I conclude by submitting suggestions that challenge the AfCFTA IP Protocol negotiators to supply homegrown African centred IP systems that radically reimagine the normative configurations of IP.

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Introduction

Africa is at a seminal intellectual property (IP) moment as it prepares for Phase II negotiations of the African Continental Free Trade Area (AfCFTA) Agreement covering investment, competition and IP. Inspired by the Pan-African vision of 'an integrated, prosperous and peaceful Africa' embodied in the African Union's (AU) Agenda 2063 and attracted by the promise to promote sustainable socio-economic development, 44 African countries signed the *Agreement Establishing the AfCFTA* on 21 March 2018 at the 10th Extraordinary Session of the Assembly of the AU in Kigali, Rwanda.[1]Effective from 30 May 2019, the AfCFTA is the world's largest continental free trade area, creating a single market for goods and services that apply to 1.2 billion people, projected to expand to 2.5 billion by 2050. Article 8 of the *Agreement Establishing the AfCFTA* provides that the Protocols on Trade in Goods, Trade in Services, Investment, *IP Rights*, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices will form an integral part of the AfCFTA as a single undertaking.[2]Thus, similar to the World Trade Organisation (WTO),AfCFTA Member States cannot pick and choose which Protocols, Annexes and Appendices to adopt and which to abandon.[3]Member States are bound to fulfil obligations set out under all the Protocols.

Accordingly, to avoid the pitfalls of Phase I AfCFTA negotiations especially the uncritical adoption of the Dispute Settlement template of the WTO, I argue that the negotiators need to carefully contour the IP Protocol to fit the African context for which it is introduced. This requires designing homegrown IP systems that underscore the unique forms of innovation and creativity in Africa to deliver an effective development-oriented IP Protocol. One of the core conundrums for the IP Protocol negotiators to confront is the fragmented IP architecture on the continent, comprising an array of partially overlapping and sometimes conflicting agreements,laws, policies and sub-regional organisations that I refer to as the regime complex for IP in Africa.

1 54 countries have now signed the AfCFTA, only Eritrea is yet to sign. African Union, *Agreement Establishing the African Continental Free Trade Area* (Mar. 21, 2018).

2 Emphasis added. Article 8, African Union, *Agreement Establishing the African Continental Free Trade Area* (May 16, 2018).

3 On the history of the WTO Single Undertaking, see Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. Int'l Econ. L. 835–58 (2009).

[4]Africa's fragmented IP architecture alongside the sharp disconnect between regional aspirations and sub-regional realities is shaped by external influences such as bilateral/regional/multilateral trade agreements and colonial/coercive pressures. This combination of factors materially contributes to the policy incoherence and inconsistency of IP regimes on the continent. I contend that the AfCFTA IP Protocol has a novel opportunity to address this fragmentation.

The prevalent forms of innovation and creativity in Africa are grounded in indigenous low-cost technologies in informal sectors such as agriculture, the mainstay of most African economies and entertainment, a nascent contributor to African economies. This does not disregard Africa's emerging digital ecosystem sparked by the ubiquity of mobile phones and the influx of high-speed internet across the continent from the early 2000s. The vibrant class of innovators and digital entrepreneurs, clustered in technology hubs modelled after Silicon Valley, such as 'Silicon Savannah' in Nairobi, Kenya and 'Yabacon Valley' in Lagos, Nigeria are developing cutting-edge technologies applicable to both the informal and formal sectors. Contextually appropriate IP systems in Africa, therefore, would consider and respond to the unique innovation and creativity scene on the continent, to ensure that IP is employed as a tool to stimulate social and economic development. In doing so, it would be imperative to design the different categories of IP, namely copyright and related rights; industrial property (including patents, trademarks, industrial designs and geographical indications-GIs); and *sui generis* rights (including plant variety protection, traditional knowledge and traditional cultural expressions), in line with the exigencies, realities and priorities on the continent. In particular, Africa's rich agricultural resources, traditional knowledge and cultural repositories afford it comparative advantages with GIs, plant variety protection, traditional knowledge and traditional cultural expressions.

The paper proceeds as follows. In Part II, I examine the AU's IP instruments. These instruments embody the AU's positions on plant variety protection, GIs, copyright and IP policies. The instruments also inform the African Group's submissions at the international level, in fora like the WTO and the World Intellectual Property Organization (WIPO). In Part III, I explore the conflicting IP frameworks at the sub-regional level under the interrelated IP organisations and sub-regional economic communities of the AU (RECs). The asymmetrical IP sub-regional organisations are

4 On regime complexity, *see* Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 Int'l Orgs. 277 (2004); Karen Alter & Kal Raustiala, *The Rise of the International Regime Complexity*, 14 Ann. Rev. L. & Soc. Sci. 329 (2018).

the Organisation Africaine de la Propriété Intellectuelle (OAPI), comprised chiefly of Francophone African countries and the African Regional Intellectual Property Organisation, (ARIPO), comprised chiefly of Anglophone African countries.

The assorted RECs are the Arab Maghreb Union (AMU), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), and the Community of Sahel-Saharan States (CENSAD).[5]These sub-regional organisations are assigned focal roles in the implementation of the AfCFTA IP Protocol. Yet, their legal frameworks are often disconnected from both the AU positions and policies and one another. The challenge for the AfCFTA IP Protocol negotiators as I discuss in Part IV would be to meticulously assess the state of affairs and imaginatively produce a representative but radical IP Protocol that centres, celebrates and champions Africa's unique forms of innovation and creativity.

My central claim is that negotiators can confidently conceive original conceptualisations of IP that produce ingenious legal norms, principles and paradigms while working within the boundaries of the international IP order. By prioritising and promoting the areas of strength for African innovation and creativity,the AfCFTA IP Protocol, like previous pioneering examples from Africa- the AU's *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000* (African Model Law) and ARIPO's *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010* (Swakopmund Protocol)–ought to be integral in defining the boundaries of African IP law. At a time when the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the WIPO Intergovernmental Committee (WIPO IGC) are grappling with the protection of farmers rights, traditional knowledge and traditional cultural expressions,the envisioned exemplary AfCFTA IP Protocol could serve as references for these organisations and Global South constituencies.

5 Part III of this Article focuses on the Economic Community of West African States (ECOWAS) in western Africa, the East African Community (EAC) in Eastern Africa, the Southern African Development Community (SADC) in southern Africa, and the Common Market for Eastern and Southern Africa (COMESA) in eastern and southern Africa.

I. THE AFRICAN UNION AND INTELLECTUAL PROPERTY

The Organisation of African Unity (OAU, the predecessor to the AU) was established by the OAU Charter of 25 May 1963 to *inter alia* promote the unity and solidarity amongst the newly independent African States and to fight all forms of neo-colonialism.[6]Following the OAU Heads of State and Government Declaration of 9 September 1999 (Sirte Declaration) for the establishment of an African Union, the AU was launched on 9 July 2002 to *inter alia* accelerate the political and socio-economic integration of the continent and defend African common positions on issues of interest to the continent.[7]The AU's IP policy frameworks, therefore,provide insights into its activities and African common positions on IP.

While the OAU Charter and the Constitutive Act of the AU do not mention IP, the following five principal instruments of the AU adopted from the early 2000s onward, set out African common positions on plant variety protection, GIs,IP policies and institutional roadmaps.[8]These are the African Model Law, the Continental Strategy for Geographical Indications in Africa 2018 –2023, (Continental Strategy for GIs), the African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in Africa', (ABS Strategic Guidelines), the Science, Technology and Innovation Strategy for Africa (STISA-2024)and the Pan African Intellectual Property Organisation (PAIPO) Statute. Other related instruments on the AU's IP commitments and declarations are considered.

This part is divided into two sections. The first section focuses on the African Model Law, Continental Strategy for GIs, ABS Strategic Guidelines and related instruments. The second section focuses on the STISA-2024, PAIPO Statute and related instruments. Both sections share concrete examples of provisions and critical reflections on the AU IP policy frameworks under study.

A. Plant Variety Protection and Geographical Indications

The African Model Law is the AU's most significant input into the international IP

6 Preamble and Article II, 1(a), OAU Charter (May 25, 1963). The Heads of State and Government of the OAU, through a Sirte Declaration on September 9, 1999 called for the establishment of an African Union, to accelerate the process of integration in the continent. In July 2002, the AU was officially launched in Durban South Africa.

7 Article 3, Constitutive Act of the African Union (July 11, 2000).

8 I acknowledge that some of these instruments such as the Continental Strategy for Geographical Indications in Africa 2018–2023 reflects the (external) interests of funders.

order. The African Model Law was designed to assist AU Members craft national laws that reflect their 'political orientation, national objectives and level of socio-economic development' and to fulfil interconnected obligations under the World Trade Organisation's (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and the *Convention on Biological Diversity* (CBD).[9] Article 27.3(b) of TRIPS obliges all members of the WTO to *inter alia* protect plant varieties through patents, an effective *sui generis* system or any combination thereof.[10] Articles 3, 8 and 15 of the CBD recognise the sovereign rights of States to exploit their natural resources, preserve the knowledge of indigenous communities and determine access to their genetic resources. In formulating the African Model Law, Johnson Ekpere,its principal author and then Executive Secretary OAU Science Technical Research Commission (STRC), sought to balance enforcement-backed private rights as required under TRIPS with the conservation, sustainable use, and fair and equitable benefit-sharing from the use of biological diversity and genetic resources endorsed under the CBD.[11]

Accordingly, the African Model Law is anchored on the principle of balanced regional, sub-regional and national laws in Africa that cater to stakeholders' divergent needs. In other words, these laws should protect the innovations, technologies and practices of local communities, including farming communities and indigenous peoples who conserve and enhance biological diversity for the benefit of present and future generations alongside commercial plant breeders who develop new plant varieties based on farmers' varieties.[12] In practical terms, the African Model Law rejects the unconditional adoption of the *International Convention for the Protection of New Varieties of Plants* (UPOV) 1991 and patents for plant varieties.[13] It embraces the *sui generis* option under TRIPS, which it creatively construes through the following provisions. Access to biological resources and benefit-sharing principles on the conditions of

9 J. A. Ekpere, *The OAU's Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, 1 (Organisation of African Unity, Scientific, Technical and Research Commission, Lagos Nigeria, 2000) [African Model Law].

10 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869, U.N.T.S. 299, 33 I.L.M. 1197 (1994). Convention on Biological Diversity, U.N.T.S. 79, 143, 31 I.L.M. 818 (June 5, 1992).

11 Ekpere, *supra* note 9, at 1–4; J. A. Ekpere,*African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, in African Perspectives on Genetic Resources: A Handbook on Laws, Policies, and Institutions, 275–86(Kent Nnadozie et al, Robert Lettington, Carl Bruch, Susan Bass & Sarah King eds., Environmental Law Institute 2003). The acronym 'UPOV' is used interchangeably with its organisation: International Union for the Protection of New Varieties of Plants (UPOV).

12 Ekpere, *supra* note 9, at 3.

13 Ekpere, *supra* note 9, at 8.

prior informed consent (Articles 3 to 15), local and indigenous community rights over biological resources (Articles 16 to 23), farmers rights (Articles 24 to 27), plant breeders' rights (Articles 28 to 56) and institutional arrangements (Articles 57 to 66).

In constructing the *sui generis* system of the African Model Law, Ekpere, an agronomist and Professor of Agriculture, foregrounded Africa's small-scale farming history. Although hardly recorded in writing, small-scale African farmers have perennially engaged in experimenting with, domesticating and developing plant varieties that contribute to the conservation of biological diversity. Fusing corporate farmer-originated technologies and traditional knowledge with indigenous agro ecological farming practices, these farmers select, save, use, exchange and sell farm-saved plant varieties and propagating materials to feed their families and communities. However, with the extension of IP to plant varieties in the United States (US)through its *Plant Patent Act in1930* and the adoption of UPOV in 1961, which inspired the introduction of plant variety protection in TRIPS, African countries are faced with IP obligations that are not as directly relevant to their context as the established practices of saving, using and exchanging and propagating plant materials to feed their families and communities. Before TRIPS, only Kenya, South Africa and Zimbabwe had plant variety protection systems.[14]Notably, the plant variety protection options in Article 27.3(b) of TRIPS reflects the debates both within the Global North (US, European Union (EU), Japan and Canada: intra-Quad dissonance) and between the Global North and Global South.[15]While the US pushed for the inclusion of patents for plant varieties, the EU opposed this. Conversely, while the Global North supported a plant breeder rights' focused system, the Global South led by the African Group, India and Thailand, amongst others, favoured a creative *sui generis* system that includes provisions such as access and benefit-sharing and farmers' rights to protect small-scale farmers.

As I have argued elsewhere, although proposals from the African Group, Thailand and India negotiators to harmonise TRIPS with the CBD and the *International Undertaking on Plant Genetic Resources for Food and Agriculture* failed during the TRIPS negotiations, these actors boldly demonstrated capacity to convert their proposals into living laws at national and regional levels, thereby reframing plant variety protection

14 Titilayo Adebola, *Access and Benefit Sharing, Farmers' Rights and Plant Breeders Rights: Reflections on the African Model Law*, 9 Queen Mary J. Intell. Prop. 105, 119 (2019).

15 UNCTAD-ICTSD, *Resources Book on TRIPS and Development*, 395–99 (Cambridge University Press, 2005). Dwijen Rangnekar, *Geneva Rhetoric, National Reality: The Political Economy of Introducing Plant Breeders' Rights in Kenya*, 19 New Poli. Econ. 359, 360(2014).

from the bottom.[16] One of the remarkable achievements of the African Model Law (like *Thailand's Plant Variety Protection Act (PVPA), 1999* and *India's Protection of Plant Varieties and Farmers' Rights Act (PPVFRA), 2001*)is the ability to weave contradictory and multifaceted legal norms, principles and systems into a coherent legal framework. Nonetheless, the African Model received international opposition. In Ekpere's words, 'there was substantial international resistance to the content of the Model Law. While some felt it will deprive Africa the benefit for international trade, others felt the continent will lose out from the benefit of modern science, technology and innovation. In fact, it was not expected that this type of document would emanate from an African organisation.'[17]Equally, the Genetic Resources Action International Network (GRAIN) reports that WIPO and UPOV sought to 'subvert the whole OAU process' by recommending the rewriting of the African Model Law to conform with their IP regimes. For example, WIPO rejected the principle of inalienability of community rights, which is one of the pillars of the Model Law.[18] At the same time, UPOV recommended that farmers rights should be subject or subordinate to plant breeders' rights.[19]

The current text of the African Model Law confirms that the AU did not implement these recommendations. As Tewolde Berhan Egziaber, then head of Ethiopia's Environmental Protection Authority averred, WIPO and UPOV were invited to 'contribute to the furtherance of the OAU process, not to change the essence of the Model Law.'[20]Importantly, the African Model Law, along with the PVPA and the PPVFRA, stand as examples of creative *sui generis* plant variety protection options under Article 27.3(b) of TRIPS. The African Model Law also establishes the African common

16 Titilayo Adebola, *Examining Plant Variety Protection in Nigeria: Realities, Obligations and Prospects*, 22 J. World Intell. Prop. 36, 49(2018). TRIPS negotiations (Uruguay Round of Multilateral Trade Negotiations 1986 to 1993 (Uruguay Round) that birthed TRIPS).

17 Adebola, *supra* note 14, at 115.

18 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process: UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), https://www.grain.org/article/entries/1966. Noah Zerbe, *Biodiversity, Ownership, and Indigenous Knowledge: Exploring Legal Frameworks for Community, Farmers, and Intellectual Property Rights in Africa*, 53 Ecological Econ. 493 (2005).

19 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process supra* note 18, Zerbe *supra* note 18, *UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), https://www.grain.org/article/entries/1966. Noah Zerbe, *Biodiversity, Ownership, and Indigenous Knowledge: Exploring Legal Frameworks for Community, Farmers, and Intellectual Property Rights in Africa*, 53 Ecological Econ. 493 (2005).

20 Genetic Resources Action International Network (GRAIN), *IPRs Agents Try to Derail OAU Process: supra* note 18, *UPOV and WIPO Attack Africa's Model Law on Community Rights to Biodiversity* (June 18, 2001), https://www.grain.org/article/entries/1966.

(negotiating) position on plant variety protection and biological diversity, debated and maintained at various international fora.[21] Indeed, the African Group heavily relied on the African Model Law during the negotiations for the Nagoya Protocol with the final text of the Protocol mirroring the aspirations and provisions of the African Model Law.[22]

Despite the existence of the exemplary African Model Law and its rejection of the unconditional adoption of the UPOV 1991 Convention, it is paradoxical to see a proliferation of UPOV membership in Africa. I argue that twin shortcomings of the African Model Law contribute to its non-existent uptake in Africa. First, it fails to offer clear templates to facilitate the implementation of novel provisions like community rights in Part IV and farmers' rights in Part V. Although the Model Law is not intended to be prescriptive, many African sub-regional organisations (and countries), which have limited expertise on the esoteric plant variety protection discourse, are unable to carve out IP/TRIPS complaint laws from it. To contrast this with the UPOV system, the UPOV 1991 Convention provides a ready-made template for members to adopt. Second, the AU does not offer support with the design and introduction of plant variety protection laws at the sub-regional and national levels. To further contrast this with the UPOV system, the UPOV office offers its members seemingly unlimited support throughout the design and introduction of UPOV-styled plant breeders' rights systems at sub-regional (and national) levels.

Even though Ekpere emphasises that the African Model is 'work in progress', the AU has done little to address its conceptual limitations, promote its implementation or probe the proliferation of UPOV in Africa.[23] One of the AU's limited interventions in relation to the African Model Law is the *Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*(Gap Analysis Report) published in February 2012.[24]The Gap Analysis Report stems from the 2011 AU Assembly Decision

21 *See, e.g.*, World Trade Organisation, *Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement: Joint Communication from the African Group* (WTO Council for Trade-Related Aspects of Intellectual Property Rights IP/C/W/404, June 23, 2003); World Trade Organisation, *Draft Decision to Enhance Mutual Supportiveness Between TRIPS Agreement and the Convention on Biological Diversity: Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group* (WTO Trade Negotiations Committee TN/C.W/59, Apr. 19, 2011).

22 Tshimanga Kongolo, African Contributions in Shaping the Worldwide Intellectual Property System, 119(Routledge 2013).

23 Adebola, *supra* note 14, at 118.

24 Peter Munyi, Marcelin Tonye Mahop, Pierre du Plessis, Johnson Ekpere& Kabir Bavikatte, *A Gap Analysis Report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (Commissioned by

on Africa's participation in the 10th Conference of Parties to the CBD [Assembly/AU/Dec.352(XVI)].[25] The AU Assembly agreed to prioritise biological diversity in the AU and to encourage AU Members to become parties to the CBD and its *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Nagoya Protocol).[26] The AU Assembly's Decision and the African Group's active participation in the negotiations for the Nagoya Protocol inspired the call to revisit the African Model Law, especially in light of other related developments in international law such as the adoption of the *International Treaty on Plant Genetic Resources for Food and Agriculture* in 2001.

The Gap Analysis Report reveals areas for revisions in the African Model Law, such as its scope and provisions on IP, access and benefit-sharing and traditional knowledge related to genetic resources.[27] The Report proposes two potential action points, with the second as the preferred option. These two action points are first, to undertake a thorough review and revision of the African model Law, and second to craft a complementary guideline document for Member States to consult alongside the African Model Law. However, the Gap Analysis Report, like the African Model Law it builds on, omits to include (practical) templates to assist AU Member States to translate its provisions into substantive sub-regional or national laws. Although this aligns with its ethos as a 'Model Law' or 'non-prescriptive guideline', as I argue above, it doubles as one of the main flaws of the African Model Law.

The AU has neither reviewed and revised the African Model Law nor crafted the complementary guideline as recommended. Nevertheless, following the AU's commitment to prioritise biological diversity and the implementation of biological diversity related international instruments in Africa, including the CBD and Nagoya Protocol, it adopted the ABS Strategic Guideline at the 25th Ordinary Session of the AU Assembly, held in South Africa, in June 2015.[28] The ABS Strategic Guidelines

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the Department of Human Resources, Science and Technology of the African Union Commission, Feb. 2012) [hereinafter Gap Analysis Report]. The Gap Analysis Report was supported by the GIZ on behalf of the Federal Ministry for Economic Cooperation and Development, the Norwegian Ministry of Foreign Affairs, Danish Ministry of Environment, Institute de l'energie et de l'environnement de la Francophonie (IEPF) and the European Union.

25 Assembly/AU/Dec.352 (XVI), Paragraph 3, Decision on the Report on Africa's Participation in the Nagoya Conference on Biodiversity Doc. Assembly/AU.15 (XVI) Add.3.

26 *Id.*

27 Gap Analysis Report,*supra* note 24.

28 The African Union also adopted the *African Union Practical Guidelines for the Coordinated Implementation of the Nagoya Protocol in Africa*[hereinafter ABS Practical Guidelines] at the 25th Ordinary Session of the African Union Assembly, held in South Africa in June 2015. The ABS Practical Guidelines provides step by step guidance on the implementation of the ABS

recognise the links between the CBD, Nagoya Protocol, ITPGRFA, *United Nations Declaration on the Rights of Indigenous Peoples* and principles established in the African Model Law.

The ABS Strategic Guidelines encourage African countries to accede to the Nagoya Protocol and to establish common African access and benefit-sharing standards to prevent (or punish) the misappropriation of African genetic resources and traditional knowledge.[29] It calls on the AU Commission, in collaboration with the RECs, to facilitate a coordinated implementation of the Nagoya Protocol in Africa. The ABS Strategic Guidelines further urge AU Member States to allocate adequate financial (and relevant resources) to support the fulfilment of their obligations under the Nagoya Protocol and other international agreements related to access and benefit-sharing. It sets out detailed instructions to assist AU Member States develop and implement access and benefit-sharing systems at the national and sub-regional levels. These include access to genetic resources for utilisation (Articles 8 to 17), benefit-sharing (Articles 18 to 24), monitoring and compliance (Articles 25 to 29), protection and promotion of traditional knowledge associated with genetic resources, community and farmers' rights, and economic development (Articles 30 to 32), and capacity building, capacity development and technology transfer (Articles 33 to 36).

Like the African Model Law and Gap Analysis Report, the ABS Strategic Guidelines sets out concrete provisions on genetic resources and associated traditional knowledge to assist African countries in drafting comprehensive access and benefit-sharing regulations to prevent the misappropriation and misuse of these resources. Although the African Model Law and Gap Analysis recommend the inclusion of access and benefit-sharing provisions as crucial elements of *sui generis* plant variety protection systems, African countries can introduce these provisions in separate or standalone access and benefit-sharing laws or regulations at sub-regional and national levels, which many have chosen. The Access and Benefit-Sharing Clearing-House, a global

Strategic Guidelines and it is an appendix to that document. The explanatory notes for the ABS Practical Guidelines states that the Strategic Guidelines for the Nagoya Protocol should be read and interpreted alongside the CBD, Bonn Guidelines, Nagoya Protocol and ITPGRFA. The ABS Strategic Guidelines also complement materials on the subject, such as the IUCN's Explanatory Guide to the Nagoya Protocol on Access and Benefit Sharing, the Swiss-funded Management Tool and Best Practice Standard and its accompanying Handbook for Implementing Genetic Resource Access and Benefit Sharing Activities and the SAN Bio Traditional Knowledge and Plant Genetic Resources Guidelines. *See also* The African Union Common Position for Negotiations of the International Regime on Access and Benefit Sharing (Adopted by the Pan-African Conference of Ministers in charge of ABS, March 2020, Windhoek, Namibia).

29 ABS Practical Guidelines, *supra* note 28, at Preamble.

repository of access and benefit-sharing information administered by the CBD Secretariat,reveals that 21 African countries have legislative, administrative or policy measures for access and benefit-sharing.[30] However, most of the countries do not include these measures in plant variety protection systems - they include them national environmental law systems.[31]To be sure, African countries can fulfil their obligations under the CBD and Nagoya Protocol with the introduction of these stand-alone access and benefit-sharing provisions. However, this is antithetical to the *raison d'être* of the African Model Law, which seeks to reconcile the conflicting principles of sovereignty and community rights under the CBD with private property rights under TRIPS.[32]The gap in coordination and communication amongst the multiple government institutions exacerbates misappropriation of genetic resources, which a holistic *sui generis* plant variety protection system could avert.

One of the AU's most recent instruments on IP is its Continental Strategy for GIs.[33]The AU's Department of Rural Economy and Agriculture (DREA) designed the Continental Strategy for GIs in collaboration with the AU Member States, regional economic communities, and technical and development partners such as WIPO and the Food and Agriculture Organisation of the United Nations (FAO).[34] The Strategy seeks to align with international and AU initiatives such as the United Nations Sustainable Development Goals (UNSDGs), Comprehensive Africa Agriculture Development Programme (CAADP), Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods (Malabo Declaration) and AU Agenda 2063. The Continental Strategy for GIs provides a

30 Convention on Biological Diversity, *The Access and Benefit-Sharing Clearing-House*, https://absch.cbd.int (accessed Aug. 25, 2020). This number may also reflect those countries that have submitted updates to the Access and Benefit-Sharing Clearing House.

31 Algeria, Benin, Burkina Faso, Burundi, Cameroon, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Ethiopia, Kenya, Madagascar, Malawi, Mauritania, Morocco, Niger, Senegal, South Africa, Sudan, Togo, Uganda, United Republic of Tanzania and Zimbabwe. South Africa has a requirement for patent applicants to 'furnish information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or use in an invention; and to provide for matters connected therewith' No. 20 of 2005: Patents Amendment Act, 2005.

32 Ekpere, *supra* note 11, at 277.

33 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023* (Oct. 2017).

34 International organisations such as the International Cooperation Centre of Agricultural Research for Development (CIRAD), the Research and Technology Exchange Group (GRET) and African Regional Economic Communities such as the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA), as well as Agriculture and Intellectual Property Ministers, Universities, Researchers, Non-Governmental Organisations, Producers' Representatives and practitioners were involved in the e-consultation process.

voluntary guide to drive the AU Commission's mandate on the subject. The Strategy also offers an opportunity for stakeholders interested in the subject, such as OAPI, ARIPO,RECs, AU Member States and international partners, to collaborate on the protection of GIs in Africa.

The Continental Strategy on GIs makes the case that GIs can be used as a tool to promote sustainable social and economic development in Africa, because of the continent's rich natural resources, biological/cultural diversity and traditional knowledge.[35]Africa is home to genetically diverse cultivated plants, wild relatives, farmed/domesticated animals and small-scale farmers with rich portfolios of traditional knowledge, who produce up to 80 per cent of some food crops consumed on the continent.[36]Employing the flexibility codified in TRIPS, the Strategy encompasses legal protection for GIs through *sui generis* systems and trademark systems. It notes the importance of effective sub-regional and national legal and institutional frameworks as well as public-private partnerships to ensure the successful development and protection of GIs.[37] It presents four advantages that Africa can leverage to maximise the potentials of GIs for the continent.[38] First, Africa has an enormous assortment of traditional (food and non-food) products with significant economic, environmental and social contributions. Second, Africa is a budding market for quality origin-linked traditional (food and non-food products). Third, African GI products, especially key commercial products like cocoa, coffee and tea, are in high demand in export markets. Fourth, Public and Private (national, regional and international) stakeholders have indicated interest and commitment to invest in developing African GIs products.

However, the Continental Strategy for GIs highlights pertinent challenges, both generic (those related to development projects in the food and agricultural sectors) and GIs specific challenges.[39] Generic challenges include organising small holder

35 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023*, at 1 (Oct. 2017). *See also* Extending the Protection of Geographical Indications: Case Studies of Agricultural Products in Africa (Michael Blakeney et al. Thierry Coulet, Getachew Mengistie & Marcelin Tonye Mahop eds., Earth scan from Routledge, 2012); Chidi Oguamanam & Teshager Dagne, *Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa*, *in* Innovation and Intellectual Property Collaborative Dynamics in Africa, 77 (Jeremy De Beer et al. Chris Armstrong, Chidi Oguamanam & Tobias Schonwetter eds., UCT Press and GIZ 2014). Michael Blakeney & Getachew Mengistie Alemu, *Geographical Indications in Africa: Opportunities, Experiences and Challenges*, 38 Eur. Intell. Prop. Rev. 290 *(*2016).

36 African Small holder Farmers Group, *Supporting Small holder Farmers in Africa*, (July 2013), http://www.ruralfinanceandinvestment.org/sites/default/files/ASFG-Framework-Report.pdf.

37 African Union, *Continental Strategy for Geographical Indications in Africa 2018–2023,* at 9–10 (Oct. 2017).

38 *Id*. at 10–15.

39 *Id*. at 15–18.

producers with limited resources and investment capacity. Specific GI challenges stem from its complex ecosystem. This encompasses questions around multidisciplinary interactions, (agronomy, economics, geography, science, technology, law), multi-stakeholder partnerships, (public and private, government authorities value chain actors and consumers) and multi layered mapping (identification of potential products, qualities of products, definition of rules, certification and control).[40] The Continental Strategy for GIs further confirms the AU's commitment to draft a comprehensive Continental Model Law for GIs to support AU Member States with the development of sub-regional or national GIs laws.[41] This Model Law, to be designed in line with relevant international treaties such as TRIPS, CBD, ITPGRFA, *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958* and *Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1970*, will address issues such as the clarification of similar and sometimes confusing terms: GIs and appellations of origin, the connections between traditional knowledge and GIs, qualification to register and own GIs, as well as concerns over generic city and transborder GIs. To avoid some of the limitations of the African Model Law discussed above, this Continental Model Law for GIs should set out fully developed and easily adaptable substantive provisions, which could constitute the GIs section in the AfCFTA IP Protocol.

In addition, the Continental Strategy for GIs submits that it is a starting point for the establishment of an 'Action Plan Geographical Indications in Africa' and concludes with six strategic outcomes.[42]First, shared African vision on GIs as a tool to contribute to sustainable rural development. Second, legal and institutional frameworks at national and regional levels to protect GIs. Third, development and registration of GI products as pilots and drivers for development. Fourth, innovative market development for GI products through trade within Africa and in export markets outside Africa, particularly the European Union. Fifth, research, training programs and extension to generate informed and African tailored practices. Sixth, the creation of awareness about GIs amongst all stakeholders. Notably, Africa already has several GI products including Penja Pepper and Oku White honey from Cameroon, Ziama-Macenta coffee from Guinea, Rooibos Tea from South Africa, Tete goat meat from Mozambique, Argan

40 *Id*. at 15–18.
41 *Id*. at 47.
42 *Id*. at 51–53.

Oil from Morocco and Taita basket from Kenya.[43]There are also on-going projects to develop other GI products around the continent. For example, WIPO is undertaking a project with the FAO to protect a wild species of fruit 'Madd de Casamance' from Senegal.[44]Nonetheless, these GI products do not even begin to capture the breadth of potential products in Africa.

Interestingly, unlike plant variety protection discussed above where the polarisations at the international level on the protection of plant breeders' rights or farmers' rights are couched as Global North versus Global South, with GIs, the debates are Old World versus New World.[45] Old World refers to countries with long histories, bountiful traditional knowledge and a smörgåsbord of placed-based products like countries in Africa, Asia and Europe. New World refers to countries with more recent histories, usually with migrant populations and fewer placed-based products like Australia, the US, and New Zealand. The Old World (or *Demandeurs*) advocates for stronger GI protection through *sui generis* systems while the New World promote trademarks as sufficient GI protection.[46]Drawing examples from the TRIPS Council and WIPO, Getachew Mengistie and Michael Blakeney point out European countries attempts to enlist support from their African counterparts to promote stronger *sui generis* systems.[47]One of the ways *sui generis* systems provide stronger protection is by allowing owners to prevent direct or indirect commercial use of registered names. This includes the prevention of the use of expressions like 'kind', style' and 'type' or the use of evocative emblems or symbols that may provide false or misleading information about the origin of the products. Like the EU where GIs are given priority in free

43 *See* The Pan-African Geographical Indications Information Hub, https://africa-gi.com/en/pan-african-gi/search (accessed Aug. 28, 2020).

44 *Id.*

45 *See* debates on geographical indications during the Uruguay Round of Multilateral Trade Negotiations (1986 to 1993), Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis (Sweet & Maxwell, 1998); Jayashree Watal, Intellectual Property Rights in the WTO and Developing Countries (Kluwer Law International, The Hague, 2001); UNCTAD-ICTSD, *Resources Book on TRIPS and Development*, 267–321 (Cambridge University Press, 2005).

46 Dwijen Rangnekar, *Demanding Stronger Protection for Geographical Indications: The Relationship Between Local Knowledge, Information and Reputation* (United Nations Institute for New Technologies Discussion Paper Series, Apr. 2004). Irene Calboli, *Expanding the Protection of Geographical Indications of Origin under TRIPS: "Old" Debate or "New" Opportunity?*, 10 Marquette Intell. Prop. L. Rev. 182–203 (2006).

47 Getachew Mengistie & Michael Blakeney, *Geographical Indications and the Scramble for Africa*, 25 Afr. J. Int'l & Comp. L. 199–220 (2017). *See, e.g.*, World Trade Organisation Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bangladesh, Bulgaria, Cuba, the Czech Republic, Georgia, Hungary, Iceland, India, Jamaica, Kenya, The Kyrgyz Republic, Liechtenstein, Moldova, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey* (IP/C/W/308. Rev. 1, Oct. 2, 2001).

trade negotiations, Africa's potential collection of GI products can offer bargaining advantages in future bilateral/regional/multilateral trade negotiations.

GI scan also be employed as a tool to localise economic control and engender effective endogenous development in Africa, which is consistent with the development-oriented aspirations of the AfCFTA. However, it is important to ensure inclusive social and economic development that directly benefits all actors in the GI product value chains, including small-scale producers. As Rosemary Coombe points out, GI advocates often preach a 'social imaginary' of harmonious communities and traditions derived from singular cultures with peaceful political relationships obscuring the social, economic and political complexities 'or perils' embedded in the development and sustenance of some GI products.[48]

B. Intellectual Property Commitments, Declarations and a Pan-African Organisation

Beyond the African Model Law and Continental Strategy for GIs, the AU has maintained its interest in promoting IP around Africa through both specialist IP and non-specialist IP instruments. For example, the *Charter for African Cultural Renaissance* adopted by the Heads of State and Government of the African Union meeting in the Sixth Ordinary Session, (23 to 24 January 2006), recognises the role of copyright in conserving culture as one of the avenues to chart Africa's course towards technological development and respond to the challenges of globalisation.[49] Article 23 of the Charter provides that African States 'should prepare an inter-African convention on copyright in order to guarantee the protection of African works. They should also intensify their efforts to modify existing international conventions to meet African interests.' In the same vein, Article 24 of the Charter provides that African

48 Rosemary Coombe & S. Ali Malik, *Transforming the Work of Geographical Indications to Decolonise Racialised Labour and Support Agroecology*, 8 UC Irvine L. Rev. 363 (2018); Rosemary Coombe & S. Ali Malik, *Rethinking the Work of Geographical Indications in Asia: Addressing Hidden Geographies of Gendered Labour, in* Geographical Indications at the Crossroads of Trade and Development in Asia, 87–121 (Irene Calboli& Ng-Loy Wee Loon eds., Cambridge University Press, 2017); Rosemary J Coombe, Sarah Ives & Daniel Huizenga, *Geographical Indications: The Promise, Perils and Politics of Place-Based Products, in* Sage Handbook on Intellectual Property, 207–223 (Matthew David & Deborah Halbert eds : Sage Publications, 2014); Rosemary Coombe, Sarah Ives &Daniel Huizenga, *The Social Imaginary of GIs in Contested Environments: Politicized Heritage and the Racialized Landscapes of South African Rooibos Tea, in* Sage Handbook on Intellectual Property, 224–37 (Matthew David & Deborah Halbert eds., Thousand Oaks: Sage Publications 2014).

49 African Union, *Charter for African Cultural Renaissance* (Department for Social Affairs, African Union Commission, Jan. 24, 2006). 34 countries have signed the Charter and 14 countries have ratified it. It will enter into force upon receipt by the Commission of the African Union of the Instruments of ratification and adhesion from two-thirds of the total membership of the African Union.

States 'should enact national and inter-African laws and regulations guaranteeing the protection of copyright and set up national authors associations and copyright offices and encourage the establishment of authors' associations responsible for protecting the material and moral interests of those who produce cultural goods and services.'

Similar to plant variety protection and GIs examined in the preceding section, African countries have abundant creative works that could qualify for protection under copyright systems. The early forms of entertainment and expressions,(otherwise known as folklore), including paintings, riddles, storytelling, songs and traditional dances have evolved over generations, with contemporary iterations adjusted to accommodate global audiences.[50] As such, Africa has untapped potential to develop globally competitive creative works. In designing systems that accord African authors and creators recognition and compensation for the use of their creative works, it is crucial to ensure that copyright laws include culturally appropriate limitations and exceptions to ensure access to educational materials and knowledge. Ruth Okediji argues that limitations and exceptions 'consistent with local institutional conditions, and which map onto domestic values, are more likely to strengthen domestic capacity for the production of knowledge goods, while also providing essential support for development planning.'[51]

For its part, the *Science, Technology and Innovation Strategy for Africa* (STISA-2024), which is the first phase of a ten-year strategy (2014-2024) that positions science, technology and innovation at the core of the Agenda 2063, maintains the AU's commitment to promoting IP in Africa. One of the strategic objectives of STISA-2024 is to 'protect knowledge production (including inventions and indigenous knowledge) by strengthening intellectual property rights and regulatory regimes at all levels.'[52] In their report on STISA 2024, Calestous Juma and Ismail Serageldin, co-chairs of the panel that reviewed the Consolidated Plan of Action and the development of the STISA-2024 noted that to improve science, technology and innovation development in Africa, its governments and regional economic communities must provide an enabling environment, which includes strengthening legal and regulatory systems to protect

50 On indigenous creative works in Global South countries, see Ruth Gana, *Has Creativity Died in the Third World? Some Implications of the internationalisation of Intellectual Property*, 24 Denver J. Int'l L. & Pol. 109 (1995); Michael F. Brown, Who Owns Native Culture? (Harvard University Press, 2004).

51 Ruth Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 Vanderbilt J. Ent. & Tech. L. 689, 718 (2019).

52 African Union, *On the Wings of Innovation: Science, Technology and Innovation Strategy for Africa 2024*, 25(African Union Commission, Addis Ababa, 2014).

IP.[53] The STISA-2024 outlines the Pan African Intellectual Property Organisation (PAIPO), which will be discussed below, as one of the central institutions to implement the initiatives of the strategy.[54] STISA-2024 states that PAIPO 'is in the process of being established to implement AU policy in the field of intellectual property. It will ensure dissemination of patent information, provide technical and financial support to invention and innovation and promote the protection and exploitation of research results.'[55]

Even though the STISA 2024 expresses a laudable objective to protect the different knowledge systems on the continent including indigenous knowledge and new technologies, practical follow up questions include 'what types of IP systems would be required and how would these systems be construed?' Here, it would be important to clarify how the AU decides to address debates associated with the different types of IP rights. For example, would copyright or patent protection best protect software, computer programmes or computer-related inventions developed in the technology hubs around Africa such as Silicon Savannah and Yabacon Valley? How would copyright laws address the liability of intermediaries for online copyright infringement? How would IP protect contested and emerging matters like protection of works generated by artificial intelligence, plant, animal or human genome sequencing, nanotechnology or inventions made/used in outer space?

The AU has not adopted any other IP frameworks to showcase its broad commitments to strengthening IP in Africa. However, the AU Ministers have affirmed their positions in subsequent instruments and engaged in the circulation of knowledge about IP amongst stakeholders in the innovation and creativity landscape in Africa. During the *African Ministerial Conference 2015: Intellectual Property (IP) for Emerging Africa* (African Ministerial Conference 2015) organised by WIPO, in cooperation with the AU Commission, the Government of the Republic of Senegal and the Japan Patent Office, the AU Ministers reaffirmed their IP commitments in the earlier mentioned Charter for African Cultural Renaissance and STISA-2024. In the *Dakar Declaration on Intellectual Property for Africa* adopted after African Ministerial Conference 2015,the AU Ministers pledged to provide 'a conducive environment with dynamic IP systems

53 Calestous Juma& Ismail Serageldin, Rebooting African Development: Science, Technology, and Innovation Strategy for Africa, 11(Belfer Center for Science and International Affairs, Harvard Kennedy School Cambridge, 2016).

54 African Union, *On the Wings of Innovation: Science, Technology and Innovation Strategy for Africa 2024, STISA*, 36(African Union Commission, Addis Ababa, 2014).

55 *Id.*

that propel creativity, innovation and inventiveness and effectively guide the promotion, acquisition and commercialization of intellectual property for sustainable growth and development and for the wellbeing of African populations.'[56] The AU ministers also committed *inter alia*, to 'foster the development and utilisation of copyright and related rights to support the development of new business models', 'document, protect and promote the use and management of traditional/indigenous knowledge systems for development in Africa', 'promote IP education in schools and higher education institutions' and 'take advantage of opportunities available within WIPO technical assistance and capacity building programs.'[57]

Indeed, WIPO is actively involved in technical assistance and capacity building on IP and strategy formulation in Africa.[58] In addition to opening two external offices in Africa, the first in Algiers, Algeria in February 2019 and the second in Abuja, Nigeria in January 2020, WIPO has hosted a series of events on the continent.[59] One of its recent events, *Respect for IP – Growing from the Tip of Africa* that took place in Sandton, South Africa, from 23 to 25 October 2018, was co-organised by the Companies and Intellectual Property Commission South Africa, Department of Trade and Industry, South Africa (CIPC), WIPO, International Criminal Police Organisation (Interpol), World Customs Organisation (WCO) and WTO.[60] The main objectives of the event were to devise strategies to address the incomplete public understanding of IP in Africa, develop cooperation - both at the national and international level- to ensure that the benefits of IP as a tool for development are fully realised in Africa and discuss ways to counter IP infringements in an effective and balanced way. Ultimately, the event served as a platform for knowledge circulation and capacity building in Africa, albeit skewed

56 This Ministerial Conference was organised in line with the Japan Funds in Trust arrangement for Africa and the least developed countries. It held in Dakar, Senegal, from November 3–5, 2015. The Ministers also recognised the 'African Conference on the Strategic Importance of Intellectual Property Policies to Foster Innovation, Value Creation and Competitiveness,' held on March 12–13, 2013, in Dar es Salaam, United Republic of Tanzania, the Young African Innovators, Creators and Entrepreneurs: Intellectual Property, Innovation and Creativity for Entrepreneurship and Job Creation and The WIPO Report on the African Fashion Design Industry: Capturing Value through Intellectual Property.

57 *Id.*

58 World Intellectual Property Organisation, Regional Bureau for Africa.

59 Other WIPO External Offices are in Rio de Janeiro, Brazil (opened in 2009), Beijing, China (opened in 2014), Moscow, Russian Federation (opened in 2014), Tokyo, Japan (opened in 2006) and Singapore, Singapore (2005).

60 The event brought together over 400 stakeholders from around 70 countries, including businesses, consumer groups, legal practitioners, policymakers, enforcement officials, government ministers, international governmental and non-governmental organisations involved in intellectual property in Africa.

towards the Western-centric corpus of IP systems that the sponsors' favour. The AU policymakers appear eager to endorse 'effective' IP systems for Africa. Nonetheless, excluding PAIPO, which seems to have stalled and the forthcoming AfCFTA IP Protocol, the actions required to operationalise their intents -as communicated in the overlapping commitments and declarations above- are yet to materialise.

A final AU initiative that could play a significant role in the harmonisation of IP and regional integration in Africa is PAIPO. The AU first considered the proposal to establish an IP organisation for Africa in the early 2000s.[61]In Joelle Dountio's tracing of the critical events leading to the establishment of PAIPO, she notes that in May 2006, the AU Department of Human Resources, Science and Technology and the AU General Office convened a WIPO-supported meeting to 'deliberate on a range of intellectual property issues. It is during this meeting that the idea of creating [PAIPO] was first mooted.'[62]The AU published a PAIPO Concept Paper during the Extraordinary Conference of the African Ministers of Council on Science and Technology (AMCOST) that held from 20 to 24 November 2006 in Cairo, Egypt.[63] The Concept Paper confirmed that the 'rationale for creating an Africa-wide institution stems from the realisation that Africa needs a mechanism to facilitate far-reaching changes in the arena of intellectual property. However, such revolutionary reforms cannot be effected through existing regional arrangements that are currently underpinned by geographical limitations and lack of continental inclusiveness. It would thus be necessary to establish a new decision-making machinery that would engage the participation of all Member States.'[64] The Concept Paper clarifies that PAIPO will serve as a cost-effective institution to streamline IP management in Africa and sharpen the visibility of IP as a tool for economic development. It adds that PAIPO 'will add impetus to the leaders' political will and commitment to inventiveness and innovation.'[65] As I will discuss in Parts III and IV, introducing one organisation to streamline IP in Africa induces intractable procedural and substantive quandaries

61 Tshimanga Kongolo, *The African IP Organizations- the Necessity of Adopting One Uniform System for All Africa*, 3 J. World Intell. Prop. 265 (2000).

62 Joelle Dountio, *Some Key Events in the Early Development of the Proposal for a Pan African Intellectual Property Organization' Knowledge Ecology International*, Knowledge Ecology International (Feb. 10, 2013), https://www.keionline.org/paipo.

63 African Union, Establishing a Pan-African Intellectual Property Organisation (PAIPO) A Concept Paper' Extraordinary Conference of the African Ministers of Council on Science and Technology (AMCOST), Cairo Egypt. EXT/AU/EXP/ST/8 (II) (Nov. 20–24, 2006).

64 *Id*. at 1.

65 *Id*.

based on the diverging sub-regional IP orthodoxies and regimes in Africa, which the AfCFTA IP Protocol negotiators would also have to address.

The AU Assembly adopted a Decision to establish PAIPO in January 2007.[66] The Decision requested the AU Commission in collaboration with the RECs, WIPO and in coordination with OAPI and ARIPO to submit texts relevant to the establishment of PAIPO. The *AU Progress Report on Research Policy Framework, Capacity Building for the African Policymakers and the Formation of PAIPO* of November 2007, reveals that the AU's Department of Human Resources, Science and Technology appointed the AU-STRC as the focal point for PAIPO.[67] It emphasises that PAIPO will only cover policy concerns and not the day-to-day administration of the existing regional intergovernmental institutions.[68] In particular, PAIPO's existence will not dissolve the existing regional IP organisations. On the contrary, the establishment of PAIPO will enrich their influence and scope. Between 2008 and 2016, there were further revisions of the Draft PAIPO Statute and consultations around Africa on the subject.[69] Caroline Ncube explains that the first Draft PAIPO statute raised concerns because it failed to address the public interest and WIPO Development Agenda, which meant that the Africa Group's victories at the international level, such as at the WTO Doha Development Round, was discounted.[70] Even though the revised and adopted PAIPO Statute refers to the WIPO Development Agenda, Ncube asserts that it still fails to 'refer to TRIPS flexibilities or the Doha Declaration.'[71]

The AU adopted the final PAIPO Statute on 31 January 2016 at the 26th Ordinary

66 African Union, Assembly of the African Union, Eighth Ordinary Session, Addis Ababa Ethiopia (Jan. 29–30, 2007).

67 African Union, *Progress Report on Research Policy Framework, Capacity Building for the African Policymakers and the Formation of Pan African Intellectual Property Organisation (PAIPO)*. African Ministerial Conference on Science and Technology (AMCOST III), Third Ordinary Session,Mombasa, Republic of Kenya, AU/EXP/ST/11(III),at 1 (Nov. 12–16, 2007). Notably, it was during Johnson Ekpere's term as Executive Secretary of the STRC that he devised the African Model Law.

68 *Id*. at 1–2.

69 *See* Caroline B. Ncube, *The PAIPO Watch' for a detailed outline of the PAIPO developments*,https://Caroline B. Ncube.com/the-paipo-watch (accessed Aug. 16, 2020). *See also* Y. Mupanga Vanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, J. Afr. L. 1 (2015); Caroline B. Ncube & Eliamani Laltaika, A *New Intellectual Property Organization for Africa?*, 8 J. Intell. Prop. L &Prac. 114–117 (2013).

70 Caroline Ncube, *Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa*, *in* The Oxford Handbook of Intellectual Property Law (Rochelle Dreyfuss & Justine Pila eds., Oxford University Press, 2018, 428) .

71 On failure to provide for membership requirements, see also *id*. and Caroline Ncube, Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation 133 (Routledge, 2016).

Summit of the AU Assembly, that held in Addis Ababa, Ethiopia.[72] Three countries have signed the Statute; Sierra Leone in July 2016, Ghana in July 2017 and Comoros on January 2018. It will enter into force30 days after the deposit of the 15th instrument of ratification.[73]The PAIPO Statute states that it primarily promotes a development-oriented IP system.[74]Therefore, it recognises the role that an efficient continental IP organisation can play in promoting the cultural and socio-economic development of Africa.

The PAIPO Statute states important functions of PAIPO, including to harmonise IP within Africa and to establish African common positions for bilateral, regional, sub-regional or multilateral relations. For example, it provides in Article 4 (a) that PAIPO will harmonise IP systems to reflect the needs of the AU, its Member States, RECs, OAPI and ARIPO. In highlighting the importance of indigenous innovation systems, Article 4 (i)states that PAIPO will 'support the establishment of continental databases on genetic resources, traditional knowledge and traditional cultural expressions and folklore.' Relatedly, Article 4 (n) notes that PAIPO will offer a forum to discuss and formulate policies that address political issues and develop African common positions on IP, particularly on genetic resources, traditional knowledge, GIs, expressions of folklore, CBD related topics and emerging IP topics. On bilateral and multilateral relations, Article 4 (h) stipulates that PAIPO will take deliberate measures to support the conclusion of bilateral and multilateral agreements in Member States. Meanwhile, Article 4 (q) provides that PAIPO will lead the African negotiation in international IP issues to ensure the attainment of African common positions.

The complex but obvious question here is, how would PAIPO fulfil these herculean tasks? Take the harmonisation proposed in Article 4 (a) of the PAIPO Statute as an example. Africa has overlapping sub-regional IP organisations and RECs, which have conflicting IP agreements and protocols. These sub-regional organisations' IP agreements and protocols do not always align with the AU instruments. The Africa Model Law and plant variety protection discussed above is an excellent case study of this disconnection. Yet, Article 4 (n) of the PAIPO Statute provides for the formulation of African common positions on genetic resources, traditional knowledge as well as access and benefit-sharing. In considering Africa's IP relations with non-Africans, many African countries already have bilateral, regional or multilateral (trade or

72 African Union, Assembly of the Union, Twenty-Sixth Ordinary Session, Assembly/AU/589 (XXVI) (Addis Ababa Ethiopia) (Jan. 30–31, 2016).

73 Article 24, Statute of the Pan-African Intellectual Property Organisation.

74 Preamble and Articles 1, 3 and 22, Statute of the Pan-African Intellectual Property Organisation.

investment related) agreements, which include IP standards that diverge from AU instruments or the African Group's position at the various international fora.[75] How would PAIPO harmonise the fragmented and disconnected IP architecture in Africa? Would fulfilling the PAIPO objectives require the re-drafting and re-adoption of sub-regional IP agreements and protocols? Would fulfilling the PAIPO objectives require the renegotiation of some bilateral, regional and multilateral agreements?

I will return to the discussions on PAIPO in the context of the AfCFTA in Part IV. In the meantime, I explore the sub-regional IP regimes in Africa next.

II. AFRICAN SUB-REGIONAL INTERGOVERNMENTAL ORGANISATIONS AND INTELLECTUAL PROPERTY

Africa's sub-regional IP organisations and RECs are crucial to both the harmonisation of IP through PAIPO and continental integration through the AfCFTA. While African countries formally encountered Western concepts of private rights over intellectual assets (or IP rights) and international IP systems during the colonial era, their odyssey to national IP law-making commenced post-political independence.[76] These newly independent states with limited experience and expertise in IP law-making backed by interest-driven support from former colonial authorities and international organisations, established sub-regional intergovernmental organisations to develop domestic systems. In this part, I focus on the two sub-regional IP organisations in Africa, OAPI and ARIPO, alongside the IP regimes in four RECs, ECOWAS, EAC, SADC and COMESA.

A. Sub-Regional Intellectual Property Organisations

The first regional IP organisation in Africa, Office Africa in et Malgache de la Propriété Industrielle (OAMPI), the predecessor to OAPI, was formed in September 1962, after twelve Francophone African countries signed the *Agreement Relating to the Creation of an African and Malagasy Office on Industrial Property* (the Libreville

75 Chidi Oguamanam, *Breeding Apples for Oranges: Africa's Misplaced Priority over Plant Breeders' Rights*, 18 J. World Intell. Prop. 165–195 (2015); Adebola, *supra* note 14, at 108; United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the African Continental Free Trade Area*, 111–12 (UNECA, AU, AfDB, UNCTAD, Addis Ababa, Ethiopia 2019).

76 Ruth L.Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 Singapore J. Int'l & Comp. L. 325–334 (2003). Carolyn Deere, The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries, 36–37(Oxford University Press, 2009) [hereinafter The Imitation Game].

Agreement).[77] Building on France's colonial relationship with Francophone Africa, the French Intellectual Property Office (INPI) was actively involved in drafting the Libreville Agreement. Without doubt, the colonial IP governance structure laid the foundation for the post-colonial reliance on France for domestic IP law-making in Francophone Africa. During the colonial era, French laws were extended to the French African Colonies by Ordinance or Orders.[78] The French administrators prioritised the protection of the intellectual assets of their nationals within the colonies, leaving the indigenous peoples no access to the IP system.[79] Accordingly, the physical exit of France from its colonies left limited local IP expertise. These former colonies memberships of international organisations, spurred by France, presented a growing need for national or regional IP laws. Tshimanga Kongolo explains that "there were two options on the table: to allow each country to design its... industrial property laws or to set up a uniform system of protection, given that all of them [the French African colonies] had applied the same French Law during the colonial period."[80]The countries chose the latter.

The Libreville Agreement, designed with technical assistance from INPI and the United International Bureaux for the Protection of Intellectual Property (BIRPI, the predecessor to WIPO), was a replica of the extant French laws. The Agreement protected patents, trademarks and industrial designs. It also introduced these threefold standards for cooperation, which are still in force in the OAPI region to date: uniform laws, common authority/IP office for Member States and common/centralised procedures, including the issuance of a single title of registration for all Member States.[81] OAMPI was renamed OAPI in March 1977, after the adoption of the *Bangui Agreement of 2 March 1977on the Creation of an African Intellectual Property Organisation*(Bangui Agreement) and withdrawal of the Malagasy Republic.[82] Article 2 (a) of the Bangui

77 The twelve countries were Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Dahomey (now Benin), Upper Volta (now Burkina Faso), Gabon, Mauritania, Senegal, Niger and Malgasy Republic. The Agreement entered into force on January 1, 1964.

78 Apart from Algeria, Morocco and Tunisia that had separate systems, the following French laws (as amended), governed the French African Colonies: Patent Law (July 5, 1844), Trademark Law (June 28, 1857) and Industrial Design Law (July 14, 1909).

79 Deere,*supra* note 76, at 249.

80 Tshimanga Kongolo, *Historical Developments of Industrial Property Laws in Africa*, 5 WIPO J. 109 (2013).

81 Deere, *supra* note 76, at 250.

82 Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organisation (Bangui [Central African Republic], Feb. 24, 1999). The Bangui Agreement entered into force on February 8, 1982. It was revised in 1999 (Feb. 24, 1999); the revision entered into force on February 28, 2002. OAPI currently has 17 members: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, the Congo,

Agreement reinforces the threefold standards established in the Libreville Agreement. It states that OAPI is responsible for 'implementing and applying the common administrative procedures deriving from a uniform system for the protection of industrial property, as well as the provisions of international agreements in this field to which the member States of the Organisation have acceded.'

OAPI provides for the protection of ten categories of IP. *Patents* (Annex I), *Utility Models* (Annex II), *Trademarks and Service Marks* (Annex III), *Industrial Designs* (Annex IV), *Trade Names* (Annex V), *Geographical Indications* (Annex VI), *Literary and Artistic Property* (Annex VII), *Protection Against Unfair Competition* (Annex VIII), *Layout-Designs (Topographies) of Integrated Circuits* (Annex IX) and *Plant Variety Protection* (Annex X).[83]OAPI's international obligations (in particular, TRIPS) external capacity building/ technical advice (including from WTO, WIPO, INPI and UPOV) and weak domestic policymaking capacity shape these IP systems.[84]On the first point about international obligations, and TRIPS, in particular, it is noteworthy to acknowledge that 12 of the 17 OAPI members are least developed countries according to United Nations classifications.[85]Consequently, pursuant to the special and differential treatment provision in Article 66.1 of TRIPS, these countries have an extension until 1 July 2021 to implement their TRIPS obligations. It bears mentioning that the mainly agrarian-based and net technology importing OAPI countries mostly develop low-cost indigenous innovations and rely on traditional knowledge and practices for everyday activities. Therefore,the Bangui Agreement ought to have maximised the flexibilities

Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, the Niger, Senegal, and Togo.

83 Annex X (Plant Variety Protection) entered into force on January 1, 2006. For a detailed examination of the different IP systems, see Ncube, *supra* note 71; Kongolo, *supra* note 22.

84 The international treaties that OAPI is signatory to are: The Paris Convention for the Protection of Industrial Property (Paris Convention), Berne Convention for the Protection of literary and Artistic Works (Berne Convention), Hague Agreement Concerning the International Deposit of Industrial Designs (Hague Agreement), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon Agreement), Convention Establishing the World Intellectual Property Organisation, Patent Cooperation Treaty, the Nairobi Treaty on the Protection of the Olympic Symbol, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, UPOV, Marrakesh Agreement Establishing the WTO, Trademark Registration Treaty, and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

85 United Nations Office of the High Representatives for Least Developed Countries, *Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), 'Least Developed Countries'*, http://unohrlls.org/about-ldcs/criteria-for-ldcs/ (accessed Aug. 28, 2020). United Nations Conference on Trade and Development,*UN List of Least Developed Countries,* https://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx(accessed Aug. 28, 2020).

allowed in TRIPS, for instance, by introducing IP systems that protect and promote farmers' rights, access to medicines and access to knowledge.

On the contrary, it introduced some strong IP systems like its Plant Variety Protection system in Annex X that conforms with the commercial plant breeder focused UPOV 1991 Act, which it joined on 10 July 2014 as its first intergovernmental member.[86] A 2019 Association for Plant Breeding for the Benefit of Society (APBREBES) Working Paper reveals that ten years after the entry into force of Annex X of the Bangui Agreement in OAPI, only 7 of OAPI's 17 members have used the Plant Variety Protection system and 'at great cost and at the expense of public funds.'[87] It adds that the system has neither produced a substantial increase in plant breeding activities in the OAPI Member States nor result in the growth of the seed industry in the sub-region. On the reverse, it has raised alarms about the misappropriation of farmers' varieties.[88]

For its procedural ambit, Article 4 (2) of the Bangui Agreement provides that it applies in its entirety to every Member State of OAPI. Article 6 (1) further provides that applications for registration of the different categories of IP should be filed directly with OAPI. However, members may file their applications for registration with national authorities where they are domiciled.[89] OAPI, therefore, conducts both formal and substantive examination for the registration of the different IP rights it grants. On international applications, Article 7provides for an international patent application, international trademark registration and international deposit of industrial designs through filing in at least one Member State of OAPI. The Administrative Council of OAPI, comprising representatives of OAPI Member States, is the highest authority of the organisation.[90] It is responsible for determining its general policy and regulating and controlling its activities.

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86 OAPI is a party to the UPOV 1991 Act. International Convention for the Protection of New Varieties of Plants, *Members of the International Union for the Protection of New Varieties of Plants* (Status on February 3, 2020). James Gathii notes that least developed countries have not generally taken advantage of the flexibilities in TRIPS. James Thuo Gathii, *Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries,* 44 Georgia J. Int'l & Comp. L. 499 (2015).

87 Mohamed Coulibaly, Robert Ali Brac de la Perriere& Sangeeta Shashikant, *A Dysfunctional Plant Variety Protection System: Ten Years of UPOV Implementation in Francophone Africa*, at 30 (APBREBES Working Paper, 2019).

88 *Id.*

89 Article 6 (2), Bangui Agreement.

90 Article 28 (1) provides for one representative per Member State for the Administrative Council. However, Article 28 (2) provides that a member may entrust its representation on the Council to the representative of another Member State. But no member of the Council may represent more than two States.

Over a decade after the twelve newly independent Francophone countries signed the Libreville Agreement, their Anglophone equivalents established the Industrial Property Association for English-speaking Africa (ESARIPO), with the assistance of the United Nations Economic Commission for Africa (UNECA) and WIPO. Unlike the former French African colonies that withdrew from the French IP laws in 1962, many British African colonies did not introduce national IP laws immediately after independence. For example, even though Nigeria gained its political independence from Great Britain on 1 October 1960, it only introduced national IP laws from 1965, starting with the Trademarks Act of 1965, the Patents and Design Act of 1970 and the Copyright Act of 1988. In line with its mandate 'to promote the protection of intellectual property throughout the world, through cooperation among States', WIPO was actively involved in capacity building in newly independent African countries.[91] It organised a Regional Seminar on patents and copyright for nine Anglophone African countries in Nairobi in October 1972, which recommended the establishment of a regional industrial property organisation.[92]

WIPO and UNECA responded to the Anglophone African countries' request for assistance in this regard in 1973 by collaborating to establish the regional organisation. The draft Agreement on the Creation of the Industrial Property Organisation for English-speaking Africa was prepared after a series of meetings at the UNECA headquarters in Addis Ababa and WIPO in Geneva.[93] A Diplomatic Conference, convened by UNECA and WIPO, which held in Lusaka, Zambia adopted this Agreement, now referred to as the Lusaka Agreement, on 9 December 1976.[94] The

91 Article 3, Convention Establishing the World Intellectual Property Organisation, July 14, 1967 (as amended Sept. 28, 1979).

92 The nine countries were Ghana, Kenya, Lesotho, Liberia, Malawi, Nigeria, Tanzania, Uganda and Zambia. The Regional Seminar adopted a resolution that endorsed the proposal made by UNECA to organise (with WIPO) a conference of the Heads of Industrial Property Offices from English-speaking African countries, to discuss the possible harmonisation of their industrial property laws and the creation of a central office.

93 For example, 19 English-speaking African countries participated in a conference on the legislation for English-speaking African countries in the field of industrial property, which took place in Addis Ababa, Ethiopia, from June 4–10, 1974. The 19 countries were Botswana, Egypt, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritius, Nigeria, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda and Zambia. The conference approved a draft agreement to establish an industrial property organisation for English-speaking African countries to promote cooperation amongst these countries. It agreed to convene a Diplomatic Conference to adopt the draft agreement. The conference also adopted a resolution for WIPO and UNECA to provide the interim Secretariat of the Organisation until it was established and a resolution to establish two committees. The first on patents, and the second on trademarks and industrial designs.

94 The Lusaka Agreement entered into force on February 15, 1978. The ESARIPO headquarters was initially in Nairobi, Kenya. The Council transferred the headquarters to Harare, Zimbabwe after

Lusaka Agreement established a regional system for the protection of industrial property, which sought to harmonise national laws of Member States and promote co-operation. On 12 December 1986, the ESARIPO Council renamed the organisation, African Regional Industrial Property Organisation, to expand the eligibility for membership beyond English-speaking Africa to all members of UNECA and the OAU (now AU). Almost two decades after, the organisation was renamed the African Regional Intellectual Property Organisation on 13 August 2004, to expand its mandate from industrial property to other categories of IP.[95]

Article III of the Lusaka Agreement provides that the objectives of ARIPO include, 'to promote the harmonisation and development of intellectual property laws and related matters, appropriate to the needs of its members and the region as a whole, to foster the establishment of a close relationship between its members in matters relating to intellectual property and to establish common services or organs necessary for the co-ordination, harmonisation and development of intellectual property activities affecting its members.' Unlike OAPI that is premised on a uniform IP structure delineated in the ten annexes to the Bangui agreement, ARIPO advances a flexible IP structure. Beyond the Lusaka Agreement, which confers ARIPO membership, Member States are not automatically bound to any of its Protocols. Simply put, ARIPO Members States can choose which Protocols to sign. ARIPO has four Protocols: *Harare Protocol on Patents and Industrial Designs* (Harare Protocol), *Banjul Protocol on Marks* (Banjul Protocol), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (Swakopmund Protocol) and *Arusha Protocol for the Protection of New Varieties of Plants* (Arusha Protocol).[96] ARIPO also has a 'Draft Policy and

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the fifth session of the Council in September 1981. UNECA and WIPO served as the ESARIPO Secretariat untilJune 1, 1981.

95 This amendment to the Lusaka Agreement was adopted by its Council of Ministers on August 13, 2004. ARIPO has 19 Member States, Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. These 12 non-Member States have observer status, Angola, Algeria, Burundi, Egypt, Eritrea, Ethiopia, Libya, Mauritius, Nigeria, Seychelles, South Africa and Tunisia.

96 The Harare Protocol on Patents was adopted on 10 December 1982, and amended on 11 December 1987, 27 April 1994, 28 November 1997, 26 May 1998, 26 November 1996, 30 November 2001, 21 November 2003, 24 November 2006, 25 November 2013, 17 November 2015, 5 December 2016, 22 November 2017, 23 November 2018 and 20 November 2019. Banjul Protocol on Marks was adopted by the Administrative Council at Banjul, The Gambia, on 19 November 1993 and amended on 28 November 1997, 26 May 1998, 26 November 1999, 21 November 2003, 25 November 2013, 17 November 2015, 22 November 2017, 23 November 2018 and 20 November 2019. The Swakopmund Protocol was adopted by a Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010 and amended on 6 December 2016. The Arusha Protocol was adopted by a Diplomatic Conference of ARIPO at Arusha (Tanzania) on 6 July

Legal Framework for the Protection of Geographical Indications' and a 'Model Law on Copyright and Related Rights.'[97] All ARIPO Member States, except Eswatini, are Contracting Parties to the PCT. ARIPO can also be designated under the PCT. In addition, ARIPO is a member of the Paris Convention, and like OAPI, its Arusha Protocol is modelled after the UPOV 1991 Convention.[98]

The ARIPO Secretariat conducts a mix of substantive and formal examination for IP applications. It administers applications for patents, utility models and industrial designs on behalf of parties to the Harare Protocol. Although it conducts a substantive examination of patent applications and utility models, it only conducts a formality examination for industrial designs. Nonetheless, national offices of parties can consider the application and inform ARIPO whether it will grant national protection. ARIPO processes trademark applications for parties to the Banjul Protocol. A trademark application can also be filed indirectly with the national industrial property office of any Contacting State that acts as a receiving office. ARIPO conducts formal examination for the trademarks applications it receives and directs them to a designated national office for substantive examination. ARIPO does not register traditional knowledge and expressions of folklore because Section 5 of the Swakopmund Protocol expunges any formality for traditional knowledge. To be clear, Section 5(2) provides that 'Contracting States and ARIPO Office may maintain registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures.' With respect to plant variety protection, ARIPO is earmarked to conduct a formal and substantial examination of applications for plant breeders' rights under the Arusha Protocol.

2015. The Arusha Protocol is not yet in force. It will enter into force twelve months after four States have deposited their instruments of ratification or accession.

97 The Draft Policy and Legal Framework for the Protection of Geographical Indications was informed by the Decision of the Thirteenth Session of the Council of Ministers, held in Accra Ghana in 2011. *See* GI roadmap in African Regional Intellectual Property Organisation, *Who We Are and What We Do* (ARIPO Zimbabwe, 2016), https://www.aripo.org/wp-content/uploads/2018/12/ARIPO_Who_We_Are__What_We_Do_1-1.pdf. ARIPO published its Model Law on Copyright and Related Rights in October 2019.

98 All ARIPO Member States are parties to the WIPO Convention, all apart from Somalia and Sudan are parties to WTO TRIPS. Members are party to a mix of the following Berne Convention, Brussels Convention on Programme-carrying Signals, Budapest Treaty, Hague Agreement on Designs, Locarno Agreement on Classifications of Designs, Madrid Agreement on Marks, Madrid Protocol on Marks, Nairobi Treaty on Olympic Symbols, Nice Agreement on Classification of Marks, Paris Convention, Patent Cooperation Treaty, Phonograms Convention, Rome Convention, Strasbourg Agreement on Patent Classification, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

The Council of Ministers, consisting of Ministers of Governments of Member States, is the supreme body for ARIPO.[99] In this capacity, the Council of Ministers is responsible for the policy orientation of the organisation and deciding on all necessary measures to develop and review the organisation's activities. It may delegate any of its powers or functions to the Administrative Council. The Administrative Council, consisting of heads of offices, is responsible for supervising the execution of the policies of the organisation as determined by the Council of Ministers. ARIPO appears to present contradictory policy positions, attributable to its external influences and support. For example, although it adopted the applaudable Swakopmund Protocol, which recognises the significant traditional practices of its Member States, it also adopted the UPOV 1991 styled Arusha Protocol, which undermines their traditional farming practices.[100]

One would have expected an organisation that protects and prioritises traditional knowledge and expressions of folklore to also accord traditional farming practices the same status. The participation of plant breeder centric organisations such as the United States Patent and Trademark Office, the EU Community Plant Variety Protection Office, the French National Seed and Seedling Association and UPOV in the workshops on the draft Plant Variety Protocol can contribute to explaining why ARIPO opted for the UPOV 1991 Convention.[101] According to the African Centre for Biodiversity, the Arusha Protocol will threaten farmers rights and sustainable agricultural development in the ARIPO region, while increasing multinational agrochemical/seed companies' corporate monopolisation of the African seed industry.[102]

Table 1: Representation of the Regime Complex for IP in Africa

*AU Member States	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
People's Democratic Republic Of Algeria						

99 Article VI, Lusaka Agreement.

100 This is an example of the 'Africanisation' of an instrument that is not wholly suited to the African context.

101 African Intellectual Property Organisation, Council of Ministers Fourteenth Session, *Consideration of the Revised ARIPO Legal Framework for Plant Variety Protection*, ARIPO/CM/XIV/8 (2013). Also, 13 of its 19 Members States are least developed countries.

102 African Centre for Biodiversity, *The Arusha Protocol and Regulation: Institutionalising UPOV 1991 in African Seed Systems and Laws* (ACB Discussion Document, Sept. 2018).

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Republic Of Angola					■	
Republic Of Benin	■		■			
Republic Of Botswana		■			■	
Burkina Faso	■		■			
Republic Of Burundi				■		■
Republic Of Cameroon	■					
Republic Of Cabo Verde			■			
**Central African Republic	■					
The Republic Of Chad	■					
Union Of The Comoros	■				■	■
Republic Of The Congo	■				■	
Republic Of Cote D'ivoire	■		■			
Democratic Republic Of The Congo						■
Republic Of Djibouti						■
Arab Republic Of Egypt						■
Republic Of Equatorial Guinea	■					
State Of Eritrea						■
***Kingdom Of Swaziland		■			■	■
Federal Democratic Republic Of Ethiopia						■
Gabonese Republic	■					

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Republic of the Gambia		■	■			
Republic of Ghana		■	■			
Republic of Guinea			■			
Republic of Guinea-Bissau	■		■			
Republic of Kenya		■		■		■
Kingdom of Lesotho		■			■	
Republic of Liberia		■	■			
Libya						■
Republic of Madagascar					■	■
Republic of Malawi		■			■	■
Republic of Mali	■		■			
Republic of Mauritania	■					
Republic of Mauritius					■	■
Kingdom of Morocco						
Republic of Mozambique		■			■	
Republic of Namibia		■			■	
Republic of Niger	■		■			
Federal Republic of Nigeria			■			
Republic of Rwanda		■		■		■
Saharawi Arab Democratic Republic						

AU MEMBER STATES	OAPI	ARIPO	ECOWAS	EAC	SADC	COMESA
Democratic Republic of Sao Tome and Principe		■				
Republic of Senegal	■		■			
Republic of Seychelles					■	■
Republic of Sierra Leone		■	■			
Somali Republic		■				■
Republic of South Africa					■	
Republic of South Sudan				■		
Republic of The Sudan		■				■
United Republic of Tanzania		■		■	■	
Togolese Republic	■		■			
Tunisian Republic						■
Republic of Uganda		■		■		■
Republic of Zambia		■			■	■
Republic of Zimbabwe		■			■	■

Source: The Author

*55 Member States of the African Union in alphabetical order.

**Member State under political sanction.

*** Name changed to Kingdom of eSwatini on 18 April 2018.

B. Sub-Regional Economic Communities of the African Union

The AU's RECs comprise the following eight sub-regional intergovernmental institutions that represent the pillars of the African Economic Community and provide the framework for economic integration as established under the *Treaty Establishing*

the African Economic Community, Abuja Nigeria of 3 June 1991.[103]ECOWAS, EAC, SADC, COMESA, AMU, IGAD, ECCAS and CENSAD. Considering the close connection between IP and trade, and indeed, between IP and all sectors of the economy, it is unsurprising that most of the constitutive agreements or protocols of the RECs include IP agendas. This part focuses on ECOWAS in the Western part of Africa, EAC in the Eastern part of Africa and SADC in the Southern part of Africa. It also highlights some activities in COMESA. Consistent twin themes in the four RECs covered is their commitment to harmonisation and cooperation. This part, therefore, points out instances where IP harmonisation and cooperation have been achieved or at least, attempted.

i. The Economic Community of West African States

ECOWAS, established on 28 May 1975by the *Treaty Establishing the Economic Community of West African States, Signed in Lagos*, creates a single trading bloc that promotes effective economic cooperation and integration in all fields of activities of its fifteen Member States.[104]Article 3 of the Revised (ECOWAS) Treaty states that the community will harmonise and coordinate national policies, while promoting integrated programmes and activities, especially in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, legal matters, human resources, education, information, culture, services, health, tourism, science, and technology.[105] In discussing science and technology,

> Article 27.1 (a) provides that Member States will strengthen national scientific and technological capabilities to foster socio-economic transformation necessary to enhance the quality of life of its population.
>
> Article 27.1 (c) goes on to stipulate that Member States will reduce their dependence on foreign technology and promote their individual and collective technological self-reliance. Article 27. 2 (c) maintains that Member States will harmonise national technological development plans by placing special

103 Organisation of African Union, Treaty Establishing the African Economic Community (June 3, 1991).

104 Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo.

105 ECOWAS members signed a Revised Treaty in Cotonou, Benin Republic on July 24, 1993. Economic Community of West African States (ECOWAS), Revised Treaty (Economic Commission, Abuja Nigeria 1993).

> emphasis on indigenous and adapted technologies as well as their regulations on *industrial property* and transfer of technology.[106] Although Article 27. 2 (c) specifies industrial property, to the exclusion of copyright and related rights or *sui generis* rights, it requires ECOWAS Member States to craft inclusive IP laws that cater to the indigenous innovative systems.

ECOWAS does not have specialised IP instruments. However, following membership of different international or sub-regional IP organisations, ECOWAS members have varying IP national IP instruments. All ECOWAS Members States are party to TRIPS and all the Member States, except Cape Verde and Nigeria, are party to either OAPI or ARIPO (See Table 1). Notably, the West African Health Organisation (WAHO), the health agency of ECOWAS, published a report in December 2012, to underscore the importance of IP to different sectors of the economy including pharmaceutical, food, agriculture, technology and trade.[107] It recommends that ECOWAS establish an IP Unit and that its Member States fully apply TRIPS flexibilities.[108]In this regard, the United States Department of Commerce's Commercial Law Development Program Office has offered assistance to both ECOWAS and its Member States like Ghana, Liberia and Nigeria, to develop IP protection and enforcement in the sub-region.[109] Peter Drahos, John Braithwaite and Susan Sell have documented in detail how the United States,backed by private multinationals,have entrenched high-protectionist IP standards across the globe.[110]Therefore,as Nirmalya Syam and Viviana Munoz Tellez correctly caution,it is imperative for ECOWAS and its Member States to 'ensure that the development of national IP policies are not so designed that IPRs strengthen the technological dominance of firms from developed countries and exacerbate technological dependence of local industries from the region, contrary to the objectives of the ECOWAS Treaty.'[111]

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106 Emphasis added.

107 West African Health Organisation (WAHO), *Development of a Harmonised TRIPS Policy: For Adoption by ECOWAS Members States that Employ TRIPS Flexibilities to Improve Access to Medicines in the Region*(WAHO/Technical Document, Oct. 31, 2012).

108 *Id*. at 42–43.

109 CLDP, *Commercial Law Development Program Office of General Counsel, United States Department of Commerce, 'CLDP Results in Sub-Saharan Africa*', https://cldp.doc.gov/about-cldp/results/cldp-results-sub-saharan-africa (accessed Aug. 15, 2020).

110 Peter Drahos & John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (Earthscan, 2002); Susan K. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (Cambridge University Press, 2003, 2).

111 NirmalyaSyam & Viviana Munoz Tellez, *Innovation and Global Intellectual Property Regulatory Regimes: The Tension Between Protection and Access in Africa*, 45 (South Centre, Research Paper 67, June 2016) [hereinafter Innovation and Global Intellectual Property Regulatory Regimes].

ii. The East African Community

The EAC, established on 30 November 1999 by the *Treaty for the Establishment of the East African Community*, seeks to develop policies and programmes to widen and deepen cooperation among its six Member States (referred to as 'Partner States') in political, economic, social, cultural fields, research, technology, defence, security, legal and judicial affairs.[112]Like the Revised ECOWAS Treaty, Article 103 of the EAC Treaty provides for the creation of both a conducive environment to promote science and technology within the community as well as the use and development of indigenous science and technologies. In particular, Article 103 (i) affirms the harmonisation of policies on the commercialisation of technologies along with the promotion and protection of IP rights.

The *Protocol on the Establishment of the East African Community Common Market 2009*, another key EAC Document, provides in Article 5.3 (k), that Partner States agree to cooperate on the promotion and protection of IP. Article 42 of the Protocol affirms that to promote research and technological development, the Council will develop technology policies and strategies that pay attention to the importance of technology management and protection of IP. Article 43 explains Partner States commitment to cooperate in copyright and related rights, patents, layout designs of integrated circuits, industrial designs, new plant varieties, geographical indications, trade and service marks, trade secrets, utility models, traditional knowledge, genetic resources, traditional cultural expressions and folklore, and any other categories of IP rights chosen by the Partner States. The Protocol requires Partner States to introduce IP policies that promote creativity, innovation and development of intellectual capital. At the same time,Article 43.4 (a) and (b) emphasises that Partner States will establish mechanisms to ensure the legal protection of traditional cultural expressions, traditional knowledge, genetic resources and national heritage as well as the promotion of cultural industries. Article 43 (6) assures that Partner States will honour their commitments in international IP agreements.

Further to the Protocol and in line with the AU Pharmaceutical Manufacturing Plan for Africa (PMPA) Business Plan 2012, the EAC Secretariat, in collaboration with the Partner States, introduced the *EAC Regional Intellectual Property Policy on the*

112 The Treaty for the Establishment of the East African Community (Signed 30 November 1999, entered into force on 7 July 1999, Amended 14 December 2006 and 20 August 2007). Members of the Community, referred to as Partner States are Republic of Burundi, Republic of Kenya, Republic of Rwanda, Republic of South Sudan, United Republic of Tanzania and Republic of Uganda.*See* Objectives of the Community in Article 5.

Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation in February 2013.[113] It sets out policy statements on *inter alia* patentability criteria, marketing approval-'Bolar' exception, test data protection, parallel importation and compulsory licensing to guide EAC Partner States on how to revise national intellectual property laws to utilise the Public-Health related WTO-TRIPS Flexibilities fully. The EAC also has a Regional Pharmaceutical Manufacturing Plan of Action (2012-2016), which reveals the road map for an efficient and effective pharmaceutical manufacturing in Partner States, that will supply the national, regional and international markets with medicines.[114] However, these policies may be undermined by a conflicting EAC Policy on 'Anti-Counterfeiting, Anti-Piracy and other IP Violations', proposed EAC Anti-Counterfeiting and Competition Legislation or IP instruments designed pursuant to the Economic Partnership Agreement between the EAC and EU signed on 18 October 2014.[115]

Beyond the policy commitments outlined above, the only core IP instrument that the EAC has drafted in line with its harmonisation and cooperation agenda is its Seed and Plant Varieties Bill 2018 (SPVB). The SPVB is wholly modelled on the commercial/corporate plant breeder focused UPOV 1991 Convention, which like OAPI and ARIPO's plant variety protection agreements, or like SADC's discussed below, contravenes the AU's African Model Law.[116]Nonetheless, EAC Partner States, like ECOWAS Member States, have varying IP instruments, following their membership

113 East African Community, *EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation*(EAC Tanznaia, Feb. 2013). This Policy builds on the EAC Secretariat and Partner States initiative to harmonise policies, legislation and regulations on Intellectual Property, with the aim to maximise the benefits of Public Health-related WTO-TRIPS Flexibilities, which was launched in 2005.

114 EAC, *East African Community Regional Pharmaceutical Manufacturing Plan of Action: 2012–2016*, https://www.unido.org/sites/default/files/2016-01/EAC_Regional_Pharmaceutical_Manufacturing_Plan_of_Action_0.pdf. However, these policies may be undermined by EAC Policies on Anti-Counterfeiting, Anti-Piracy and Other Intellectual Property Rights Violations as well as proposed EAC Anti-Counterfeiting and Competition Law.

115 *See generally* UNCTAD-GIZ-EAC Secretariat, *Regional Workshop on Policy Coherence for Local Production of Pharmaceutical Products and Other Means to Improve Access to Medicines and Medicinal Products in the East African Community* (Speke Resort Munyonyo, Kampala, Uganda, Sept. 21–23, 2015)https://unctad.org/meetings/en/SessionalDocuments/tot_ip_0027_en.pdf. In Article 3 of the Economic Partnership Agreement Between the East African Community Partner States, of the One Part, and the European Union and its Member States of the Other Part, the Parties undertake to conclude negotiations on intellectual property rights 5 years upon entry into force of the Agreement. The Economic Partnership Agreement will enter into force after the parties' sign and ratify it.

116 For a civil society reaction to the EAC Seed and Plant Varieties Bill, see African Centre for Biodiversity, *Concerns with the Draft EAC Seed and Plant Varieties Bill*, September 2018 Version (African Centre for Biodiversity South Africa, Apr. 2018), https://www.acbio.org.za/sites/default/

of TRIPS or ARIPO (See Table 1). All EAC Partner States except South Sudan are members of TRIPS, while all EAC members except Burundi and South Sudan are members of ARIPO (See Table 1). Notably, Rwanda is a party to the ARIPO's Swakopmund Protocol, which could ameliorate some of the adverse effects of the SPVB at the national level. A question that arises here, which applies to the other sections of this part,is how does a Member State of a REC resolve contradictory sub-regional IP obligations?

iii. The Southern African Development Community

SADC, unveiled on 17 August 1992 as a replacement to the Southern African Development Coordinating Conference,seeks to 'achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of South Africa and support the socially disadvantaged through regional integration.'[117]Its *Protocol on Trade in the Southern African Development Community* covers one of its notable provisions on IP.[118]Article 24 of the Protocol asks Member States to adopt policies and implement measures within the Community to protect IP in line with TRIPS. Other SADC instruments relevant to IP include the *Regional Indicative Strategic Development Plan* (RISDP, 2005 – 2015) and the Revised RISDP (2015 – 2020) adopted in 2015.[119] Consistent with the SADC Treaty, the RISDP seeks to harmonise IP laws in its Member States, as a way to promote technology development, transfer and diffusion, including indigenous knowledge.[120]The RISDP mentions the importance of agricultural research and training on emerging issues like IP in flora and fauna, and the needs to ensure that technology developed is affordable to resource-poor farmers. To support this technology development, SADC adopted

files/documents/Concerns%20with%20the%20draft%20EAC%20Seed%20and%20Plant%20Varieties%20Bill%2C%20September%202018%20version%20FULL%20REPORT.pdf.

117 SADCC was formed on April 1, 1980when the Heads of States and Governments of the Front-line States and representatives of the governments of Lesotho, Malawi, and Swaziland signed the *Lusaka Declaration 'Towards Economic Liberation'* in Lusaka Zambia. SADCC was formed principally to support the cause on national political liberation in Southern Africa, and to reduce dependence particularly on the apartheid era South Africa. SADC has 16 Member States: Angola, Botswana, Comoros, the Democratic Republic of Congo, Lesotho Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. While the Southern African Customs Union is not discussed in this article, it is noteworthy as the only sub-region to have resisted a US FTA because of IP issues relating to HIV AIDS and access to medicines. *See* James Thuo Gathii, *The Neo-Liberal Turn in Regional Trade Agreements*, 86 Washington L. Rev. 421, 469–70 (2011).

118 Southern Africa Development Community Protocol on Trade 1996 (amended in 2010).

119 The Regional Indicative Strategic Development Plan (2005–2015) was adopted in 2003 and the Revised Regional Indicative Strategic Development Plan (2015– 2020) was adopted in 2015.

120 Strategy 4.5.4.

its *Protocol on Science, Technology and Innovation*2008, which seeks to enhance and strengthen the protection of IP.[121]

In relation to access to medicines, the SADC adopted a *Protocol on Health* in 1999.[122] Article 29 of the Protocol on Health specifies that States will co-operate in the development of both modern and traditional (or complementary) medicines. It provides in part for the 'harmonisation of procedures of pharmaceuticals, quality assurance and registration', 'production, procurement and distribution of affordable essential drugs', 'research and documentation on traditional medicines and its utilisation' and 'the establishment of a regional databank of traditional medicine, medicinal plants and procedures in order to ensure their protection.' However, it highlights that the protection for traditional medicine, medicinal plants and procedures should be in accordance with related IP regimes governing genetic resources, plant varieties and biotechnology. In 2006, SADC Health Ministers also adopted the SADC *Pharmaceutical Business Plan* (PBP) 2007 to 2013 (renewed: 2014 to 2019), which seeks to enhance the availability of and access to affordable, quality, safe,efficacious essential medicines, including African Traditional Medicines. The PBP aligns with the Protocol on Health to achieve its goals.[123] Given the high rate of communicable diseases such as HIV/AIDS, tuberculosis and malaria and disparity in access to medicines in its Member States, it is commendable that SADC prioritises TRIPS flexibilities, including least developed countries' scope to manufacture generic versions of patented medicines,as an opportunity to build local manufacturing capacities.

Similar to the EAC, SADC adopted the commercial/corporate plant breeder focused Protocol for the *Protection of New Varieties of Plants (Plant Breeders' Rights) in the Southern African Development Community Region* in August 2017, styled after the UPOV 1991 Convention.[124] Nonetheless, SADC's Plant Genetic Resources Centre (SPGRC) and Technical Agreement address some of the questions about the exclusion of farmers' varieties from the formal seed system. It provides for the registration of

121 Article 2 (m), Protocol on Science, Technology and Innovation (Aug. 17, 2008).

122 The SADC Protocol on Health was signed on August 18, 1999.

123 SADC has an overall 'SADC Pharmaceutical Programme' created in June 2004 and located in the Social and Human Development and Special Programmes Directorate. *See* https://www.sadc.int/themes/health/pharmaceuticals/ (accessed Aug. 28, 2020). For a detailed discussion on access to essential medicines in SADC, see Chikosa Banda, *Intellectual Property and Access to Essential Pharmaceuticals: Recent Law and Policy Reforms in Southern Africa Development Community Region*, 31 Maryland J. Int'l L. 44 (2016).

124 Botswana is the latest SADC Member State to sign the Protocol on 29 June 2020. Eight other SADC Member States have signed it: Angola, Democratic Republic of Congo, Eswatini, Lesotho, Mozambique. *See* Sabrina Masjinila & Mariam Mayet, The SADC PVP Protocol: Blueprint for Uptake of UPOV 1991 in Africa (African Centre for Biodiversity, Sept. 2018).

farmers varieties in the SADC Variety Database subject to the description of the variety, including its name, description, performance, farmer experiences during cultivation and merits of the variety. The SPGRC is working alongside national plant genetic resources centres to design registration systems for farmers varieties, which would offer the opportunity for commercialisation of farmers' varieties. Accordingly, SADC showed support for smallholder farmers in a regional dialogue hosted by the African Centre for Biodiversity and Participatory Ecological Land Use Management (PELUM) Zimbabwe, which took place from the 3-4 December 2019. Bruce Chulu from the SCII Zambia requested the organisers to 'come up with procedures on the characteristics required for farmers varieties and present it to SADC through its Member States. He noted that 'the region will not refuse.'[125]

Like ECOWAS and EAC discussed above, SADC members also have varying national laws stemming from their membership of TRIPS, OAPI and ARIPO (See Table 1). All SADC members are party to TRIPS, while 9 of the 15 SADC Member States are party to OAPI or ARIPO (Angola, Madagascar, Mauritius, Seychelles, South Africa and Swaziland are non-members of either organisation) (See Table 1).Notably, SADC has the first fully operational (sub) regional EPA with the EU in Africa, signed on 10 June 2016 and operational from 10 October 2016.[126] The SADC-EU EPA covers Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland, with Angola having an option to join in the future.[127]In Article 16 of the EPA, parties commit to cooperate on the protection of IP and reaffirm their commitment to TRIPS obligations and flexibilities. A question here is how will the parties achieve cooperation on TRIPS flexibilities? As discussed in Part II, the African Group and EU submissions at the TRIPS Council show that the African countries (including the SADC EPA States) interpretations of TRIPS flexibilities differs significantly from the EU's in certain instances such as plant variety protection.

One subject that the EPA parties share similar positions on at the TRIPS Council is GIs. The parties recognise the importance of GIs (and traditional knowledge) and

125 African Centre for Biodiversity,'*Registration of Farmers' Varieties in SADC: A Report from Dialogue held at Victoria Falls, Zimbabwe, December 3–4, 2019*, at 11 (African Centre for Biodiversity, March 2020).

126 Other SADC members, the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe, are negotiating Economic Partnership Agreements with the EU through the sub-regional organisations.

127 Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (16.9.2016, I. 250/28, Official Journal of the European Union).

commit to considering ways to cooperate on both subjects. To drive its GIs alliance, the EPA comprises a bilateral protocol between the EU and South Africa to protect GIs alongside trade in wines and spirits.[128] Under the Bilateral protocol, the EU commits to protecting 105 products (agricultural products, foodstuffs and wines) from South Africa, including Rooibos,Karoo meat, Napier, Paarl, Stellenbosch and Tygerberg. For its part, South Africa commits to protecting 251products (agricultural products, foodstuffs, beers, wines and spirits) including Parmigiano Reggiano, Prosciutto di Parma, Champagne, Cognac, Irish Cream and Scotch Whisky. As mentioned above, GIs are less controversial in Africa,especially because external actors' -such as the EU's- push for stronger GIs systems align with African positions on the subject.

iv. The Common Market for Eastern and Southern Africa

While ECOWAS, EAC and SADC are case studies here, I will briefly highlight COMESA's *Policy on Intellectual Property Rights* and tripartite agreement with EAC and SADC before unpacking the intersections of the sub-regional IP organisations and RECs in Part IV.[129] Established by the *Treaty Establishing COMESA* signed on 5 November 1993 and ratified on 8 December 1994, COMESA provides for its Member States to exchange information on patents, trademarks and designs laws and to cooperate in science and technology development to develop and implement suitable patent and industrial property laws.[130]Although these provisions exclude copyrights and related rights, COMESA's Policy on IP covers both industrial property and copyrights. It submits that the generation, creation, innovation and management of IP plays an important role in wealth creation and national development, especially with the global shifts from resource-based economies to knowledge-based and innovation-driven economies.[131]Accordingly, it provides for Member States to promote the utilisation and protection of IP.

The Policy is divided into two parts. Part A, 'COMESA Policy on Intellectual Property Rights' covers the connection between IP and economic development, trade, cultural industries, traditional knowledge, expressions of folklore, information

128 Protocol 3: Geographical Indications and Trade in Wines and Spirits, Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part (16.9.2016, I. 250/28, Official Journal of the European Union).

129 COMESA, Official Gazette of the Common Market for Eastern and Southern Africa (COMESA), Council of Ministers Decision 90, at 26 (Volume 16, October 15, 2011).

130 COMESA has 21 Member States: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe. Articles 104 (1) (d) & 128 (e),Treaty Establishing the Common Market for Eastern and Southern Africa.

131 Paragraphs 3 &11, COMESA Policy on Intellectual Property Rights.

communication technology, audit and valuation. Part B, 'The COMESA Policy on Copyright and Copyright Related Industries' is dedicated to copyright and related rights. Both parts foreground the contributions of IP to cultural, social and economic development and the need for member states to adopt effective legal and policy frameworks that fully exploit TRIPS flexibilities. However, the policy omits to cover concrete issues required for balanced systems that address conflicts and competing interests in IP required to fully exploit TRIPS flexibilities. Syam and Tellez assert that 'COMESA IP Policy only makes superficial references to the need for Member States to use the flexibilities under TRIPS without providing any guidance on how the flexibilities can be utilised in respect of each sector of the economies of the Member States of COMESA.'[132] Beyond its Policy, COMESA has not adopted any IP instruments.

COMESA, EAC and SADC launched a Tripartite Free Trade Area (T-FTA) on 10 June 2015.[133] The core objective of the tripartite agreement is to contribute to promoting social and economic development of the region and enhancing regional and continental integration processes. One of the commitments in the yet to be finalised Phase II negotiations is an IP chapter that will be Annex 9of the T-FTA.[134]Annex 9, divided into eight Articles, sets out more detailed IP provisions than those of ECOWAS, EAC or SADC discussed above. In addition to the overarching provisions on Member States undertaking to design effective IP systems that incentivise innovation and creativity and contribute to social and economic welfare, other noteworthy provisions include Articles 3 and 6 on copyright, Article 4 on traditional knowledge, genetic resource and folklore, Article 5 on Information and Communications Technology and Article 7 on industrial property. While these are crucial provisions, similar to the concerns raised about the COMESA IP Protocol in the preceding paragraph, Annex 9 fails to engage in a nuanced coverage of other vital IP subjects relevant to its developing and least-developed country members, such as those on pharmaceutical patents and access

132 Syam & Tellez, *supra* note 111, at 43.

133 The Agreement, launched in Sharm El Sheikh, Egypt, covers the 29 members of COMESA, EAC and SADC. 22 Member States have signed the Agreement Establishing the Tripartite Free Trade among the COMESA, EAC and SADC: Angola, Botswana, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, State of Libya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, South Africa, Susan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. 8 countries have ratified the Agreement: Botswana, Burundi, Egypt, Kenya, Namibia, Rwanda, South Africa and Uganda.

134 Article 45, Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, The East African Community and The Southern African Development Community (June 10, 2015).

to medicines, copyright and access to knowledge, geographical indications and the appropriate type of protection system or plant variety protection and farmers' rights.

The UNECA, UN,AfDB and UNCTAD *Assessing Regional Integration in Africa IX* report recommends that T-FTA negotiators consider *inter alia* these essential themes during the T-FTA Phase II IP negotiations.[135] First, the adoption of a regional IP exhaustion regime, measures for cooperation on patent examination and policy on IP rights/public health/investment in access to medicines. Second, the enforced ratification of the Protocol amending TRIPS 2005 to qualify for production and exportation of pharmaceutical products. Third, the adoption of an agenda on plant breeders' rights regime contoured to suit the needs of the local seed ecosystems and publicly funded agricultural research centres. Fourth, the enforced ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled. As the T-FTA is expected to contribute to AfCFTA, these recommendations would also apply to the AfCTFA IP Protocol negotiations.

Neither the AU nor the AfCFTA Secretariat has released a draft text of the AfCFTA IP Protocol. Million Habte, the AU Commission coordinator for the AfCFTA IP Protocol negotiations confirms that negotiations for the Protocol have not commenced.[136]Drawing from Parts II and III,I will discuss pertinent points to drive a development-oriented AfCFTA IP Protocol next.

III. THE AFCFTA AND A DEVELOPMENT ORIENTED INTELLECTUAL PROPERTY PROTOCOL

The analysis advanced above indicates that one of the early exercises for the AfCFTA IP Protocol negotiators would be to assess and ascertain how the Protocol fits within the fragmented IP architecture on the continent. Consequently, I pose two preliminary questions. First, how should the AfCFTA IP Protocolconnect with the regime complex for IP in Africa? By this I mean what role should the existing patchwork of regional and sub-regional institutions, instruments and policy frameworks play in the AfCFTA IP Protocol. Second, what should the scope of the AfCFTA IP Protocol be? By this

135 For the 9 key points in full, see United Nations Economic Commission for Africa, African Union, African Development bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the African Continental Free Trade Area*, 110 (UNECA, AU, AfDB, UNCTAD, 2019).

136 Habte explains that the AU Commission may start the process by providing trainings. Personal communication with Million Habte (Aug. 26, 2020).

I mean which IP categories would it cover and how would it conceptualise them? I share reflections on these questions in this part.

A. How Should the AfCFTA IP Protocol Connect with the Regime Complex for IP in Africa?

To start with, the AfCFTA is one of the flagship projects of the AU's Agenda 2063. Therefore, I argue in favour of applying the AU's IP instruments, commitments and declarations to the AfCFTA IP Protocol. This would generate questions about which of the AU's aspirations make it into the IP Protocol and by extension, which gets extinguished. Uncontroversial subjects such as GIs would be easier to finalise because the African position aligns with external actors such as the EU and WIPO - who subtly or overtly influence IP law and policymaking at the sub-regional and national levels in Africa. However, controversial subjects such as plant variety protection, access to medicines and access to knowledge would incite scrutiny, generate knotty questions and demand detailed deliberations.

In Part III, I discussed OAPI, ARIPO, EAC and SADC's UPOV 19991 Convention styled plant breeders laws or draft laws, which limits the policy space for these sub-regional organisations and their Member States to introduce provisions like the protection of farmers' varieties, farming communities' varieties, farmers rights to save seeds or access and benefit-sharing principles recommended by the African Model Law. Some of these sub-regional institutions or their Member States, such as South Africa from SADC and Tanzania from EAC, are also parties to bilateral or regional trade agreements that mandate them to accede to the UPOV 1991 Convention.[137] The pivotal question, therefore, is whether the AfCFTA IP Protocol should require countries that have adopted onerous UPOV 1991 Convention obligations to re-negotiate those commitments to the extent that they depart from the development-oriented vision of the AfCFTA IP Protocol? I argue in the affirmative and in favour of making the African Model Law an important baseline on plant variety protection for the AfCFTA IP Protocol, which means an explicit rejection of sole reliance on the inflexible plant breeders' rights system of the UPOV 1991 Convention as 'a model' plant variety protection system.

For its part, PAIPO raises structural and procedural challenges. The PAIPO Statute provides that PAIPO seeks to harmonise IP in Africa. The tough question to

137 "*Harmonize*", Oxford English Dictionary Online (Oxford University Press, June 2020).

tackle here is 'what does harmonise mean?' The Oxford English Dictionary defines harmonise as 'to be in *harmony* (with); to accord, agree (in sense, sentiment, feeling, artistic effect, etc.), or 'to bring in agreement (two or more things, or one thing with another); to reconcile.'[138] It defines harmony as a 'combination or adaptation of parts, elements, or related things, so as to form a consistent and orderly whole; agreement, accord, congruity.'[139]Its Latin etymology indicates its early link to music – joining or concord of sounds for a pleasing effect. Music engages simultaneous integration of notes, tones or pitches to produce new and nuanced sounds. Drawing from these definitions, PAIPO's task to harmonise IP in Africa, would be to ensure the sub-regional organisations agree with one another and can combine or adapt different elements of their frameworks to form a consistent and orderly whole while maintaining their independence. I argue that this combination *or harmonisation* ought to be grounded on the AU's IP agenda.

To be clear, *harmonise* differs from *unite*. The latter, which means 'to combine or join (something) *with* (also *to*) another; to bring or put together to form a single entity; to cause to be one' or 'to come together to form a single body or entity; to join or combine *with* (also *to*) another' is not PAIPO's stated goal.[140] Without question, unity would be problematic to achieve. In music terms, 'harmony requires diversity and eschews uniformity.'[141]Outside Africa, other regions have adopted different standards for IP harmonisation.[142] For example, the EU emphasises that harmonisation (or approximation) of IP plays a paramount role in the free circulation of goods within the European Single Market.[143]To achieve this, although the Member States have national IP laws (and the principle of territoriality applies), it introduces a mix of EU Directives and Regulations that cover certain substantive categories of IP. For example,

138 *Id*

139 *Id*

140 *"Unite"*, Oxford English Dictionary Online (Oxford University Press, June 2020).

141 Martin Boodman, *The Myth of Harmonization of Laws*, 39 Am. J. Comp. L. 699, 701 (1991). On harmonisation of laws, see also Jose Angelo Estrella Faria, *The Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage*, 14 Uniform L. Rev. 5 (2009).

142 To draw lessons for the AfCFTA IP Protocol, I unpack regional harmonisation of IP laws employing case studies from different regions in a forthcoming article.

143 Article 118, Treaty on the Functioning of the European Union (TFEU) ("In the context of the establishment and functioning of the internal market the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."). *See also* Articles 34, 35, 36, 207 and 262 of the TFEU; Hanns Ullrich, *Harmony and Unity of European Intellectual Property Protection*, *in* Intellectual Property in the New Millennium, 20–46 (David Vaver& Lionel Bentley eds., Cambridge University Press, 2004).

it has uniform protection for Trade Marks and Designs in EU Member States through Directive (EU) 2015/2436) and Council Directive98/71/EC, respectively.[144]The EU also has a variety of harmonising Directives for particular copyright subject matters such as Database (Directive 96/9/EC), Software (Directive 2009/24/EC), Information Society/Digital Environment (Directive 2001/29/EC) and Term/Duration of copyrights (Directive 2011/11/EU). In addition, the EU has uniform IP enforcement measures through its Enforcement Directive 2004/48/EC.[145]Importantly, the Court of Justice of the European Union (CJEU) smoothens residual unevenness through the interpretation of IP laws in the region.[146]In this regard, one of the significant contributions of the CJEU to harmonising copyright law is *Infopaq International A/S v Danske Dagblades Forening*, which *inter alia* sets out the definition of originality in copyright as including 'author's intellectual creation.'[147] In short,Member States retain national IP laws,while the EU adopts variegated approaches to harmonisation for the different categories of IP with the enforcement framework and CJEU augmenting the process. A stark dissimilarity between the EU and AU is that the former does not have sub-regional IP organisations or RECs, which is an added layer of complexity in the African context.

Furthermore, in recognising the diversity in Africa displayed through the mix of developing and least developed countries embedded within divergent social, economic and political contexts, I submit that PAIPO should embrace the principle of variable geometry,which offers flexibility and differentiated speeds of integration by allowing countries make liberalised commitments based on their economic ability. James Gathii expounds that variable geometry covers rules, principles, and policies included in trade integration treaties that afford members, especially the poorest members '(i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonisation objectives; (ii) mechanisms to minimise distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalisation commitments and policies aimed at the equitable distribution the institutions and organisations of regional integration to avoid concentration in any

144 *See also* Regulation (EU) 2007/1001 on the European Union Trade Mark and Council Regulation (EC) No 6/2002 on Community Designs.

145 *See* European Commission, *The EU Copyright Legislation*, https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation (accessed Aug. 28, 2020).

146 European Commission, *Intellectual Property*, https://ec.europa.eu/growth/industry/policy/intellectual-property (accessed Aug. 28, 2020). Jonathan Griffith, *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, 38 Eur. L. Rev. 65 (2013).

147 Infopaq International A/S v Danske Dagblades Forening (C-5/08) I.P.Q 57 (2009) 1-6569 [2009] E.C.D.R. 16.

one member; and (iii) preferences in industrial allocation among members in an RTA [regional trade agreement]…'[148] Thus, embracing variable geometry would ensure the implementation of the PAIPO is tailored to corporately suit all Member States.

PAIPO will not start from scratch as there are already a series of agreements to cooperation and harmonisation agreements at the sub-regional level for it to build on. For example, OAPI and ARIPO have consistently confirmed commitment to cooperation and harmonisation. On 26 July 2019, the Director Generals of both organisations signed a revised Work Plan for 2019-2020, adopted during the 5th OAPI-ARIPO Joint Commissionat the ARIPO headquarters in Harare, Zimbabwe.[149]Five salient features of the Work Plan and Joint Commission commitments are as follows. First, it emphasises the significance of reciprocal participation in activities of both organisations such as their ordinary sessions of Administrative Council, OAPI's African Invention and Technical Innovation Fair (SAIIT) and ARIPO'sIP Conference. Second, it undertakes to enhance the exchange of publications on the systems and procedures of both parties and to have OAPI research articles published in the African Journal of Intellectual Propertyand the ARIPO Magazine. Third, itencourages delegations from both Member States to lobby for African common positions on technical and strategic IP matters at the international level. Fourth, it agrees to conduct a study on the harmonisation of the OAPI and ARIPO systems. To facilitate this, both organisations agreed to coordinate reciprocal study visits and office exchanges as avenues for their experts to learn more about the legal systems, grant/registration procedures, information communication technology tools and best practices adopted in each organisation. Fifth, it highlights the importance of both organisation's capacity building activities as critical to creating a strong IP human resources capital in Africa. In this regard, both organisations committed to providing

148 James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 North Carolina J. Int'l L & Comm. Reg. 572, 609 (2010).

149 African Regional Intellectual Property Organisation, *ARIPO – OAPI Fifth Joint Commission Adopts a Revised Work Plan for 2019 – 2020*(Aug. 2, 2019),https://www.aripo.org/aripo-oapi-fifth-joint-commission-adopts-a-revised-work-plan-for-2019-2020/. Organisation Africaine de la PropriétéIntellectuelle, 'Joint Commission OAPI-ARIPO: Strengthening Cooperation Links (Ties), http://oapi.int/index.php/en/brevet/item/450-joint-commission-oapi-aripo-strengthening-cooperation-links-ties (accessed Aug. 20, 2020). Also, a webinar titled 'Towards Intellectual Property Rights Harmonization in Africa' organised by Africa International Trade Commerce Research on July 2, 2020, the Director Generals of OAPI and ARIPO expressed their dedication to the harmonisation of intellectual property in Africa. *See* http://africainternationaltrade.com/wp-content/uploads/2020/07/Report-Of-The-Webinar-On-Toward-Intellectual-Property-Rights-Harmonization-In-Africa-V7.pdf. *See also* WIPO-OAPI-ARIPO Tripartite Agreement signed on October 1, 2018. According to the cooperation framework, the organisations undertake to provide joint technical assistance programs to Member States of ARIPO and OAPI.

training and capacity building to develop common IP programmes. OAPI and ARIPO also signed a four-year cooperation agreement on 07 February 2017 at the ARIPO headquarters in Harare, Zimbabwe. The agreement, which supersedes the earlier agreements signed by both organisations in 1996 and 2005 respectively, sets out similar commitments as the Work Plans and Joint Commissions with the firm dedication to promoting harmonisation, cooperation and African Common Positions at the core.[150]

Similarly, RECs like COMESA, EAC and SADC are also working on activities to promote cooperation as I outlined with the example of the T-FTA in Part III above. In establishing the relationship between the RECs and the AfCFTA IP Protocol, the preamble, Articles 3 (h) and 19 of the AfCFTA Agreement affirm that it is cooperative. Indeed, the RECs are considered fundamental to the success of the AfCFTA. For example, while the preamble of the AfCFTA confirms that RECs are part of its building blocks, Article 19 (2) affirms: 'that are member of other regional economic communities, regional trading arrangements and customs unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.'

Another way to develop the cooperation and harmonisation of IP in Africa is for the AU to create a platform to coordinate, collate and consider all the African Group's and African countries' contributions in international fora like the WTO, WIPO and World Health Organisation (WHO). Different, often unconnected,representatives take the lead on processes and relations in these organisations. For example, representatives from the trade ministries are usually the primary interlocutors at the WTO, representatives from the IP offices are the main participants in WIPO while representatives from the health ministries are the key invitees to the WHO. African academics from the diaspora are also actively involved in multilateral negotiations (such as, in the WIPO-IGC). The proposed AU driven African-centric platform would promote the preservation and presentation of African Common Positions. I also suggest that the AU introduces monitoring and evaluation mechanisms to periodically review its harmonisation strategies and IP common positions in line with appropriate indicators and baselines.

In sum, the AfCFTA IP Protocol should introduce harmonising standards to address the increasingly fragmented IP architecture on the continent. The provisions of the IP Protocol would, therefore, have a constitutional hierarchy over the existing

150 African Regional Intellectual Property Organisation, *OAPI and ARIPO Sign New Cooperation Agreement* (Feb. 9, 2017), https://www.aripo.org/oapi-and-aripo-sign-new-cooperation-agreement/.

sub-regional IP instruments. The test for the negotiators here would be to move from rhetoric and intention into action. I turn to some action points in relation to the scope of the AfCFTA IP Protocol.

B. What should the Scope of the AfCFTA IP Protocol be?

IP is a broad term that encompasses wide-ranging proprietary rights. National, regional and international institutions select varying scopes of coverage for the subject. As I mentioned in Part III, OAPI provides for these ten categories of IP: Patents, Utility Models, Trademarks and Service Marks, Industrial Designs, Trade Names, Geographical Indications, Literary and Artistic Property, Protection Against Unfair Competition, Layout-Designs (Topographies) of Integrated Circuits and Plant Variety Protection. ARIPO provides for Patents, Industrial Designs, Marks, Traditional Knowledge and Expressions of Folklore and Plant Variety Protection. As a starting point, the negotiators would need to identify the categories of IP to protect. A combination of the categories covered in both organisations would suffice (while OAPI covers most of the relevant categories of IP, the inclusion of traditional knowledge and expressions of folklore from ARIPO completes the outline).

To advance toward development-oriented systems, the IP categories have to be carefully constructed. As Ruth Okediji puts it, 'intellectual property right are not scientifically derived, but instead, culturally constructed and negotiated between the state and private interests.'[151]IP is connected to quotidian experiences as it applies to arts, agriculture, (bio)technology, crafts, culture, designs, education, entertainment, environment, fashion, food, health,science and sports, amongst others. Indeed, the promise of national 'development' spurred newly independent Global South countries to craft domestic lP laws, become a party to international IP organisations and participate in capacity-building or training programs.[152] The recurrent rhetoric was and still is that IP furnishes a pathway to industrialisation that will enhance the material welfare of the Global South.[153]For example, Article 7 of TRIPS provides: 'the protection and enforcement of intellectual property rights should contribute to the promotion of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare.' Article 8 adds in part: 'Members may, in formulating or amending their laws and

151 Okediji, *supra* note 76, at 317.

152 Ruth Okediji, *The Limits of International Copyright Exception for Developing Countries*, 21 Vanderbilt J. Ent. & Tech. L. 689, 691 (2019).

153 *Id.*

regulations, adopt measures necessary to …promote the public interests in sectors of vital importance to their socio-economic and technological development.'

Although there is limited empirical evidence to support the claim that IP effectuates enduring economic development, I underscore the development centric discourse of the AU and African regional institutions here because of its potential, if constructed correctly, to offer some economic growth outcomes in African societies. I take an example from GIs. The Scotch Whisky Economic Impact Report 2018, building on the work of the Centre for Economics and Business Research, reveals that Scotch Whisky contributed GBP5.5 billion to the United Kingdom's economy in 2018.[154] The report adds that Scotch Whisky supports more than 42, 000 jobs across the United Kingdom; including 10,500 jobs in Scotland and 7,000 jobs in rural communities.[155] To be sure, IP policies and laws cannot effect these outcomes in isolation. Appropriate cultural, economic social, technological and political contexts would be required. A crucial factor to consider (which is not discussed in the article) is how enforcement standards contribute to IP and development in Africa (and its investment relationships with external actors).

In my view, a development-oriented AfCFTA IP Protocol will unreservedly define IP in terms that are fit for the different social and economic contexts around Africa and celebrate the continent's areas of strength, especially in its agricultural, creative, cultural sectors. Accordingly, this development-oriented AfCFTA IP Protocol will demand robust qualitative and quantitative research, based on contextually appropriate methodologies and methods, to excavate the exigencies, realities and priorities across the continent. For example, the Open African Innovation Research and Training Project finds that most of the research on IP, innovation and creativity focus on the formal sectors of the economies, thereby, marginalising the informal forms of innovation and creativity, ubiquitous in Africa (and the Global South).[156] Similarly, Chidi Oguamanam and Funmi Arewaun cover how Nigeria's film industry (otherwise referred to as Nollywood) thrives outside a strong copyright (enforcement) system.[157] The interrelated activities of artists, entrepreneurs and infringers inform

154 Scotch Whisky Association, *Scotch Whisky Economic Impact Report 2018* (Apr., 2019), https://www.scotch-whisky.org.uk/media/1591/final-2018-economic-impact-report.pdf.

155 *Id.*

156 *See, e.g.,* Jeremy de Beer et al. Innovation & Intellectual Property: Collaborative Dynamics in Africa, 7 (UCT Press, 2014).

157 Chidi Oguamanam, *Beyond "Nollywood" and Piracy: In Search of an Intellectual Policy for Nigeria,* 3 NIALS J. Intell. Prop. 3 (2011); Olufunmilayo Arewa, '*Nollywood: Pirates and Nigerian Cinema*', in Creativity without Law: Challenging the Assumptions of Intellectual Property

the industry's progress. It is essential to emphasise that there will be variations in IP requirements for different sectors and sub-regions or countries. Put differently no one-size IP composition would suit the heterogeneous continent;hence, the need for (qualitative and quantitative) research and variable geometry as highlighted above. For example, while Nollywood thrives with a weak copyright system, the agricultural sector in Nigeria may thrive with strong farmers' rights and traditional knowledge systems. Therefore, the research and data derived would equip African negotiators (and law and policymakers)draft effective laws and make informed decisions when considering external offers on capacity building and technical support.

Furthermore, depending on how the negotiators decide to resolve the harmonisation question posed above, including whether a new substantive IP instrument is required or whether the existing regional instruments would be reviewed, I advance additional questions to foster their remedial efforts. First, how are the different IP categories delineated? Second, what are the terms of protection? Third, what are the limitations and exceptions to the exclusive rights granted? As examples, I share succinct suggestions on patents, GIs,plant variety protection and traditional knowledge drawing from OAPI, ARIPO and the TRIPS minimum standards.

i. Patents

The AfCFTA negotiations have the flexibility to shape the scope of patents on the continent by adopting inclusive definitions of inventions and exceptions to patentability that suit the innovation styles and ideological positions of its peoples. OAPI's Annex 1 (Bangui Agreement) and ARIPO's Harare Protocol provide for patents in line with Article 27 (1) of TRIPS, which stipulates that WTO Members are to make patents available for inventions, whether products or processes, in all fields of technology, based on three conditions, namely novelty, inventive step and industrial applicability.[158]However, WTO Members may exclude from patentability, inventions that are contrary to *ordre public* or morality, including to protect human, animal, plant life, health or to avoid serious prejudice to the environment.[159] TRIPS neither defines 'inventions' nor the *ordre public* or morality exceptions allowed. However, Article 27 (3) provides that Members *may* exclude 'diagnostics, therapeutic and surgical methods for the treatment of humans or animals' or 'plants and animals other than micro-

(Kate Darling & Aaron Perzanowski eds., NYU Press, 2017); Chidi Oguamanam, *Nollywood Phenomenon*: *"The Nollywood Phenomenon: Innovation, Openness, and Technological Opportunism in the Modelling of Successful African Entrepreneurship",* 23 J. World Intell. Prop. (2020).

158 Article 27 (1), TRIPS.

159 Article 27 (2), TRIPS.

organisms, and other essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.'[160]

One of the cardinal elements the African Model Law is its opposition to patents for life forms.[161] Article 9 of the African Model Law clearly states that patents for life forms and biological processes are not recognised. OAPI's Annex 1 and the Harare Protocol provide similar exceptions to patentability,including 'inventions that are contrary to public policy or morality', 'discoveries, scientific theories and mathematical methods', 'plant varieties and animal species', 'methods for the treatment of the human or animal body by surgery or therapy, including diagnostic methods' and 'computer programs.'[162]These provisions should inform the crafting of the exceptions to patentability in the IP Protocol.

OAPI and ARIPO's 20-year patent duration from the date of filing can set a precedent for the AfCFTA IP Protocol negotiators.[163]For pharmaceutical patents and access to medicines which have come to the fore because of the Corona virus disease (COVID-19), the negotiators should address patent terms and additional protection for minor improvements (otherwise referred to as patent evergreening). Olasupo Owoeye, Olugbenga Olatunji and Bukola Faturoti, aptly argue that patent evergreening affect access to medicines in the Global South.[164]Furthermore, in line with sub-regional interventions such as the *EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation* and flexibility allowed in Articles 30, 31 and 31*bis* of TRIPS, the negotiators should provide robust compulsory licensing provisions and related data exclusivity waivers to safeguard public health in Africa.[165]Amaka Vanni rightly reminds us that the way Global South actors conceptualise, establish and interpret pharmaceutical patent laws impacts on access to medicines, public health and development.[166]

160 Article 27 (3), TRIPS.

161 Ekpere, *supra* note 9, at 21–22.

162 Article 6 of Annex 1, Bangui Agreement, Section 3, Harare Protocol.

163 Article 33, TRIPS; Article 9 of Annex 1, Bangui Agreement.

164 Olasupo Owoeye, Olugbenga Olatunji & Bukola Faturoti, *Patents and Trans-Pacific Partnership: How TPP-Style Intellectual Property Standards may Exacerbate the Access to Medicines Problems in the East AfricanCommunity,* 33 Int'l Trade J. 197 (2019).

165 African countries can also explore opportunities for South-South technology transfer and cooperation. *See* ObijioforAginam, *Global Health Governance, Intellectual Property and Access to Essential Medicines: Opportunities and Impediments for South-South Cooperation,* 4 Global Health Governance 15(2010).

166 Amaka Vanni, Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria (Hart, 2019).

ii. Geographical Indications

I recommend that the AfCFTA IP Protocol negotiators should design *sui generis* systems for GIs - as opposed to trademark systems –as the *sui generis* system benefits both the developing and least developed countries on the continent because they are endowed with potential products that could qualify as GIs. OAPI provides a *sui generis* GI system in Annex VI of the Bangui Agreement. In contrast, ARIPO protects GIs through collective or certification marks under its Banjul Protocol. Both systems reflect the latitude offered in Article 22 (2) of TRIPS, which provides for WTO Member States to provide any legal means to protect GIs. Article 22 of TRIPS defines GIs as goods that originate in the territory of a Member, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. Accordingly, Member States can protect these GIs through a variety of legal frameworks, including *sui generis* systems, trademarks and unfair competition laws.[167]

In unpacking debates on the conceptualisation of GIs, Chidi Oguamanam and Teshager Dagne propose that 'given the territorial nature of most agricultural practice in Africa, a geographical link as a condition for GI protection adds significant value to GIs as tools to contextualise policy objectives in the protection of biodiversity, the preservation of cultural identity and protection of biodiversity.'[168]Besides the fact that GIs are only registerable in other jurisdictions if they have strong protection in their countries of origin, *sui generis* systems provide a broader scope of protection that conserve local traditional knowledge systems, methods of production, processes of transfer and methods of utilisation, which preserve the authenticity of protected products both at national and international levels. The *sui generis* system will provide GI owners with the exclusive rights to exclude others from any forms of unauthorised reproduction, imitation or falsification of the protected products. In addition, *sui generis* GI systems are not time-limited and often remain valid unless the registration is cancelled, as opposed to (certification and collective) trademarks that are usually granted for renewable ten-year periods.

iii. Plant Variety Protection

Like GIs, Africa's agricultural heritage gifts it with unique plant varieties and associated

167 Article 22, TRIPS.

168 Chidi Oguamanam&TeshagerDagne, *Geographical Indication (GI) Options for Ethiopian Coffee and Ghanaian Cocoa, in* Innovation & Intellectual Property: Collaborative Dynamics in Africa, at 100(Jeremy De Beer,et al. Chris Armstrong, Chidi Oguamanam & Tobias Schonwettereds., UCT Press, 2014).

farmers' traditional knowledge to conserve and develop new varieties, which make it an excellent site to promote *sui generis* plant variety protection systems. Both OAPI and ARIPO's Annex X Bangui Agreement and Arusha Protocol respectively provide UPOV 1991 Convention Styled systems in line with the choice offered in Article 27.3(b) of TRIPS, which allows WTO Member States to protect plant varieties through patents, effective *sui generis* systems or any combination of systems. As TRIPS neither defines *sui generis* nor recommends the UPOV system, I maintain that the IP Protocol negotiators can creatively conceptualise a *sui generis* plant variety protection system for the continent despite the policy contradictions the debates on the subject.

Bram de Jonge and Peter Munyi propose that one way to address the debates about the suitability of the UPOV 1991 Convention for Africa is to adopt a differentiated system, with 'varied levels of protection, both for different crops and with respect to different categories of farmers.'[169] However, I argue that adopting the comprehensive system akin to the African Model Law fittingly legitimises the small-scale farmers indigenous innovation systems prevalent in Africa. The components of the *sui generis* plant variety protection systems should include community rights,farmers rights and plant breeders' rights. Important exceptions to plant breeders' rights here should consist of farmers' rights to save, use, exchange and sell seeds/propagating materials.

iv. Traditional Knowledge

I suggest that ARIPO's Swakopmund Protocol should serve as a starting consultation point for the AfCFTA IP Protocol negotiations on traditional knowledge. Accordingly, Section 2 of the Protocol defines traditional knowledge as 'any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community or contained in the codified knowledge systems passed on from one generation to another.' Like patents, the Protocol clarifies that traditional knowledge is not limited to any technical field, and notes that it may include agricultural, environmental, medical knowledge or knowledge related to genetic resources.[170]

Factors for the negotiators to clarify include a definition of traditional knowledge, conditions for protection, beneficiaries of protection, rights conferred, assignment

169 Bram De Jonge, Niels P Louwaars & Julian Kinderlerer, A Solution to the Controversy on Plant Variety Protection in Africa' Nature Biotechnology (May 2015); Peter Munyi, Bram De Jonge & B Visser, *Opportunities and Threats to Harmonisation of Plant Breeders' Rights in Africa: ARIPO and SADC,* 24 Afr. J. Int'l & Comp. Law 86, 104 (2016).

170 Section 2 of the Swakopmund Protocol.

and licensing, access and benefit-sharing, exceptions and limitations, compulsory licensing, duration of protection and dispute resolution.[171] Where relevant, the African Model Law can also offer guidance on the subject. For example, in Article 16, it provides for the rights of communities over their innovations, practices, knowledge and technologies acquired through generations.[172] In Article 26. 1 (a) it further provides that farmers rights include the right to protect their traditional knowledge relevant to plant and animal genetic resources.[173] However, the negotiations should avoid the limitations of the Swakopmund Protocol and the African Model Law like in the instances where substantive IP provisions are not clarified in a way that African countries can easily adopt or adapt.

There are no international definitions or standards for traditional knowledge as TRIPS fails to include it as one of its categories of IP. Graham Dutfield notes that 'traditional knowledge was a non-issue at the GATT Uruguay Round of trade negotiations.'[174]Nonetheless, following repeated calls from the African Group and other Global South actors, WIPO IGC has an on-going mandate to negotiate text-based instrument(s) for the protection genetic resources, *traditional knowledge* and traditional cultural expression.[175]Debates around adopting a tiered or differentiated approach to traditional knowledge and traditional cultural expressions are gradually evolving in the WIPO-IGC negotiations.[176] According to Chidi Oguamanam, a tiered or differentiated approach 'is a pragmatic and malleable strategy that seeks to negotiate the extent of exclusive rights or non-exclusive rights that attach to the beneficiaries or claimants of TK/TCEs [traditional knowledge/traditional cultural expressions], as a factor of how much of those, or aspects thereof, may already be in the public domain.'[177]

171 Sections 2 to 15 of the Swakopmund Protocol.

172 Article 16 of the African Model Law.

173 Article 26.1 (a) of the African Model Law.

174 Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge,* 33 Case Western Reserve J. Int'l L. 233, 236 (2001). On the complexities around traditional knowledge at the international level, see Graham Dutfield, *TK Unlimited: The Emerging but Incoherent International Law of Traditional Knowledge,* 20 J. World Intell. Prop. 144 (2017).

175 *See* World Intellectual Property Organisation, *WIPO Intergovernmental Committee (IGC)*, https://www.wipo.int/tk/en/igc/ (accessed Aug. 28, 2020). Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., Routledge, 2017).

176 Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept,* at 7 (CIGI Papers No 185, Aug. 2018).

177 *Id.* at 6. *See also* Ruth Okediji, *Traditional Knowledge and the Public Domain* (CIGI Papers No. 176, June 2018).

While the tiered and differentiated approach to traditional knowledge (and traditional cultural expressions) remains a fluid and working concept in the WIPO IGC, it could also serve as a guide for the IP Protocol negotiations and law-making on the subject. Similarly, the negotiators should consult the CBD (Articles 8j and 15), Bonn Guidelines, Nagoya Protocol, ITPGRFA (Article 9) alongside related *United Nations Declaration on the Rights of Indigenous Peoples 2007* and the *United Nations Declaration on the Rights of Peasants and Other Peoples Working in Rural Areas 2018*, which all provide legal norms and principles on traditional knowledge and related access and benefit-sharing principles. The protection of traditional knowledge, which fails to fit neatly within the Western-centric characterisation of IP law remains a thorny topic at the international level. Nonetheless, I invite the AfCFTA Protocol negotiators to consult the African Group's submissions at the WIPO IGC to understand its position on the subject.[178]For example, in its first position paper on the subject presented at the third session of the WIPO IGC (13 to 21 June 2002), the African Group proposed that 'in developing effective national, regional and international systems of protection [for traditional knowledge], it is necessary to develop flexible *sui generis* systems that take customary laws, protocols and practices into account, to provide protection not adequately provided by existing rights and systems.'[179]If this proposal is adopted, the negotiators would need to consider the elements of the *sui generis* system (in line with the factors for clarification I outlined above).[180]

As a general point, to promote the overall integration objective of the AfCFTA, the negotiators should introduce a provision on regional exhaustion for all categories

178 World Intellectual Property Organisation, *WIPO Intergovernmental Committee (IGC) Meetings and Documents,* https://www.wipo.int/meetings/en/topic.jsp?group_id=110 (accessed Aug. 28, 2020).

179 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Position of the African Group: Paper Presented by the African Group' Third Session, Geneva 13 to 21 June 2002* (WIPO/GRTKF/IC/13/15 14 June 2002), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_15.pdf. The Position Paper follows from the 'Decision on Intellectual Property, Genetic and Biological Resources, Traditional Knowledge and Folklore in Africa' taken by the Council of Ministers and adopted by the Heads of African States at the Seventy-fourth Ordinary Session/Ninth Ordinary Session of the OAU from 5 to 8 2001 in Lusaka, Zambia and reflects the views and proposals developed by African States at a variety of meetings held in Africa.

180 *See also* World Intellectual Property Organisation, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Elements of a Sui Generis System for the Protection of Traditional Knowledge,* Document Prepared by the Secretariat (Fourth session Geneva, December 9 to 17 2002, WIPO/GRTKFIC/48 (Sept. 30, 2002), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_8.pdf.

of IP.[181] This prevents IP owners from restricting the circulation of IP products around the continent. In other words, once the IP owner places a product in one African country, she cannot prevent its circulation around the continent. Nevertheless, the IP owner retains the right to prevent exportation or importation from countries outside Africa. A related subject for the negotiators to consider is the connection between IP and competition law.

Finally, some constraints to designing development-oriented AfCFTA IP Protocol based on Africa's terms include dependence on donor funds, conflicting bilateral/regional trade and investment agreements, limited legislative capacity and negotiating skills alongside limited understanding of IP norms and the interfaces between IP and development.[182]To address these constraints, the negotiations for the AfCFTA IP Protocol should be fully funded from African sources. The negotiators should prescribe terms of reference predicated on Africa's interests but compliant with international minimum standards and the AU should constitute a multidisciplinary team of IP negotiators that care about Africa and can creatively craft effective homegrown IP systems that challenge and expand the existing Western driven IP agenda. The AfCFTA IP Protocol negotiators should establish a working group with representatives of OAPI, ARIPO and the RECs to decide on the harmonisation strategy, while engaging in consultations with interest groups with stakes in IP, including from the agriculture, creative, cultural, education, health, industrial, manufacturing, science and technology sectors.

IV. CONCLUSION

In this article, I have mapped the major policy and legal frameworks relating to IP at the regional and sub-regional levels in Africa. This is important because of the renewed attention on IP in Africa following the entry into force of the AfCFTA and its promise to deliver a development-oriented IP Protocol. The AU (formerly, OAU) has, through the AfCFTA, decided to rekindle its founding principles of a 'unified Africa.' In his address at the launch of the OAU, Pan-Africanist Kwame Nkrumah ardently asserted 'Africa must unite now...The forces that unite us are intrinsic and greater

181 On exhaustion of IP, see Intellectual Property Exhaustion and Parallel Imports(Irene Calboli & Edward Lee eds., Edward Elgar 2016); Shubha Ghosh & Irene Calboli, Exhausting intellectual Property Rights: A Comparative Law and Policy Analysis (Cambridge University Press, 2018).

182 Thanks to Johnson Ekpere for highlighting these points. Personal Communication with Johnson Ekpere (July 4, 2020).

than the superimposed influences that keep us apart.'Indeed, regional integration was the primary vision of the Pan-African leaders and African independence advocates like George Padmore, Haile Selassie, Jomo Kenyatta, Leopold Senghor and W.E.B Du Bois.[183]Remarkably, at a time when economic partnerships at international and regional sites are stalling or dismantling, Africa has decided to look to the past, to chart a new path for its future economic relations.

My ultimate thesis is that despite the regime complex for IP in Africa -comprising overlapping and non-hierarchical laws, policies and sub-regional organisations- the AfCFTA IP Protocol can deliver its desired development-oriented IP system that harmonises the fragmented IP landscape in Africa. While acknowledging the enormous efforts required to accomplish this, I argue that the AfCFTA IP Protocol negotiators should circumspectly but creatively build on the existing frameworks for harmonisation and cooperation in the region, including PAIPO, OAPI and ARIPO agreements as well as the COMESA- SADC-EAC T-FTA. To promote policy coherence, I suggest that the AU should establish an OAPI, ARIPO and RECs working group to explore apposite options for IP harmonisation along with an African-centric platform to coordinate IP positions both within the region and in international fora.

Phase II of the AfCFTA negotiations offers a watershed moment for the IP Protocol negotiators to carefully reconstruct the broken IP architecture in Africa by introducing systems that recognise and reward its unique forms of innovation and creativity. In this regard, I argue that the IP Protocol should prioritise geographical indications, *sui generis* plant variety protection (based on the African Model Law), traditional knowledge and traditional cultural expressions as these are areas of strength for Africa. Finally, interest-driven external donor funding and bilateral/regional/multilateral trade and investment agreements may sabotage the AU's development-oriented aspirations. Therefore, the AU must screen the external influences and participation in the AfCFTA IP Protocol negotiations and the domestic IP systems across Africa, to ensure that it sets and safeguards its IP agenda.

183 On Pan-Africanism and regional integration, see Luwam G.Girar, *Rethinking and Theorizing Regional Integration in Southern Africa,* 28 Emory Int'l L. Rev. 123 (2014).

Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)

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There is a gap in the legal scholarship on African regional trade agreements (RTAs) that links law and development to narratives of developmental regionalism. This article addresses the gap by making the case for an explicit linking of Law and Development scholarship and Developmental Regionalism in African RTAs. First, the article argues that the cross-pollination of the fields provides an opportunity for a more rigorous understanding of developmental regionalism in African RTAs. Second, the article that developmental regionalism as an analytical tool responds to and encapsulates the multidimensional character of African RTAs. Third, the article argues for a more rigorous engagement with the role of law in African RTAs. Since African RTAs incorporate economic and non-economic ideas, the article against the failure narratives that are produced by dominant legal formalist thinking. These dominant modes of legal thinking privilege Eurocentric legal thoughts embedded in transplanted trade agreements. In conclusion therefore, the article argues that our understanding of African RTAs as 'flexible legal regimes' or in anti-formalist terms is deepened by an explicit linkage of the fluid concept of development to the selective implementation of the RTAs based on the priorities of African states.

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Introduction

The discourse of regionalism in Africa and the legal regimes of African regional trade agreements (RTAs) have been studied in the shadow of established and long-standing regimes in Europe.[1] The linear comparison of the African regional trade regimes to the European counterpart has entrenched the narrative failure of the African RTAs. African RTAs are not simply trade enhancing regimes like their European counterparts.[2] African RTAs are multidimensional. They have both economic and non-economic objectives as well as formal and informal regimes. The fetishizing of Eurocentric traditional assumptions about the formal and narrow nature of trade agreements and their neoclassical emergence underplays the multidimensional and eclectic nature of African RTAs. Dominant Eurocentric understandings of the RTAs have failed to account for the structures of unequal regional economic development, legacies of colonialism, informality, and the murky coexistence of African RTAs in a complex world order. The multiple objectives of African RTAs center social, economic, political, environmental, physical infrastructure, electioneering monitor, conflict resolution and regional security among other associated development initiatives. Hence, they are loosely described as development-oriented models of RTAs.

Yet, there is a gap in the scholarship on African RTAs that theoretically analyzes the linkages and overlaps between the concept of developmental regionalism and the insights that can be derived from Law and Development (L&D) scholarship. In this article, I contend that the cross-fertilization of ideas in both areas engender a deeper and theoretically grounded understanding of African RTAs.[3] Although some

1 Karen Alter, The New Terrain of International Law: Courts, Politics, Rights (Princeton University Press, 2014).

2 Richard Frimpong Oppong, Legal Aspects of Economic Integration in Africa (Cambridge University Press, 2011); James T. Gathii, African Regional Trade Agreements as Flexible Legal Regimes (Cambridge University Press, 2011); Kofi Oteng Kufuor, The Institutional Transformation of the Economic Community of West African States (Routledge, 2017).

3 On Law and Development scholarship, *see* Luis Eslava, *The Developmental State: Independence, Dependency and the History of the South, in* The Battle for International Law: South-North Perspectives on the Decolonization Era (Jochen von Bernstorff & Philipp Dann eds., Oxford University Press, 2019); Yong-Shik Lee, Law and Development: Theory and Practice (London: Routledge, 2018); David M. Trubek et al., Law and the New Developmental State: The Brazilian Experience in Latin American Context (Cambridge University Press 2013); Stephanie de Moerloose, *Law and Development as a Field of Study: Connecting Law with Development,* 10(2) L. & Dev. Rev. 179 (2017); Gabriel Garcia, *The Rise of the Global South, the IMF and the Future of Law and Development*, 37(2) Third World Q. 191 (2016); Yong Shik-Lee, *Call for a New Analytical Model for Law and Development,* 8(1) L. & Dev. Rev. 1 (2015);

research now theorize developmental regionalism, only a handful of them draws on the theory and praxis of L&D to enrich developmental regionalism.[4] The concept of 'developmental regionalism' and its contours in African RTAs vary and maps on to the heterogeneity of Africa.[5]

Developmental regionalism remains crucial to the aspirations of African States as exemplified by the Agreement Establishing the African Continental Free Trade Area Agreement (AfCFTA).[6] As the frontiers of developmental regionalism in the 21st century gains greater prominence in the AfCFTA[7] and sub-regional organizations, there is an urgent need for critical engagement with the concept. It is important for legal academic scholarship to analyze and provide guidance on the contours of developmental regionalism and the varying roles of law; with a view to not only deepening our understanding of African RTA regimes but also establish a pathway for policy experts in a way that advances Africa's interests.[8]

This article argues against the uncritical narrative of 'development' and concept of developmental regionalism in African RTAs.[9] To address the gap in

David M. Trubek & Alvaro Santos, The New Law and Economic Development: A Critical Appraisal (Cambridge University Press, 2006).

4 *See generally* Jonathan Bashi Rudahindwa, Regional Developmentalism through Law: Establishing an African Economic Community (Routledge, 2018) (studying regionalism in Africa and the various ways in which law can be used to address the particular issues raised by regional schemes across the continent. The author contemplates the role that law can play to help achieve the various objectives assigned to regional schemes in the context of the Treaty of Abuja). Said Adejumobi & Cyril Obi, Developmental Regionalism and Economic Transformation of Southern Africa (Routledge, 2020). In particular, *see* Said Adejumobi & Zebulun Kreiter, *The Theory and Discourse of Developmental Regionalism*, *in*, Developmental Regionalism and Economic Transformation of Southern Africa (Said Adejumobi & Cyril Obi eds., Routledge, 2020) (arguing that "Regionalism must not only spur regional economic growth and relative even development for the member states but also ensure palpable benefits through the provision of regional public goods for the citizens of the region, which will invariably increase their sense of regional identity and commitment to the regional integration project.").

5 Richard Gibb, *Regional Integration and Africa's Development Trajectory: Meta-Theories, Expectations and Reality*, 30(4) Third World Q. 701–21, 701 (2009).

6 *Agreement Establishing the African Continental Free Trade Area Agreement,* African Union, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

7 Dr. Faizel Ismail, *A 'Developmental Regionalism' Approach to the AfCFTA* (Trade and Industrial Policy Strategies, Working Paper, 2018) (arguing that adopting a "developmental regionalism" approach to trade integration provides the best prospects for the AfCFTA to catalyze the process of transformative industrial development, cross-border investment and democracy, governance, peace and security in Africa). Dauda Garuba, *ECOWAS's Experience in developmental regionalism, in* Developmental Regionalism and Economic Transformation of Southern Africa (Said Adejumobi & Cyril Obi Eds., Routledge, 2020).

8 For an analysis of "African-Centered" intellectual property regime, *see* Titilayo Adebola, *Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol*, 1 Afr. J. Int'l Econ. L. (2020).

9 Instances of the uncritical and neoliberal way in which developmental regionalism is deployed is

theorizing the 'development' in developmental regionalism, I make explicit the interconnection between L&D and Developmental Regionalism in African RTAs. While the article acknowledges the shortcomings of mainstream L&D scholarship, it contends that these critiques do not foreclose its cross-pollination for theorizing a rigorous understanding of how development in African RTAs is understood.

Expressly linking developmental regionalism to L&D scholarship enriches how African RTAs are understood and distinguishes their analysis from the dominant models based on neo-classical economics that relegate African RTAs as inferior regimes. A compelling justification for regional integration in Africa is to achieve economic independence, and equitable development of the Member States. Linking regionalism to L&D helps to account for the multidimensional aspects of developmental regionalism in Africa. The linkage also brings to the forefront of the discourse, the co-existence of the economic and non-economic aspects of Africa's peculiar and overlapping interests in regional cooperation. Further, expressly linking African RTAs to L&D scholarship offers a unique interdisciplinary lens that makes it possible to address not only the peculiar historical, economic and political context of the different trade agreements, but also their legal trajectory.

This article does not propose a guide of the role of law *in* developmental regionalism in Africa. The actual operation of law varies from one society to another. The heterogeneity of legal paradigms in African societies and their differing impacts on our understanding of the formal and informal aspects of the RTAs should be studied on their own terms. In this context, I agree with Maxwell Chibundu that

> [l]aw, flowing from the experiences of the people, forms an essential backdrop of the social institutions within which the quest is undertaken. Incorporating the understanding of those generally ignored experiences into a field that aims for universality, that equates glo-

evident in some of the United Nations Economic Commission for Africa's reports. For example,
> … 'developmental regionalism' [is] at the centre of its strategy for growth and structural transformation, current global trends show a growing scepticism towards regional integration and trade agreements. It is therefore critical that Africa not backtrack on its commitments to continental trade liberalization and related structural reforms through the [AfCFTA]. Trade remains a key driver of productivity, growth and welfare gains. It is also an important means of implementation and financing of the Africa development agenda. However, current concerns about the unequal distributive impact of trade require efforts to ensure a progressive pro-poor [AfCFTA]…

See UNECA, *Assessing Regional Integration in Africa VIII, "Bringing the Continental Free Trade Area About"* (Oct. 2017), https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf.

> balism with Westernization and economic success with development and humanitarianism, is the challenge for law and development.[10]

The article argues that rethinking developmental regionalism as an analytical tool avoids strappings of prescriptive analysis. Developmental regionalism is most developed in the Southern African sub-region.[11] It's contours will vary and expand based on the developmental priorities of the different sub-regions in Africa. Hence, conceptualizing developmental regionalism as an analytical tool avoids falling into the critique of universality and the applicability of regimes across Africa without adaptability to the peculiar socio-economic reality of the region. In conclusion, the article argues that our understanding of African RTAs as 'flexible legal regimes' or in anti-formalist terms is deepened by an explicit linkage of the fluid concept of development to the selective implementation of the RTAs based on their priorities.

This article proceeds as follows. In Part I, which is divided into two sections, I explore the development narratives embedded in the RTAs and contend that multidimensional development aspirations are baked into African RTAs. The first section concludes with a description of my understanding of developmental regionalism as can be gleaned from the RTAs. The second section conceptualizes the incoherence of developmental regionalism as a distinct feature of the multiplicity of African RTAs.[12] This argument is based on two further sub-points: first, since the concept of development is eclectic, the article argues that developmental regionalism need not be described in static and linear terms. Second, the incoherence of developmental regionalism is reflective of the heterogeneity and post-colonial reality of African States and the diverse social, economic, political and physical infrastructure development goals they pursue. In Part II, I draw on the scholarship on L&D, to broaden the theorizing of developmental regionalism. I periodize the trajectory of African RTAs into three overlapping moments and link the ideas to deepen our understanding of the theoretical genealogy of developmental regionalism.

10 *See* Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29(2) Case Western Reserve J. Int'l L. 169–261, 261 (1997).

11 Said Adejumobi & Cyril Obi, Developmental Regionalism and Economic Transformation of Southern Africa (Routledge, 2020).

12 This argument builds in part on James Thuo Gathii's discussion of the features of African RTAs. James Gathii, *African Regional Trade Agreements as Flexible legal Regimes*, *supra* note 2.

I. PART I

A. 'Development' Narratives in African RTAs

The RTAs of the various Regional Economic Communities (RECs) in Africa have substantive economic development aspirations embedded in them. They are in part a development strategy for the regions to combat the under-development legacies of colonialism. Economic cooperation in Africa is also a means of augmenting the external vulnerabilities of the cooperating states.[13] This section of the article discusses some of the provisions in the trade agreements of the RECs and the AfCFTA. It argues that the RTAs mirror a multidimensional development model. In short, that aspirations of economic development are baked into the constituting treaties of African RTAs.[14]

In West Africa, the Revised Treaty establishing the Economic Community of West African States (ECOWAS) aims "… to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, maintain and enhance economic stability, … and contribute to the progress and development of the African Continent" and the adoption of a Community.[15] Developmental aspirations are further ingrained in connection with gender, tourism, socio-economic development, energy, population, social affairs, industrial, food and agriculture, human and financial resources to mention a few.

In East Africa, the objective of the Treaty Establishing the East African Community (EAC) is to "develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit."[16] Article 5(3) of the EAC Treaty provides that in pursuing the objectives, the community shall ensure "the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of

13 *See* Melaku Desta, Guillaume Gérout & Jamie MacLeod, *Safeguarding the African Continental Free Trade Area from Externally-Imposed Threat of Fragmentation*, Afronomics law.com (Mar. 14, 2019), https://www.afronomicslaw.org/2019/03/14/safeguarding-the-african-continental-free-trade-area-from-externally-imposed-threats-of-fragmentation/.

14 S.K.B Asante, Regionalism and Africa's Development (Macmillan Press Ltd., 1997).

15 *Economic Community of West African States Treaty*, art. 3(1), https://www.ecowas.int/ecowas-law/treaties/ [hereinafter ECOWAS Treaty]. *See also id.* art. 3(2)(k) (incorporates a commitment to the promotion of balanced development of the ECOWAS region with particular attention paid to the landlocked and small island Member States).

16 *Treaty for the Establishment of the East African Community*, art. 5(1), https://www.eacj.org/?page_id=33.

the Partner States" and in a way that would lead to equitable economic development. Like the ECOWAS counterpart, Article 5(e) of the EAC Treaty provides for "… the mainstreaming of gender in all its endeavors and the enhancement of the role of women in cultural, social, political, economic and technological development."[17] Others include, energy, industrialization, science and technology to mention a few. However, unlike the ECOWAS Treaty, the EAC Treaty incorporates sustainable development.

In Southern Africa, the objective of the Declaration and Treaty of the Southern African Development Community (SADC) as codified in Article 5(1)(a) is the promotion of "sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration." The SADC also commits to mainstreaming gender in the process of community building, achieve sustainable utilization of natural resources and effective protection of the environment while strengthening and consolidating the long standing historical, social and cultural affinities and links among the people of the SADC.[18]

Mostly recently, the Agreement Establishing the African Continental Free Trade Area commits among other objectives to the promotion and "…attainment of sustainable and inclusive socio-economic development, gender equality; … industrial development through diversification and regional value chain, agricultural development and food security...."[19] African RTAs codify broad political and socio-economic considerations underpinned by such principles as variable geometry, flexibility, and special and differential treatment.[20]

The foregoing shows the development-oriented nature of African RTAs. In my

17 *Treaty for the Establishment of the East African Community*, art. 5(3)(a)(b)(d)(e)(g), https://www.eacj.org/?page_id=33. For an excellent analysis of the gender gap in international economic law in Africa, *see* Clair Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies*, 1 Afr. J. of Int'l Econ. L. (2020).

18 *Treaty of the Southern African Development Community,* art. 5(1)(g)(h)(k), https://www.sadc.int/files/5314/4559/5701/ Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf.

19 *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*, art. 3(e)(g), https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

20 *Agreement Establishing the African Continental Free Trade Area (AfCFTA),* art. 5 (c)–(d), https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (provides that the agreement shall be governed by the principles of variable geometry; flexibility and special and differential treatment). *See also* UNECA, Assessing Regional Integration in Africa VIII, "Bringing the Continental Free Trade Area About" 9 (Oct. 2017), https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf; James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes,* 35(3) North Carolina J. Int'l L. & Com. Reg., 572 (2010).

view, the theorizing this development-orientation of African RTAs has not been rigorous enough. The analysis that have examined the connection critiques and sometimes inadvertently reverts to the Eurocentric models that they criticize. First, while early studies of developmental regionalism made the connections with L & D discourse, the cross-pollination was limited and studies of African RTAs from the 1990s have not consistently built on it. For example, while Jonathan Rudahinwa's acknowledges the limited applicability of Eurocentric, and neo-liberal economic orthodoxy at the heart of African RTAs as ill-suited for achieving development in Africa,[21] Babatunde Fagbayibo rightly acknowledges that despite Rudahinwa's "… criticisms of the unsuitability of Eurocentric methods in advancing regionalism, [he] showed more bias towards the European Union (EU) as an apt referential tool for integration through the law."[22] Likewise, contemporary examination of African RTAs has not sufficiently grounded the analysis in the developmental state phenomenon in Africa. In the past decade, there has been emphasis on human rights, millennium development goals, sustainable development goals, infrastructure development and the role of public-private partnerships. While these are now being examined to tease out and enrich their theoretical genealogies, this article makes the case for linking them to L&D. Second, in the limited situations where they have been theorized, most of the scholarship that link L&D discourse to regionalism were undertaken by International Relations scholars, with only a handful of legal scholars explicitly engaging in the subject. Third, contemporary engagement with developmental regionalism by political scientists, economists and legal scholars have been more descriptive and less critical or analytical. This leaves a significantly weak connection between L&D and African RTAs. While there is a significant utility to describing the contours of developmental regionalism, developmental priorities differ. One should also be cautious of offering a one-size-fits all definition because of the eclectic nature of development as a concept.

With the foregoing in mind, I argue that developmental regionalism encapsulates historical, contemporary and evolving praxis of regional economic cooperation in Africa. Theoretically, developmental regionalism draws on the analytical tools of law, post-colonial studies, economics, politics and sociology to inform our understanding of the multidimensional character of African RTAs. Development oriented African

21 Rudahindwa, *supra* note 4, at 27.

22 Babatunde Fagbayibo, *REVIEW V of Regional Developmentalism through Law: Establishing an African Economic Community, Jonathan Bashi Rudahindwa,* Routledge, 2018, Afronomicslaw.com (June 3, 2019), https://www.afronomicslaw.org/2019/06/03/review-v-of-regional-developmentalism-through-law-establishing-an-african-economic-community-jonathan-bashi-rudahindwa-routledge-2018/.

RTAs foreground the interconnectedness of law, not necessarily the primacy of law in African RTAs. African RTAs are about economic and non-economic goals. Traditional aspects such as trade, investment and intellectual property, are today complemented by regional physical infrastructure projects, industrial agendas, human rights, sustainable development and climate change. To this list, one can add regional value chains and digital trade as emerging frontiers in Africa's development-oriented regionalism. In my view, understanding developmental regionalism in these broad terms of theory and evolving praxis of African RTAs, while constructing and engaging how these expand our understanding of existing theoretical approaches, offer a more hopeful account of rethinking economic cooperation in Africa on their own terms. In situating the analysis as co-constitutive and expanding L&D, the analysis and regime avoids the charge of African exceptionalism. In this regard, Maxwell Chibundu's observation is also instructive: "Societies do not function as autarchies; they borrow from others and are stimulated by outside exposures. Outside influences, however, are digested as part of the local story, not as the source of or the substitute for local experiences."[23]

B. Incoherence and Eclecticism of Developmental Regionalism: A Defining Feature of African RTAs

Developmental regionalism in African RTAs is incoherent. It is incoherent in the sense that different sub-regions define the concept relative to their priorities. While some of the features especially the economic ones may be common, the non-economic aspects differ.[24] My goal in this section therefore is not to make the case for a coherent analysis of developmental regionalism. Rather, my argument for conceptualizing the incoherence of developmental regionalism in Africa as a distinct feature is predicated upon two arguments: first; since the concept of *development* is eclectic and defies a coherent definition, we need not infuse developmental regionalism with a static and linear understanding. Second, the incoherence of developmental regionalism is reflective of the heterogeneity and post-colonial reality of African States and the diverse social, economic, political and physical infrastructure development goals they pursue.

23 Chibundu, *supra* note 10, at 242.

24 *See generally supra* note 7. Dauda Garuba, *ECOWAS's Experience in developmental regionalism*; Soren Scholvin, *Developmental Regionalism and Regional Value Chains: Pitfalls to South Africa's Vision for the Tripartite Free Trade Area*, 53(3) Afr. Spectrum 115–29, 118 (2018); Zoleka Ndayi, *In Quest of Regional Integration in Africa: Can the AU/NEPAD Reconcile Economic Plurilateralism with Developmental Regionalism?*, 6(1) J. Afr. Renaissance Studies - Multi-, Inter- and Transdisciplinarity 78–93 (2011).

In this regard, I question the position of institutions such as the United Nations Conference on Trade and Development (UNCTAD) that argue for a "… comprehensive, [and] coherent developmental integration agenda …."[25] In my view, given the diversity and heterogeneity of African states, the important question here is why do we need one? How does one describe a universal vision of development for African states in a coherent and cohesive order that mirrors the unequal development and power asymmetry? In short, can African States have a fair-trade regime that centers their developmental interest without an overarching universal definition?

The *development* in developmental regionalism in Africa must be read critically. Development as a concept is eclectic. While it is possible to describe what constitutes development relative to a moment and era, a universal definition of development is not ideal. Amartya Sen, for example argued that development entails political freedom, economic choice, and protection from poverty.[26] To David Trubek & Mark Galanter, development is "progressive social, political, and economic changes in developing countries".[27] Such definition, although more holistic than economic growth centric development, leaves unclear the metrics of development, particularly, social development. Globally, two of the most common categories of development are human development and sustainable development.[28] The United Nations Development Programme (UNDP) identifies the ability to lead a long and healthy life, ability to acquire knowledge, and the ability to achieve a decent standard of living as making up the Human Development Index.

25 *Economic Development in Africa: Intra-African Trade: Unlocking Private Sector Dynamism*, United Nation Conference on Trade and Development (UNCTAD) (2013), at 96, https://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf (last visited July 13, 2020).

26 Amartya Sen, Development as Freedom (Anchor Books, 2000).

27 David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisc. L. Rev. 1062, 1062 (1974). *See also* Myrdal's definition of development as "movement upward of the entire social system". Gunnar Myrdal, *What is Development?* 8(4) J. Econ. Issues 729 (1974).

28 *See* UNDP, *Human Development Indices and Indicators: 2018 Statistical Update*, at 1 (UNDP, 2018). A detailed analysis of human and sustainable development (sustainability) is outside the scope of this work. For robust analysis of 'Human Development', see Purusottam Nayak, *Human Development: Concept and Measurement*, *in* Growth and Human Development in North East India 3–18 (Oxford University Press, 2010); Sabina Alkire, *Dimensions of Human Development*, 30(2) World Development 181 (2002). For in-depth exposition on what sustainable development means, see Robert Kates et al., *What is Sustainable Development: Goals, Indicators, Values, and Practice*, 47(3) Envtl.: Science & Policy for Sustainable Dev. 8 (2005).

It acknowledges the diversity and heterogeneity of Africa cultures, the inequality of their economies and the evolutionary nature of the non-trade specific socio-economic cooperation projects.

Regional developmentalism, properly so-called is an analytical framework that centers the social, economic, political, environmental and associated concerns of African states. The task of delineating its contours then is not a static one, rather, it is one which evolves from within and from below based on the practices of African states parties in regional economic cooperation.

Further, understanding the nature of regional economic cooperation in Africa as distinct from their European counterparts and other traditional narratives necessarily entails an acknowledgment of the co-existence of the freedom of choice of what development policy goals furthers the national aspirations of the member states. Developmental regionalism simultaneously centers the different interests of cooperating Africa states without dispensing the need to integrate African economies into the global economy. Developmental regionalism therefore not only includes historical economic policy approaches such as collective self-reliance that was codified in the Lagos Plan of Action of 1980, but offers a broad foundation for economic, social, environmental, and physical cooperation for governments and the private sector. In this regard, growing public-private partnerships, interstate physical infrastructure development corridors, special economic zones, and regional value chains exemplify the emerging contours of developmental regionalism.

Academic scholarship that delineate the contours of developmental regionalism have either focused on economic growth and infrastructure development or not focused enough on the role of law and its distributive impact on African RTAs. As far back as 1971, John W. Sloan, a political scientist, wrote

> … economic integration among developing countries may more properly be described as developmental regionalism because it is designed not only to expand trade but also to encourage new industries, to help diversify national economies, and to increase the region's bargaining power with the developed nations.[29]

29 John W. Sloan, *The Strategy of Developmental Regionalism: Benefits, Distribution, Obstacles and Capabilities*, 10(2) J. Common Market Stud. 138, 143 (1971); For the analysis of the Asian contexts, *see* Andrew Harding, *Multi-Level, Recursive Law and Development: Singapore's Legal Role in ASEAN,* 5 Asian J. L. & Soc'y 251 (1971); Christopher Dent & Peter Richter, *Sub-*

Sloan further defined developmental regionalism as covering the "joint policies of economic cooperation, coordination, and integration among underdeveloped countries designed to accelerate the rate of development of both member states and the geographical region".[30] Developmental regionalism will not only aid the expansion of trade, but encourage new industries, diversify national economies and increase the bargaining power of the developing regions in the global economy. With the State as the principal actor in the national context, developmental regionalism was historically state-centric and allowed very little political space for other actors as central governments direct policy and shape the regional administrative organs. Developmental regionalism however does not cure external dependency, but only moves dependency 'closer' home; a situation Sloan considers more "politically acceptable".[31]

Developmental regionalism shared the optimism that it would diversify the export portfolio of developing countries, by shifting the external to the regional partners, and gradually loosen the tight grip of economic imperialism that developed countries held over the developing states of the post-colony. The ultimate goal of developmental regionalism, in Sloan's view, is the equitable transformation of the economies of the cooperating member states into a more integrated, self-reliant regional economy that will sustain economic growth. Sloan however recognizes the limitations of the proposal in noting that the main obstacle to achieving developmental regionalism is the plague of underdevelopment. In concluding his article, Sloan notes as follows:

> Developmental regionalism is not a panacea for the problems of the third World; its success is dependent upon domestic reforms and generous aid from the industrialized countries … The response to disappointments must be to search for new forms of regional cooperation rather than withdrawal into extreme forms of nationalism … The fundamental dilemma of developmental regionalism is that it increases the burdens upon member-states which already bear the heavy burden of underdevelopment.[32]

In my view, and unlike Sloan, I contend that developmental regionalism has an emancipatory component for African states. Although this may not have been

Regional Cooperation and Developmental Regionalism: The Case of BIMP-EAGA, 33(1) Contemp. Southeast Asia 29 (2011).

30 Sloan, *supra* note 31, at 142.

31 *Id.*

32 Sloan, *supra* note 31, at 162.

apparent in the 1970s when Sloan's article was published, the situation is different today. Developmental regionalism in contemporary African RTAs is at heart about centering Africa's economic development and trade relations on their own terms. The international economic order and the inequality it creates is skewed significantly against developing African countries. No single socio-economic developmental strategy will simultaneously address African States' international subjugation while uplifting them from the enduring legacies of colonialism. As such, I argue for a re-imagining of developmental regionalism as a series of steps in a long continuum of multiples strategies for African states. From this point of view, recognizing its emancipatory potential is critical.

Re-orientating the coloniality of roads, routes and their design in contemporary Africa is another key aspect of developmental regionalism. Physical infrastructure in the colonial era were designed to aid the strategies of the colonizers.[33] In trade context, the roads and the routes led outside the country and the continent. The road infrastructures in colonial Africa were not designed to foster intra-African trade. Further, the colonial partition of African states deepened the poor connectivity — air and road — in Africa.[34] The subsequent lack investment in road infrastructure both to enhance connectivity and boost movement of goods and services has contributed to the poor performance of formal trade in Africa. In this context, developmental regionalism is also emancipatory because of the promise of re-orienting the path dependency and colonial routes in road infrastructure regional development corridors.[35] Sloan's analysis, understandably did not discuss the role of law in the process of developmental regionalism and how it may be a constraint to the equal distribution of the gains of regional integration. Notwithstanding the blind spots in Sloan's analysis, situating African RTAs in the structures of inequality, power asymmetry and unstable national, regional and international contexts that they emerged sheds more light on the predicaments that these states confront.

At the sub-regional level, Southern African is the region where developmental

33 Libbie Freed, *Networks of (colonial) power: roads in French Central Africa after World War I*, 26(3) Hist. & Tech. 203–223 (2010).

34 Makau W. Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich. J. Int'l L. 1113 (1995).

35 While not without its own challenges, the South African-Mozambique Toll Road is an example a road project designed through public private partnership with a view to exploring new pathways for African states in infrastructure, trade and investment. *See* Ian Taylor, The Maputo-Witbank Toll Road: Lessons for Development Corridors? (DPRU Policy Brief No. 00/P5, Dec. 2000).

regionalism has been shaped the most in Africa.[36] The Southern African approach to regional developmentalism centers physical infrastructure, and industrial production as key drivers of development. Sören Scholvin's analysis of developmental regionalism and regional value chains in the context of the Tripartite Free trade Area (TFTA) and South Africa in particular draws on the Sloan's conceptualization. Scholvin, argues that "developmental regionalism is about proactive economic policies advanced and coordinated by the states of the region in question – as opposed to a politically passive approach of mere liberalisation."[37] For South Africa, emerging as a leading country in regional value chain and serving as a hub is critical to their national policy.[38] Like Sloan, Scholvin notes that there are challenges to actualizing these aspirations: overcoming Africa's infrastructure gap and the idea of regional value chains as the path towards industrialization is problem laden.[39]

At the regional level, in the context of the AfCFTA, Faizel Ismail argues that a developmental regionalism approach to "trade integration provides the best prospects for the AfCFTA to catalyze the process of transformative industrial development, cross-border investment and democracy, peace and security in Africa."[40] Developmental regionalism Faizel argues

> … include cooperation between African countries in a regional integration framework on four parallel and interconnected pillars: a) cooperation on building mutually beneficial trade integration (fair trade integration); b) cooperation on industrial development and upgrading in regional value chains (transformative industrialization); c) cooperation on investment in cross-border infrastructure and trade facilitation; and d) cooperation on the building of democracy, good governance and peace and security.[41]

36 Adejumobi & Obi, *supra* note 4.

37 Scholvin, *supra* note 24.

38 *Mapping Global and Regional Value Chains in SACU: Sector-Level Overviews*, *World Bank Group*, (2016), https://openknowledge.worldbank.org/handle/10986/23790.

39 "Corresponding debates are far from actual implementation and setting up RVCs will lead to win-lose situations – with barely surmountable conflicts over who receives the most lucrative segments of such value chains. South Africa's focus on trade in goods means that the much greater potential of trade in services is neglected. Taking a very critical perspective, one may even argue that South Africa tries to use the TFTA as a means to make the regional states adopt its own version of protectionist industrial development, which implies that the opportunities for interlinking RVCs with GVCs will be ultimately foregone." Scholvin, *supra* note 24, at 125.

40 Faizel, *supra* note 7, at 6.

41 *Id.* at 13. Faizel relies on Said Adejumobi and Zebulun Kreiter's review of the literature on developmental regionalism six key features they deduced.

These features include: i) a strong institutional architecture and capacity to drive the regional

Faizel's analysis reincarnates Sloan's argument with a contemporary take on the multidimensional aspects of regional economic cooperation in Africa. Thus, while it is therefore more expansive, it is also descriptive. Indeed, as I have argued in this article, it does not reflect all the possible contours of development as it is economy centric. Some of the substantive development themes that are missing from Faizel's description include: climate change, human rights, environmental protection and gender equality. This limitation underscores the need to further expand the theoretical basis for developmental regionalism in Africa. By so doing, we also open developmental regionalism to an explicit analysis of the role of law in African RTAs. For the avoidance of doubt, developmental regionalism pivots away from the institutionalist market-led regionalist perspective which has been dominant in African RTAs and scholars have highlighted its weakness to African regional economic integration process.[42]

II. PART II

A. Genealogies of Law, Development and Developmental Regionalism

In this section, I draw on L&D scholarship to broaden the basis for theorizing developmental regionalism. This has two advantages. First, the linkage offers a broader basis for theorizing developmental regionalism in African RTAs and therefore compliments existing scholarship on developmental regionalism. Similarly, the linkage offers a useful alternative to the Vinerian classic model of economic integration and the neoclassical economic model which do not adequately fit the trajectory of African

integration agenda; ii) a clear articulation of goals, objectives, essence, nature, and direction of the regional integration project, and the benefits of regional integration as a mechanism for facilitating regional development; iii) ensuring peace and security as a composite and foundation of a regional integration agenda; iv) evolving complementary and symmetrical benefits for all member states involved in the regional development project; v) articulation of regional public goods and development priorities necessary for facilitating economic transformation in the region including on infrastructure, trade, agriculture and food security, private sector development and industrialization; and vi) evolving a bond of common regional citizenship and identity necessary for regional human capital mobilization. The above quote is cited in Faizel's article as "Adejumobi, S. and Kreiter, Z. 2016. The Theory and Discourse of Developmental Regionalism. Paper Prepared for Presentation at a Regional Forum on: Developmental Regionalism, Peace and Economic Transformation in Southern Africa organized by ECASRO- SA and APN-SSRC in collaboration with the SADC Secretariat and hosted by the Government of Kingdom of Swaziland from 28-30 September 2016, Ezulwini, Swaziland. UNECA, SADC, SSRC, APN."

42 James T. Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States*, 45 Vill. L. Rev. 971 (2000).

RTAs. Second, the linkage offers developmental regionalism as an analytical tool that maps on to the multidimensional character of African RTAs. As argued in Part 1 of this article, this also dispenses with the need to define the concept in any specific terms. Describing the concept of developmental regionalism is helpful, such endeavours are however not exhaustive. Regional developmentalism is fluid and will reflect the contemporary orthodoxies of the day and the economic and non-economic priorities that each regional economic community deems fit. The approach also avoids a one-size - fits - all approach to the role of law in explicating developmental regionalism. Chibundu offers an instructive approach on how African's should imagine the role of law in economic development projects.

> Central to the role of law in development is the dialectical under- standing of law as a significant and frequently effective force in shaping behavior, embedded within and springing from the institutional structures and social practices of a community. The conventional approach to law and development focuses on one or the other. Because much of that work has been undertaken by Western scholars among whom the instrumentalist and positivist view of law as behavior molding has tended to command broad acceptance, the synthetic balance of the dialectic has been missing. An imperative for law and development is restoring to the field discussion of the nature, structure, and relevance of the social practices of the people and societies whose lives the field purports to seek to understand. The utility of a dialectical methodology lies not in establishing the dominance of one set of relationships, but in its efficacy to illuminate the convergence of the numerous forces always at work even in the simplest of social interactions.[43]

My aim therefore is not to draw a linear line that fits the African RTA regime into the narratives of L&D. Rather, my purpose is modest: to deepen the theoretical analysis of developmental regionalism in narratives of African RTA by demonstrating the linkages in ideas and their diffusion through institutions at different times and expanding same as an expansion of the discursive field of L&D.

43 Chibundu, *supra* note 10, at 255.

i. Law and Development and Developmental Regionalism

L&D scholars categorize the history of L&D into moments that include—"Law and the Developmental State"; "Law and the Neoliberal Market"; and "the Critique of Neoliberalism".[44] Whereas the first two moments are characterized by dominant economic development theories namely the state-led development and neoliberalism, the third is largely heterogeneous—a "catch-all phrase for a combination of policies that seem difficult to categorize as developmentalist or neoliberal, or to unscramble using the common policy vernaculars of the post-neoliberal period".[45] A major feature of the third L&D moment is the recognition of non-market values, including legal reforms and the rule of law, as constituting essential components of the developmental agenda.[46] L&D rose to prominence in the 1950s and 1960s from the work of development assistance projects of the United States government, international agencies, and private foundations working with government and legal institutions in the developing countries. In a sense, L&D describes the relationship(s) between law and economic development in the particular context of the developing or Third World countries.[47]

More broadly, its ideas, projects, and strategies are aimed at transforming the economic, political and social space of developing countries mainly through law and the 'reform' of the legal system. The practice of L&D is the self-conscious effort to change law and legal institutions to achieve some or specific goals such as designing

44 Trubek & Santos, *supra* note 3, at 1–18. *See also* David Kennedy, *The Rule of Law, Political Choices, and Development Common Sense*, *in* Trubek & Santos, *supra* note 3, at 95–173 (periodizing L&D into four phases—post-war consensus (1945–1970); period of crisis and retrenchment (1970–1980); Washington consensus (1980–1995); and chastened Neoliberalism (1995–present)).

45 David Kennedy, *Law and Development Economics: Toward a New Alliance*, *in* Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century, 63 (David Kennedy & Joseph E. Stiglitz eds., Oxford University Press, 2013).

46 Yong-Shik Lee, *General Theory of Law and Development*, 50(3) Cornell Int'l L. J. 415, 422 (2017).

47 *See* Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Self-Estrangement*, 25(3) Am. J. Comp. L. 492–530 (1977). *See* Vijay Prashad, The Darker Nations: A People's History of the Third World xv (The New Press, 2007) (arguing that the Third World was not a place, but a project through which the peoples of Africa, Asia and Latin America dreamed of a new world); Sundhya Pahuja, *Appendix one: a note on the use of 'Third World'*, *in*, Decolonising International Law: Development, Economic Growth and the Politics of Universality 261–62 (Cambridge University Press, 2011). *See also* Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World (Princeton University Press, 1995).

strategies, polices, agreements to foster socio-political and economic growth.[48] Arguably, the unresolved question remains how such socio-political and economic development can be attained. The transplantation of laws and legal frameworks of the first moment failed to provide answers.[49] The prioritization of the market and obscuration of the 'State' of the second moment has also failed. Indeed, the absence of empirical basis for the claims of L&D that legal reforms translate into developmental strides remains a key criticism of the L&D movement.[50] In Peer Zumbasen and Ruth Buchanan's view, "L&D brings into dialogue a wide range of legal and non-legal fields, and thus becomes part of scholarly and policy discourses ranging from development studies, economics and economic geography, and trade law to post-colonial studies."[51] The shape of the space where the interactions of multidisciplinary approaches occur nevertheless remains constituted by legal ideas.[52] The point of the foregoing is that L&D and the dominant ideas that underpin African RTAs map on to each other. I return to this point below in my mapping of the overlapping periods and ideas that show the trajectory of African RTAs.

ii. Anti-formalism and Flexibility as the Analytical Tool of Law and Developmental regionalism

Developmental regionalism as an analytical tool exists in the shadow of dominant and evolving socio-economic, political and legal contexts. I contend that formalism and legal positivist thinking embedded in traditional trade agreements has facilitated the narrative of failure African RTAs. In particular, this conceptualization of the role of law inelegantly excludes the phenomenon of cross-border informal trade in Africa RTAs. Likewise, legal formalism is antithetical to informal trade in Africa. In response to this, I contend that flexibility arguments and anti-formalism show the

48 David M. Trubek, *The Owl and the PussyCat: Is there a future for Law and Development?*, 25 Wis. Int'l L. J. 235–42, 235 (2007–08).

49 Trubek & Galanter, *supra* note 27.

50 David Trubek, Law and Development 50 Years On, at 1 (University of Wisconsin Law School; Legal Studies Research Paper Series Paper No. 1212).

51 Ruth Margaret Buchanan & Peer Zumbansen, Law in Transition: Human Rights, Development and Transitional Justice 1–2 (Hart Publishing, 2014).

52 On the constitutive role of law or what it means to say that law constructs social relations, see Alan Hunt, *Law as a Constitutive Mode of Regulation*, *in* Explorations in Law and Society: Toward a Constitutive Theory of Law 310–33 (Rutledge, 1993); Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, 21 Studies in L., Pol. & Soc'y 215 (2000).

inadequacy of legal formalism as the dominant form of legal thought by which we should understand African RTAs.

Pluralizing the modes of legal thought in African RTAs and their counterparts to include the formalist and anti-formalist approaches to understanding their legal regimes will not only open up regional developmentalism to a broader application of the African context but will also demonstrate the concreteness of Africa's contribution to international economic law in general.

Pluralizing the roles of law in developmental regionalism is a necessary inference and indeed consequence of the behaviour of African States in regional economic relations. As such, the ensuing analysis should not be interpreted as an attempt to fit the practices of African states into the dominant legal thinking of the role of law by L&D scholarship. Rather, the aim is to incorporate the strategic deployment of law by African states in regional projects to reveal the deliberateness with which they interplay formalist and anti-formalist or flexible approaches in pursuit of their preferred goals. Chibundu's views are further instructive here:

> In post-colonial African societies, the essence of law is neither the maintenance of tradition, nor the bringing of modernity to African societies. The future does not require that Africans choose between dualism and Westernization. The difficult but necessary role for law lies in helping Africans decipher and articulate principled mechanisms by which their experiences can be structured and institutionalized. In doing so, borrowing some of the language of legitimation in the Western legal tradition is likely to be unavoidable, but the direct approximation of the practices represented by such language may be solely coincidental.[53]

iii. First Moment: State-Led Regionalism

This period primarily covers the era from early independence of African States to 1980 when neoliberalism became the dominant economic orthodoxy. Regional integration in Africa is closely associated with contested notions of development, and in particular, modernity.[54] The state orchestrated development was based on a series of assumptions that included the idea that import-substitution program and

53 Chibundu, *supra* note 10, at 261.

54 Gibb, *supra* note 5, at 705. For a critique of modernity as it epitomizes the genealogy of the good governance narratives, see Gathii, *supra* note 52.

protectionism in the internal market will generate growth. With the State as the principal actor, the dominant economic development ideas at the national level were projected onto the regional development platform. It is therefore unsurprising that similar assumptions about import substitution industrialization and consequential emphasis on protectionism that dominated the state-led development era were a fundamental aspect of regionalism in Africa in the 1970s.[55]

In the first moment, it was thought that the transplantation of rules from the West would enhance the pursuit of economic and political development by developing countries. The Westernization of "the legal infrastructure of the Third World countries was expected to create neutral, more accessible and more responsive government institutions."[56] The legal theory of this period combined a number of ideas that in broad terms understood the role of law as "instrumental" and "purposive."[57] Law, accordingly, has the capacity to bring about the social, economic and political changes that are conducive to development such as industrialization processes, judicial strengthening or the general mechanism for growth of national economies. Law was further considered as "subordinate to social purposes – implementing, fulfilling, and accomplishing the objectives of the society, rather than expressing a priori limits or historical commitments to be respected or purposes of its own to be achieved."[58] In other words, the role of law was interpreted in the light of the developmental aspirations of the state.

Formalism in law was conceived as critical and instrumental to the achievement of economic and political developmental goals. It was the positivistic conception of law that triumphed under the dominant aegis of the liberal legalist school.[59] Specifically, "rules were developed, interpreted, and applied without careful attention

55 According to Estela Carmona de Hanlon, old regionalism was inspired "by the protectionist and industrializing actions typical in the 1950s–1970s … The 1950–1970s is usually seen as a period of shallow integration, the "old regionalism", inspired by the need of developing countries to reinforce the structural economic reform process." *See* Estela Carmona de Hanlon, *Old Regionalism versus New Regionalism in the Context of the EU-Mercosor Agreement*, 237–272, 238 (N° 12/13 2007/08, Revista De La Facultad De Ciencias Juridicas). *See also* Maxwell Chibundu, *Africa's Economic Reconstruction: On Leapfrogging, Linkages, and the Law*, 16(2) Third World Legal Stud. 17–41 (2003).

56 Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22(1) Wisconsin Int'l L. J. 1, 19 (2004).

57 David Kennedy, *"The Rule of Law", Political Choices, and Development Common Sense"*, *in*, Trubek and Santos, *supra* note 3, at 103.

58 *Id*. He notes further that "the purpose of the legal order itself was the consolidation of national economic and political authority—often associated with national self-determination and decolonization—rather than say, the integration of local economic life into a global economy, or the facilitation of private exchange and private ordering through supplementary regulatory interventions." *Id*. at 102–03.

59 Chibundu, *supra note* 10, at 215.

to policy goals" and context of the periphery societies.[60] In the context of African countries, the legal positivist/formalist underpinning of the rules reflect a legacy of the colonial laws that were inherited by many of the newly independent colonies.[61] These laws were distant from the reality and context of the diverse economic, political and cultural settings of African countries ad regional economic integration practices that were constructed on the principles of pan-Africanism. In this regard, rather than the legal positivist legal regime, the norm of pan-African solidarity plays a significant role in regulating and constraining interstate behavior among African states.[62] Formalism thus resulted in the weak enforcement and low legitimacy among the cooperating member. The legal thought was distant from the shared experiences of the member states.

The role of law was consequently implicit in the practices of the state. As many of the African States were not comfortable ceding sovereign powers to a supranational regional body, legal formalism was the gold standard for the post-colonial African states. The high commitment to sovereignty and therefore legal formalism however worked differently in the economic cooperation. Whereas law was formal in the national context to protect the states' economic and sovereign territories, it was flexible or anti-formalist at the regional levels and hence implicit. In other words, while African states recognized that law can be instrumental to regional economic development, its role as a tool for facilitating the economic relations between the parties for largely anti-formalist. This simultaneous and strategic use of law of both formalist and anti-formalist legal strategies in pursuit of national and regional characterizes the other moments of L&D.

iv. Second Moment: Developmental Regionalism

From the 1980s, neoliberalism was promoted globally by the Bretton Wood Institutions as the dominant economic development orthodoxy.[63] The global spread of neoliberalism

60 According to Trubek, "development planners argued that '*formalist law teachers* taught that law was an abstract system to be applied by rigid internal rules without concern for policy relevance and impact; *formalist legislatures* copied foreign models or followed abstract principles instead of studying social context and shaping rules for instrumental ends ... Formalist practitioners [also issued] interpretations based on some abstract logical system or rote application of formulae thus impeding rather than fostering progress.'" David Trubek, *supra* note 3, at 76.

61 "Colonial laws are laws for a special purpose to govern situations that were regarded as exceptional. They were intended to enable optimal extraction of value from foreign territories while disciplining populations that were felt as inferior and dangerous." Martti Koskenniemi, *Colonial Laws: Sources, Strategies and Lessons?,* 18 J. Hist. Int'l L. 248–77, 251 (2016).

62 Luwan Dirar, *Norms of Solidarity and Regionalism: Theorizing State Behaviour among Southern African States*, 24 Michigan State Int'l L. Rev. 667, 668–69 (2016).

63 For a history of neoliberalism, *see* David Harvey, A Brief History of Neoliberalism (Oxford

was a key episode in the good governance agenda and the forms institutional proliferation they required. In African RTAs, the policy effect of neoliberalism was only started gaining effect in the 1990s. This coincided with the rise of different wave of regional integration in Africa in the 1990s when regional communities "… became involved in regional security and good governance issues, which later created a political opening to transform" of many African RTAs.[64] Consequently, this translated into the revision of the establishing treaty of some of the regional economic communities. For example, in the context of the ECOWAS Court of Justice; Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister argue, that "the renewed governmental support for a court in the early 1990s reflected a growing sense that deeper regional integration required a judicial body to resolve disputes and interpret legal rules."[65] The point here is that the expansion that this era witnessed in the 1990s is a consequence of changes in the global economy with direct consequence on the relationship between developing countries and the liberal trading order.[66]

The spread of neoliberalism in African RTAs led to the studies dubbed of "new regionalism" in the 1990s by International Relations scholars. Old regionalism which mapped on to the First moment is a set-up "associated with the promotion of regional self-reliance through industrialization and protectionism".[67] Old regionalism's emphasis on protectionism, albeit at a regional scale, is in response to the perceived adverse effects of colonial era international trade structure which confined developing states to the peripheral as producers of raw materials, while industrialized states occupied the position of core countries. New regionalism is a

> … network of power relationships co-constructed by myriad multiple-actor, cross-border coalitions of states, intergovernmental organizations …, and civil society ... Significantly, the emerging architecture of regional

University Press, 2007); John Toye, Dilemmas of Development: Reflections on Counter-Revolution in Development Theory and Policy (Wiley-Blackwell, 1987).

64 Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107(737) Am. J. Int'l L., 736, 740 (2013); *See also* Karen J. Alter, The New Terrain of International Law: Courts, Politics, Rights (Princeton University Press, 2014).

65 Alter, *supra* note 66, at 746.

66 *See* Sonia E. Rolland & David M. Trubek, Emerging Powers in the International Economic Order: Cooperation, Competition and Transformation, 3401–35 (Cambridge University Press, 2019).

67 Rudahindwa, *supra* note 4, at 17.

> political and economic interactions … includes several indigenous large or conglomerate financial institutions, multinational cross-border transport and telecommunications industry operators, as well as business coalitions and advocacy networks representing a variety of economic sectors, firm sizes, and genders that developed over the past two decades[68]

The preference for global dependency as against 'neighborhood dependency' is a key difference between the old and new regionalism. In the dispensation of new regionalism, states are "encouraged to open up their economies to the global market and the international economic order through freer trade and the implementation of liberal economic rules".[69] In Africa, while new regionalism accurately describes aspects of regionalism, some of the core ideas of the old regionalism remain. Most glaringly, the states are still the only actor in economic integration related disputes that arise from the RTAs with capacity to sue before the regional courts.[70] To the extent that deeper integration into the international economy and open markets are values common to both neoliberalism as represented in the second moment of L&D and the globalization-theme of new regionalism, there is a compelling case to combine them further to understand developmental regionalism.

Neoliberalism as a development approach has been applied in many Third World countries "as a particular form of policy-related doctrine … combined with concrete proposals for institutional reform that would move societies towards"[71] specific outcomes such as market fundamentalism. As early as 1990s, economists have started questioning policy directions of neoliberalism.[72] Neoliberalism entails an opening of the market

68 Okechukwu C. Iheduru, *Regional Integration and the Private Authority of Banks in West Africa*, 41(2) Int'l Stud. Rev. 273–302 (2012); Sanuel O. Oloruntoba, *ECOWAS and Regional Integration in West Africa: From State to Emerging Private Authority*, 14(7) History Compass 295–303 (2016).

69 Rudahindwa, *supra* note 4, at 19.

70 *Afolabi v. Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment (Apr. 27, 2004).

71 *See* Terry Flew, *Six Theories of Neoliberalism*, 122(2) Thesis Eleven 49–71, 64 (2014). Flew synthesizes the varying uses of the term neoliberalism to include: (i) an all-purpose denunciatory category; (ii) an institutional framework characterizing particular forms of national capitalism; (iii) the way things are; (iv) a dominant ideology of global capitalism; (v) a form of governmentality and hegemony; and (vi) a variant within the broad framework of liberalism as both theory and policy discourse.

72 Joseph E. Stiglitz, Keynote at Annual World Bank Conference on Development Economics (Apr. 28, 1999), available at http://siteresources.worldbank.org/INTABCDEWASHINGTON1999/Resources/stiglitz.pdf; (last visited July 12, 2020). Stiglitz's critique draws attention to the interconnectedness of various factors – political, economic, social and cultural – as relevant to the implementation of development policies.

to external forces. In the African context, James Gathii contends that the diffusion of neoliberalism from Western centers of the World is "being reproduced in the periphery."[73] Neoliberalism thus required the integration of the national and regional economies into the global economy with emphasis on export-led development. The general belief among development economists is that the import-substituting industrialization has not produced any meaningful growth in developing countries and that their economies are in need of restructuring "so as to reduce inefficiency, increase international competitiveness, and generally promote greater reliance on export-linked growth."[74] With the spread of polices such as deregulation and privatization, the outward orientation of neoliberal regionalism has led to the "diminution of the ability of both states and interstate organizations to control aspects of trade and monetary relations."[75] In advocating for open and free market, the proponents of neoliberalism contend that economic development in Third World countries can only be realized through trade liberalization and the dismantling of developmental ideas that pitch the state as the sole development agent.[76] Regional trade agreements needed to reflect the current transformation of the world, that is,, "[g]lobalization and regionalization are intimately connected, and must thus be understood within the same framework, together shaping the emerging world order." [77]

With respect to law, unlike the state-led era, neoliberalism placed greater emphasis on law. The conception of law did not change from the first moment – law "remained a pragmatic and purposive instrument of policy".[78] Law in its formalist sense was at the forefront of institutional and regulatory developments in the neoliberal regime. Although the instrumental value of law to development was a dominant aspect of the

73 *See* James Gathii, *The Neoliberal Turn in Regional Trade Agreements,* 86 Wash. L. Rev. 422–71, 455 (2011) (noting that various manifestations of neoliberalism are being "produced, reproduced, and diffused around the world simultaneously").

74 *See* Eva A. Paus, *Economic Growth through Neoliberal Restructuring? Insights from the Chilean Experience*, 29(1) J. Developing Areas, 31, 32 (1994).

75 James H. Mittelman, *New Regionalism in the Context of Globalization*, 2(2) Global Governance 189–213, 191 (1996).

76 James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 Buffalo Hum. Rights L. Rev. 107 (1999).

77 "With regard to context, the new regionalism needs to be related to the current transformation of the world, a more multipolar rather than the old bipolar world order, which is to a large extent shaped by globalization." Fredrik Söderbaum, The Political Economy of Regionalism: The Case of Southern *Africa* 30 (Palgrave Macmillan, 2004).

78 Kennedy, *supra* note 3, at 137. Speaking on the nature of the legal theory of neoliberalism, Kennedy notes that "the implicit – and sometimes explicit – legal theory of neoliberalism seemed to forget much of what had been commonplace within the domain of legal theory for more than a century about both the limits of law as an instrument of social change, and the plasticity of legal rules and standards." *Id.* at 143.

first era of development and by extension old regionalism; under the new regionalism, "…under the rubric of rule of law, good governance, or best practices, the legal and institutional environment of economic growth has become a site of interest and activity in the world of development."[79] Affirming the growing importance of law in the second moment, legal reform in this era is no longer limited to the role of law in fostering economic growth, law itself has become a constitutive element of development and is critical to the achievement of social objectives.[80] However, as Kerry Rittich points out, despite the importance attributed to law for specific purposes, "there is a new consciousness of the limits of law and a new interest in non-regulatory … issues."[81] This is evidenced by the emphasis on "soft norms of regulation and non-legal norms as well as the expanded role given to non-state actors in functions ranging from norm generation to monitoring and compliance."[82] The resurgence of associated legal reforms in African states reflected a "fundamental optimistic perspective on the role of law … in development" at three levels: "whether particular characteristics of a society's legal system play a significant causal role in determining its prospects for development – in short, law matters"; the possibilities for meaningful reforms – that legal systems change in response to deliberate efforts at reform; and "their ability to identify the legal reforms that will ultimately promote development."[83] As such, the rise of regional economic community courts, regional parliaments and other institutional aspects of the RECs distinguished them from the first era.

A few examples will suffice for now. In relation to ECOWAS, distinct from the 1975 establishment treaty,[84] the revised ECOWAS treaty emphasized the pooling of sovereignties, necessity to respond to changes in the international scene to "derive greater benefits from those changes", the need for an enabling legal environment, and established the ECOWAS Court of Justice.[85] It further recognized human rights as enshrined under the African Charter on Humans and People's Rights, included a

79 *See* Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the incorporation of the Social*, *in* The New Law and Economic Development: A Critical Appraisal, 204 (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2006).

80 *Id.*

81 *Id.*

82 *Id.*

83 *See* Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Sceptics* 1–60, 5 (N.Y.U. L. Econ., Working Paper No. 133, 2018).

84 *ECOWAS* Treaty, *supra* note 15.

85 *Revised Treaty of the Economic Community of West African States*, Preamble, arts. 56–59, (1993), https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf [hereinafter *Revised ECOWAS Treaty*].

chapter on the environment and natural resources, recognized the right of the press, women and development, and elaborated on social and cultural rights.[86] The revised ECOWAS Treaty went further to establish the Economic and Monetary Union (EMU) and mandated Member States to "give priority to the role of the private sector and joint multi regional enterprises in the regional economic integration process".[87] Further to Article 35, a custom union was subsequently established. In apparent recognition of the imbalance between the more established economies and the smaller states, the revised draft provides for the "promotion of balanced development of the region" and recognizes the equality of Member States as a fundamental principle.[88]

The impact of globalization and neoliberalism on the revised ECOWAS treaty is not in doubt. Yet, it will be a mischaracterization to describe the transition as a complete switch from the local (protectionist) to the global. It is more like the creation of a confluence where the 'global' requirement of neoliberalism meets and mixes with the local imperatives of protectionism.[89] Hence, while referring to the need to "adapt" international trends and cooperate with third party States and organizations, its first two principles are "inter-dependence of Member States" and "solidarity and collective self-reliance".[90] And despite conferring a pride of place to businesses and market forces, Member States, for example, committed to cooperate to "protect the prices of agricultural export commodities on the international market".[91]

86 *Revised ECOWAS Treaty*, *supra* note 87, arts. 29–31; 60–66.

87 *Revised ECOWAS Treaty*, *supra* note 87, art. 54.

88 *Revised ECOWAS Treaty*, *supra* note 87, art. 3(2)(k), 4(a).

89 In this regard, Maxwell Chibundu argues that:

> one of the dominant features of contemporary globalization is the perception of the creation of a transnational community in which geopolitical boundaries are reduced to no more than bureaucratic nuisances. In this view, power is rendered innocuous, and its use invisible. Law applies indifferently to persons of all nationalities. The ascendance of non-governmental entities as the purveyors of power is hailed as a blessing because it reduces the influence of governments in the making of international law. The values that these entities espouse and which, presumably, are thereby embedded in the international legal system that they foster, are those which promote the interest of the individual over those of the State, human rights over State rights, democracy over autocracy, and legality over lawlessness.

See Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7(1) Ind. J. Global Legal Stud. 79–116, 107 (1999) (exploring inter alia, how often do we take a stance outside of our self-created universe to consider the ramifications of our prescriptions? Above all, what are the connections between rules, practices, and institutions, and can these connections be created or maintained within a universalist frame of reference?).

90 *Revised ECOWAS Treaty, supra* note 87, art.4(b).

91 *Revised ECOWAS Treaty, supra* note 87, art. 25(1)(d).

Figure 1 – The Three Overlapping Moments of Regionalism in Africa

First Moment	Second Moment	Third Moment
State-centric Protectionist Import Substitution Industrialization Power imbalance Non-economic goals Power Imbalance No supranationalism	Open regionalism Glocalization Neoliberalism/Market liberalization Non-State parties Conflicting supranational agenda Economic and non-economic agenda Establishment of sub-regional courts Rise of Public Private Partnerships (PPP). Power Imbalance	Active sub-regional Courts Economic and non-economic agenda Rise of PPPs Power Imbalance Regional Value Chains Competition Law Sustainable Development Regional Development Corridor Digital Trade

v. The Third Moment – Developmental Regionalism

While the three moments bleed into one another in some respects, the Third Moment is still unravelling. As can be gleaned from the map above, the *Third Moment* of regional cooperation in Africa carries on some of the ideas from the first era, while it has also ushered in some new agenda. Most notably, strategic litigation before the sub-regional courts and the various competition law regimes emerging in the sub-regional communities are at the forefront of the new era. In the past decade and a half, the sub-regional courts in Africa have gone from courts without cases to an active alternative forum of litigation.[92] The substantive issues litigated before these courts include but are not limited to environmental law issues[93]; the right to education; civil and political rights;[94]

92 James Thuo Gathii, The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change (Oxford University Press, forthcoming 2020).

93 Eghosa Osa Ekhator, *International Environmental Governance: A Case for Sub-regional Judiciaries in Africa*, *in* Human Rights and the Environment under African Union Law 209–31 (Michael Addaney & Ademola Oluborode Jegede eds., Palgrave Macmillan, 2020); Michael Addaney, Elsabe Boshoff & Michael Gyan Nyarko, *Protection of Environmental Assets in Urban Africa: Regional and Sub-Regional Human Rights and Practical Environmental Protection Mechanisms*, 24 (2) Aust'l J. Hum. Rts. 182 (2018); James Thuo Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism* 16(2) Chicago J. Int'l L. 386 (2016).

94 Solomon Ebobrah, *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives*, *in* The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives 274–302 (Danwood Mzikenge Chirwa & Lilian Chenwi eds., CUP, 2016); Milej Tomasz, *Human Rights protection by*

business and human rights[95]; and mega-politics disputes.[96] Africa's sub-regional courts have also begun a trend of entertaining economic integration and trade related disputes. In this regard, the East African Court of Justice, arguably the most dynamic of the sub-regional courts and the OHADA Common Court of Justice and Arbitration have been at the forefront of adjudicating over trade disputes.[97]

The rise of competition law regimes in Africa's sub-regional economic communities is another distinctive and emerging feature of the Third Moment.[98] Regional competition law regimes such as the COMESA Competition Commission,[99] the ECOWAS Regional Competition Authority,[100] the EAC Competition Authority among others now exist in Africa with modest substantive work being done. The African Continental Free Trade Area Agreement also has the negotiation of a competition law regime as part of its agenda.[101] While the analysis of these sub-regional competition law regimes is beyond the scope of this article, the regimes complement existing national competition frameworks and regional economic integration efforts as key building blocks of an emergent African regional trade regime. Further, contemporary frontiers of developmental regionalism extend to public-private partnerships[102], regional value

international courts—What role for the East African Court of Justice?, 26(1) Afr. J. Int'l & Comp. L. 108 (2018).

95 James Thuo Gathii, *Variation in the use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79(1) Law & Contemp. Probs. 37 (2016).

96 Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, *in* The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change (James Thuo Gathii, Oxford University Press, forthcoming 2020).

97 Harrison Mbori's excellent contribution to this inaugural issue buttresses this point and examines the important jurisprudence emerging from some of the sub-regional courts in Africa. *See* Harrison Otieno Mbori, *Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)*, 1 Afr. J. Int'l Econ. L. (2020).

98 For a concise mapping of the development of this regime, *see* Tim Büthe & Vellah Kedogo Kigwiru, *The Spread of Competition Law and Policy in Africa*, 1 Afr. J. Int'l Econ. L. (2020); *See also* Eleanor M. Fox & Mor Bakhoum, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (Oxford University Press, 2019).

99 The COMESA Competition Commission, available at https://www.comesacompetition.org

100 ECOWAS, *ECOWAS launches Regional Competition Authority* (May 27, 2019), https://www.ecowas.int/ecowas-launches-regional-competition-authority/.

101 Vellah Kedogo Kigwiru, *The Cooperation on Competition Policy under the African Continental Free Trade Area*, 17(1) Manchester J. Int'l Econ. L. 98–121 (2020).

102 Olabisi D. Akinkugbe, *The Dilemma of Public-Private Partnerships as a Vehicle for the Development of Regional Transport Infrastructure in Africa*, 6(2) L. & Dev. Rev. 3–28 (2013); Augustine Edobor Arimoro, Public-Private partnerships in Emerging Economies (Routledge, 2020).

chains[103], services[104] and the digital economy.[105] Perhaps more than any other era, the Third moment, directly challenges pessimistic assessment of African RTAs. In other words, in contrast to the claim by Percy Mistry in 2000 that "Africa's commitment to integration appears to have been visceral rather than rational, more rhetorical than real", the Third Moment illustrates a substantive and progressive move in the practice of African RTAs.[106] The modest progress that I argue in favour here does not preclude the existence of challenges. African RTAs after all are not exceptional in these challenges. The point here is that African RTAs for too long existed in the shadow of the vestiges and legacies of colonialism and Euro centric understanding of RTAs.

III. CONCLUSION

This article examined the need to deepen the analysis of developmental regionalism in Africa by expanding its theoretical foundations. African RTAs as developmental regionalism have evolved in parallel to some of the emergent and dominant trends in L&D scholarship. While acknowledging the shortcomings of L&D, the article demonstrates that our understanding of African RTAs is enriched by the cross-pollination of ideas with L&D. The interconnectedness argument developed in this article is not absolute. It has its limitations like any other theory, it does not explain everything. However, it elevates the discourse of developmental regionalism in Africa beyond a set of descriptive features useful for a particular region. The article also argues that the roles of law in African RTAs oscillate between formalist and anti-formalist legal regimes. Both approaches co-exist in African RTA praxis as they are strategically deployed by member states in pursuit of economic and or non-economic regional goals.

103 Scholvin, *supra* note 24; Daniel Omoro Achach & Patrick Wasonga Anam, *Of Global Rush for Personal Protective Equipment, Regional Value Chains and Lessons for Africa*, Afronomicslaw.com (May 5, 2020), https://www.afronomicslaw.org/2020/05/05/of-the-global-rush-for-personal-protective-equipment-regional-value-chains-and-lessons-for-africa/.

104 Regis Y. Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility,* 3(1) J. Int'l Econ. L., 65–95 (2020).

105 Franziska Sucker, *COVID-19 pushes digital solutions and depends digital divides: What role for African digital trade law?*, Afronomicslaw.com (May 9, 2020), https://www.afronomicslaw.org/2020/05/09/covid-19-pushes-digital-solutions-and-deepens-digital-divides-what-role-for-african-digital-trade-law/.

106 Percy Mistry, *Africa's record of regional economic integration*, 99 Afr. Aff. 553–73 (2000).

African Practice in International Economic Law: 2017–2019

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This section provides updates and context into some of the significant developments in Africa's participation in IEL. In particular, it provides background discussions on the recently signed Agreement Establishing the African Continental Free Trade (AfCFTA), the China-Mauritius FTA, the Kenya-US FTA Negotiations, recent participation of African countries in the WTO Dispute Settlement Body and what this means for WTO jurisprudence. The section concludes by providing considerations on Nigeria's border closure and the 2020 World Investment Report. Despite the challenges faced by the continent, these activities not only reflect an increased interest in the broad subject of trade and investment liberalisation in Africa, but also a growing involvement of African States in IEL governance.

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Contents

Introduction

Several significant developments occurred in the field of trade law within the last two years. This section on African Practice in International Economic Law provides a broad overview of some of these developments highlighting how they have changed the trade landscape within the continent and what this signifies for rule-based multilateralism both at regional and global level.

I. THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA)

The Agreement Establishing the African Continental Free Trade Area (AfCFTA)[1] was signed at the 10th Extraordinary Summit of the AU Assembly on March 21, 2018 in Kigali, Rwanda and entered into force on May 30, 2019. The AfCFTA, a by-product of the 1994 Abuja Treaty,[2] aims to create a 'single market for goods, services, free movement of persons and capital, and liberalised market for goods and services in order to deepen the economic integration of the African continent.'[3] The AfCFTA is part of a wider plan for continental integration, which is seen by many within and outside the continent as an important development framework. The AfCFTA will cover a market of 1.2 billion people and a gross domestic product (GDP) of $2.5 trillion, across the 55-member States of the African Union,[4] making it the largest trade Agreement since the creation of the World Trade Organization (WTO).[5]

1 *See* African Union, Agreement Establishing the Continental Free Trade Area (adopted Mar. 21, 2018) [hereinafter AfCFTA Treaty], *available at* https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf; Regis Y. Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility*, 23 J. Int'l Econ. L. 65–95 (2020).

2 *See* Organization of African Unity, Treaty Establishing the African Economic Community (June 3, 1991) [hereinafter Abuja Treaty], https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf.

3 *Id. art. 3.*

4 Collins C. Ajibo, *African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects*, 53 J. World Trade 871–94 (2019). *See* also Third World Network–Africa Publication, AfCFTA Phase 1 Negotiations: Issues and Challenges for Eastern Africa, at 2 (2019), http://twnafrica.org/wp/2017/wp-content/uploads/2019/10/AfCFTA-Phase-1.pdf.

5 Kingsley Ighobor, *Africa Set for a Massive Free Trade Area,* UN Africa Renewal (Aug. – Nov. 2018), https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-

Structured in two phases, Phase I negotiations which have been concluded focused on a single continental market for goods and services with a Protocol on Rules and Procedures on the Settlement of Disputes. The Agreement contains nine annexes related to: rules of origin, customs cooperation and mutual administrative assistance, trade facilitation, non-tariff barriers, technical barriers to trade, sanitary and phytosanitary measures, transit, and trade remedies. However, exceptions of Annex 1 on Schedules for Tariff Concessions, Schedules of Specific Commitments for Trade in Services, an Appendix on the AfCFTA Rules of Origin remain outstanding. Harmonising rules of origin across the various regional economic communities (RECs) has proven quite divisive among members. This is because certain countries prefer the use of product-specific rules 'where countries tailor the design of the rules in relation to a particular sector of economic interest on one hand, and general rules of origin that normally apply to all sectors, irrespective of product."[6] Phase II negotiations focusing on competition, investment and intellectual property (IP) were scheduled to start in 2020 but has been suspended as a result of the global health pandemic caused by COVID-19. South Africa's Wamkele Mene is the inaugural Secretary General of the AfCFTA and his appointment is for four years.

The AfCFTA comes at a time when global trade is facing both structural and political challenges, such as the stalemate at the WTO dispute settlement body and the China-US trade war. Therefore, it is not surprising that analysis of the impact of the AfCFTA project that the Agreement will positively impact trade and international economic activities on the continent on three main fronts. First, it will boost intra-regional trade and development. Businesses within the continent currently face high tariffs. Currently, intra-continental tariffs stands at 6.1 per cent[7] making Africa one of the most unfavourable

area; *African Continental Free Trade Area: Questions & Answers,* African Union, UNECA & African Trade Policy Centre (2018), https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers. *See also David Luke, Making the Case for the African Continental Free Trade Area, Afronomics* law.org (Jan. 15, 2019), https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/.

6 *African Leaders Launch Continental Free Trade Area*, International Centre for Trade and Sustainable Development (2020), https://www.ictsd.org/bridges-news/bridges/news/african-leaders-launch-continental-free-trade-area. *See also* The African Continental Free Trade Area: A Tralac Guide 5 (6th ed. 2019).

7 African Continental Free Trade Area: Questions & Answers, African Union, UNECA & African Trade Policy Centre (2018), https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf [hereinafter AfCFTA Q&A]. According to the

climates for business. Further, only 10 to 12 percent of African trade is between African countries compared to 40 percent of trade between North American countries, and 63 percent of European trade.[8] The AfCFTA, it is hoped, will reduce and eventually eliminate tariffs and non-tariff barriers (NTBs) between African states, which will boost trade between member states, make it easier for African businesses to trade within the continent, and foster healthy competition in many sectors within the continent. In fact, the Economic Commission for Africa (ECA) estimates that the AfCFTA has the potential both to boost intra-African trade by 52.3 per cent by eliminating import duties, and to double this trade if non-tariff barriers are also reduced.[9] Outside of trade, many analysts believe the Agreement will also improve the quality of infrastructure and industrialization, including transportation and electricity as well as to facilitate the goals of intra-African trade liberalization.[10]

Second, the creation of the WTO globally expanded international trade and investment in services. According to the United Nations Conference on Trade and Development (UNCTAD), in 2019 trade in services exports accounted for 7 per cent of world GDP at US$6.0 trillion, even though Africa services exports amounted to less than 3 per cent of GDP.[11] Meanwhile, in 2014, manufactured products represented 14.8 percent of African exports to the rest of the world, compared with 41.9 percent of intra-African exports.[12] Therefore, it is not surprising that one of the key arguments in favour of, and benefit of the AfCFTA, is export diversification. It is projected that the AfCFTA will promote trade diversification that will produce sustainable growth, particularly the type of trade that moves away from unreliable extractive industries and commodities towards finished and value-added products, thereby creating African-led development and industrialization. Furthermore, it is hoped that liberalisation in services, if implemented as proposed in the AfCFTA, will promote sectoral

AfCFTA Negotiation Modalities, tariffs on non-sensitive products will be eliminated after five years (non-LDCs) or 10 years (LDCs). Tariffs on sensitive products will be eliminated after 10 years (non-LDCs) or 13 years (LDCs). *See* Third World Network–Africa Publication, *supra* note 4, at 16.

8 James Thuo Gathii, *Agreement Establishing The African Continental Free Trade Area*, 58 Int'l Legal Materials 1028–83 (2019).

9 AfCFTA Q&A, *supra* note 7.

10 Gathii, *supra* note 8, *at* 1028.

11 United Nations Conference on Trade and Development (UNCTAD), 2019 e-Handbook on Statistics (2019), https://stats.unctad.org/handbook/Services/Total.html#figure1.

12 *African Leaders, supra* note 6.

and industrial growth and foster a coherence in continent-wide policy based on transparent, inclusive and integrated single services market in Africa.[13]

Finally, the creation of the Dispute Settlement Mechanism within the AfCFTA framework provides for the rules and procedures for the settlement of disputes in a transparent and predictable way consistent with the provisions of the AfCFTA.[14] The Settlement of Dispute Protocol, akin to the WTO Dispute Settlement Body (DSB), will help in building jurisprudence and expertise on trade dispute settlement within Africa. This is crucial as many African States are reluctant to engage with the WTO DSB. Importantly, the AfCFTA provides for different options for dispute settlement such as arbitration, conciliation, good office and mediation.[15] Thus, it is only after parties fail to resolve their disagreement using one of the dispute settlement options will a formal panel under the AfCFTA DSM be established. The provision of other means of dispute settlement, commentators believe, offers a 'genuine way forward to forge an engaged dispute resolution that is relevant for integration.'[16]

Of course, there are worries that many African countries are unprepared to implement their AfCFTA commitments as the Agreement goes into full effect. The Nigerian-Benin border closure, for instance, underscores this concern.[17] However, this singular act raises questions about the willingness of countries to comply with the AfCFTA. Other commentators such as Franklin Obeng-Odoom, opines that as a result of its 'exclusive focus on continental Africa, disinterest in systemic redistribution, and encouragement of the private appropriation of socially created land rents prevents AfCFTA from achieving

13 Preamble of the AfCFTA Treaty's Protocol on Trade in Services [hereinafter Services Protocol], *available at AfCFTA Treaty, supra note* 1*, at* 31.

14 *See also* James Thuo Gathii*, Introduction to the Symposium on Dispute Settlement in the African Continental Free Trade Agreement,* Afronomicslaw.org (2019), https://www.afronomicslaw.org/2019/04/08/introduction-to-the-symposium-on-dispute-settlement-in-the-african-continental-free-trade-agreement/.

15 AfCFTA Treaty's Protocol on Rules and Procedures on Settlement of Disputes [hereinafter Settlement of Dispute Protocol], *available at* AfCFTA Treaty, *supra* note 1, at 59 (Article 8).

16 Olabisi D. Akinkugbe, *What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution,* Afronomicslaw.org (Apr. 9, 2019), https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/.

17 Landry Signé & Colette van der Ven, *Nigeria's Benin border closure is an early warning sign for the African free trade deal*, Quartz Africa (2019), https://qz.com/africa/1741064/nigerias-benin-border-closure-is-a-warning-for-afcfta-trade-deal/.

its goals.'[18] This is because the AfCFTA has failed to take seriously the problem of inequality between Members as well as soaring nativism and protectionism around the world. As a result, the Agreement risks deepening the continent-wide poverty and inequality. Despite these challenges, Africa is better-off with free trade than otherwise and the success of the AfCFTA will depend on political will of its Members, technical capacity, and appropriate use of availability of existing resources to redress the anomalies already present in the Continent.

II. CHINA-MAURITIUS FREE TRADE AGREEMENT

On October 17, 2019, the Republic of Mauritius and the People's Republic of China signed a Free Trade Agreement (FTA). The negotiations were officially launched in December 2017 and formally concluded on September 2, 2018 after four rounds of intensive negotiations. The Agreement comprises 17 Chapters covering trade in goods, sanitary and phytosanitary measures, technical barriers to trade, competition, intellectual property, E-commerce, trade in services, investment and economic cooperation.[19] The FTA also contains Annexes on rules of origin, market access for goods schedule for Mauritius and China.

The China-Mauritius FTA is part of a larger move by China to further integrate into the global economy in general and to expand its trade relations with Africa in particular. Another objective of the FTA is to further expand bilateral trade and investment interactions between the two countries, proffer new ideas on a China-Africa comprehensive strategic partnership and elevate China-Africa economic and trade cooperation. The China-Mauritius agreement is the first free trade agreement between China and an African country.[20]

III. MOROCCO — DEFINITIVE ANTI-DUMPING MEASURES ON SCHOOL EXERCISE BOOKS FROM TUNISIA21

Tunisia, on 21 February 2019, requested the Dispute Settlement Body (DSB) to establish a panel to examine anti-dumping duties imposed by Morocco

18 Franklin Obeng-Odoom, *The African Continental Free Trade Area*, 79 Am. J. Econ. & Soc. 167 (2020).

19 *China and Mauritius Sign Free Trade Agreement,* China FTA Network (2019), http://fta.mofcom.gov.cn/enarticle/chinamauritiusen/enmauritius/201910/41658_1.html.

20 *Id.*

21 DS578: Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (Dispute Settlement Body, World Trade Organization 2020).

on imports of school exercise books. The measure at issue was the definitive anti-dumping measure imposed on imports of school exercise books from Tunisia. According to Tunisia, these measures were inconsistent with a number of provisions under the WTO's Anti-Dumping Agreement[22] and the General Agreement on Tariffs and Trade (GATT) 1994.[23] More specifically, Tunisia questioned the evidence of dumping, injury or a causal link of dumping and the calculation of an artificially high normal price of school exercise books. According to Tunisia, Morocco had failed to comply with its obligations under the Anti-Dumping Agreement by failing to disclose the analysis of injury suffered by the domestic industry and details of the findings and conclusions reached, which led to the imposition of the measure at issue. On the basis of these and other reasons, Tunisia requested that the DSB establish a panel to examine this matter.

The Morocco-Anti Dumping case establishes both a precedent and an opportunity. First, it is a precedent in that it is the first WTO dispute involving two African countries as a complainant and as respondent, even though this is the second time that Morocco is involved in a dispute proceeding at the WTO. Second, it is an opportunity for African countries, which are generally reluctant to litigate international trade matters, to both build their technical expertise and to contribute to the growing body of WTO jurisprudence. Unfortunately, by taking this dispute to the WTO, Tunisia missed an opportunity to establish an intra-REC trade dispute record.[24] In analysing the consultation, Regis Semo notes that by filing in the WTO, these countries lost an opportunity to litigate the issue in an African international trade court despite Morocco and Tunisia being parties to the Arab Mediterranean Free Trade Agreement (AMFTA), the Pan-Arab Free Trade Area and the Arab Maghreb Union. Nevertheless, it a welcomed improvement that African states are participating in the DSB, thereby contributing to the WTO jurisprudence.

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22 Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.8, 5.10, 6.5, 6.5.1, 6.8, 9, 11, 12.2, 12.2.2, 18.1 and paragraphs 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

23 General Agreement on Tariffs and Trade 1994 [hereinafter GATT], Articles II:1(a), II:1(b), VI:1 and VI:6(a).

24 Regis Y. Simo, *The Tunisia/Morocco Scuffle at the WTO: A Missed Opportunity to Establish a Record of Regional Interstate Trade Disputes or a Chance to Contribute to Shaping WTO Jurisprudence?*, Afronomicslaw.org (2020), https://www.afronomicslaw.org/2019/04/03/the-tunisia-morocco-scuffle-at-the-wto-a-missed-opportunity-to-establish-a-record-of-regional-interstate-trade-disputes-or-a-chance-to-contribute-to-shaping-wto-jurisprudence/#.

IV. THE UNITED STATES AND KENYA TO NEGOTIATE A FREE TRADE AGREEMENT

In December 2018, the White House announced its strategy for future relations with Africa.[25] This included an expressed desire to increase trade links between the two. However, the fruits of this commitment have been a bit hit and miss. On the one hand there were positive steps such as the renewal of the African Growth and Opportunities Act (AGOA). On June 28, 2019 the Office of the U.S. Trade Representative (USTR) announced the initiation of the annual review of the eligibility of sub-Saharan African countries to receive the benefits of AGOA.[26] As a result of this exercise, 38 countries are currently eligible for AGOA benefits.[27] However, in stark contrast, in February 2020, the Trump administration introduced travel bans for nationals of four African countries: Eritrea, Nigeria, Sudan and Tanzania. This policy will hinder trade in services and investment flows. In the midst of these events came the announcement that the US and Kenya would negotiate a trade deal. This followed a meeting between the two leaders – President Donald Trump and President Uhuru Kenyatta – on February 6, 2020. Subsequent to that meeting (on March 17, 2020) the US Congress was notified of the intention of the two governments to pursue trade negotiations.[28] The Kenyan cabinet had already approved the launch of formal negotiations on a free trade agreement on January 30, 2020.[29]

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25 *President Donald J. Trump's Africa Strategy Advances Prosperity, Security, and Stability*, The White House (Dec. 13, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-africa-strategy-advances-prosperity-security-stability/.

26 Office of the United States Trade Representative, *Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act,* 84 Fed. Reg. 31135 (June 28, 2019), https://agoa.info/images/documents/15602/federal-regsiter-agoa2019-13905.pdf. The AGOA Implementation Subcommittee of the Trade Policy Staff Committee develops recommendations for the President on AGOA country eligibility. The Subcommittee requests comments and conducts a public hearing on this matter before making the recommendations.

27 *African Growth and Opportunity Act (AGOA)*, Office of the United States Trade Representative https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa.

28 *President Trump Announces Intent to Negotiate Trade Agreement with Kenya*, Office of the United States Trade Representative (Feb. 6, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya. Luke Anami, *US Cranks Up Trade Deal with Kenya,* The East African (Mar. 24, 2020), https://www.theeastafrican.co.ke/business/US-cranks-up-trade-deal-with-Kenya/2560-5499796-139up1q/index.html.

29 *Cabinet Approves Start of Free Trade Talks with the US*, The Standard (Jan. 31, 2020), https://www.standardmedia.co.ke/article/2001358611/cabinet-meeting-okays-kenya-us-free-trade-talks.

The expressed goals of the trade deal have been enunciated as follows:

- To form part of a broader agenda to pursue reciprocal and mutually beneficial agreements between the United States and individual sub-Saharan African countries. The agreement is to be a model for future engagements.
- To build on the objectives of AGOA.
- To contribute to African regional integration.[30]

There are concerns that Kenya may not benefit from a free trade agreement with the United States in light of the fact that it exports mostly low-value goods to the US, while the US exports high value goods to Kenya. Furthermore, the trade deal is likely to include provisions that may be easier for the US to comply with, than for lesser-developed Kenya. For example, the US favours provisions on the facilitation of trade, which would require the implementation of trade processing automation and the use of e-commerce in trade. Kenya may struggle to implement these reforms due to the heavy financial implications involved.

There are also concerns that the agreement, if negotiated, could actually undermine regional integration efforts, particularly with regard to its compatibility with the East African Community (EAC) treaties and the African Continental Free Trade Agreement (AfCFTA).[31] In relation to the former, the protocol on the establishment of the East African Community Common Market (2009) has article 37 which concerns the coordination of external trade relations. The article requires that members adopt a common negotiating position with third parties. Kenya seems to be ignoring this provision by going at negotiations with the United States alone, without the other members of the EAC. The ethos of the AfCFTA, on the other hand, is that members are to concentrate on boosting intra-African trade and are discouraged from entering into bilateral trade deals with third parties. There is concern that the potential US – Kenya accord could have the effect of increasing barriers to

30 Office of the United States Trade Representative, *United States-Kenya Negotiations: Summary of Specific Negotiating Objectives* (May 2020), https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf.

31 *See, e.g.*, Jack Caporal, *Going Solo: What is the Significant of a U.S.-Kenya Free Trade Agreement?*, CSIS (Mar. 18, 2020), https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement.

intra-African trade and therefore undermining regional integration efforts. For example, it is expected that the agreement will include rules of origin to ensure that only the products of the parties to the agreement benefit from the trade preferences, and excluding goods from other nations from benefiting from the arrangement. However, despite these concerns, Kenya is keen to have the agreement because it believes that it will lead to greater investment inflows of investors who will be seeking to gain access to the US market. Furthermore, Kenya is anxious to secure a deal ahead of the expiry of AGOA in 2025.

Kenya would not be the first African country to strike a bilateral trade deal with the United States.[32] In August 2018, the US and Morocco entered into an agreement on the import of US poultry and poultry products into Morocco. This was despite Morocco being a member of the Arab Maghreb Union[33] as well as the Community of Sahel – Saharan States (CEN – SAD) at the time.[34] However, the US – Morocco agreement is far less comprehensive than the proposed US – Kenya deal, as it is a subject – specific agreement. Being so narrow, it did not, for example, even require congressional approval like the Kenya – US deal will. Furthermore, Morocco is yet to ratify the AfCFTA so it can be argued that it is not bound by its stance which discourages agreements with third parties. Conversely, Kenya ratified the AfCFTA on May 10, 2018 and is therefore bound to heed its commitments thereunder.[35]

V. NEGOTIATIONS TO RENEW THE COTONOU AGREEMENT

The Cotonou Agreement was entered into in the year 2000 between the European Union (EU) and African Caribbean and Pacific (ACP) countries as a successor to the Lomé Agreement of 1975. The intention was to replace the former non-reciprocal arrangement with a reciprocal one and to be the basis for the formation of Economic Partnership Agreements (EPAs) between the two parties.[36] The agreement was set to expire on February 29, 2020, unless

32 Lucas B. Terna, *Is Morocco Africa's Leading Free Trade Bastion?,* Afronomicslaw.org (Mar. 20, 2019), https://www.afronomicslaw.org/2019/03/20/is-morocco-africas-leading-free-trade-bastion/.

33 Established in 1989 with 4 other members: Algeria, Libya, Mauritania and Tunisia.

34 Established in 1998 with 29 members.

35 *Status of AfCFTA Ratification,* TRALAC (last updated May 6, 2020), https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

36 There are currently 79 African Caribbean and Pacific countries. 48 of these are sub-Saharan African countries.

renewed. Negotiations on its renewal were initiated on September 28, 2018.[37] The original agreement had focused on development cooperation, trade and political dialogue. Now, new global concerns have arisen, such as climate change and the fight against terrorism. The shifting of interests mandated a re-evaluation of the framework agreement to reflect modern challenges, realities and aspirations.

The only progress that has been made so far in the negotiations is the adoption of negotiating mandates by the two sides. The EU Council adopted the mandate on June 22, 2018 while the ACP countries adopted theirs on May 30, 2018 at an ACP Council of Ministers.[38] Secondly, there is a broad agreement about the structure of the agreement – the key chapters. A novel (yet controversial) aspect is that, in addition to the general framework agreement, there are to be three separate agreements for each of the ACP regions. This is to take account of the differences in interests of the countries in the three regions.

The expiry of the Cotonou Agreement had to be postponed to December 2020 owing to delays in the conclusion of the negotiations. There is still a lot of ground to be covered in the negotiations and it is unclear whether the extended deadline will be met. This is more particularly so on account of the COVID-19 outbreak which has generally led to a slowdown in all activities across the globe, and forced all governments to turn their attention to dealing with the health pandemic in their various countries. The parties are yet to consolidate the proposals on the provisions, to agree on the institutional structure and on the modalities of cooperation, as well as to set the final provisions.

Some trepidation has been expressed regarding the Cotonou Agreement. For one, trade agreements between unequal partners are always challenging to construct in a manner that will end in an outcome that is viewed as being fair to all sides. Secondly, the diversity of the ACP group (and even of the African states themselves as a group) presents challenges to agreeing on mutual interests. For example, there have even been divisions among African governments over the adoption of the EPAs. Only 14 states have so far accepted interim-EPAs with the European Union. Many African states have feared

37 *Cotonou Agreement,* European Council, https://www.consilium.europa.eu/en/policies/cotonou-agreement/

38 ACP Negotiating Mandate for a Post-Cotonou Partnership Agreement with the European Union, ACP/00/011/188 (adopted May 30, 2018), http://www.acp.int/sites/acpsec.waw.be/files/acpdoc/public-documents/ACP0001118_%20ACP_Negotiating_Mandate_EN.pdf.

that liberalising trade with Europe will result in the loss of customs revenue, which is an important contributor to government revenue. Further, it is feared that it may harm African producers whose products may struggle to compete with European imports. It is not the African side alone which has had challenges that have stalled the integration process. The European side has also faced institutional battles that have under-mined their efficacy in these negotiations. Indeed, broadly speaking, it has been a difficult time for integration in general, given events such as the trade wars and Brexit.

A former Nigerian trade minister remarked that "if 30 years of nonreciprocal free market access into the EU did not improve the economic situation of the ACP, how can a reciprocal trading arrangement achieve anything better?"[39] This question is a valid one, yet not one to be used as a basis for a decision to completely throw out the initiative. Instead, it should be a question that drives the impetus to find solutions to improve the effectiveness of the framework.

VI. GENERAL TRADE AND INVESTMENT POLICIES/COMPLAINTS

Madagascar, Morocco and South Africa Launch Safeguard Investigation at the WTO

On January 7, 2019, Madagascar notified the WTO's Committee on Safeguards that on December 31, 2018, it had decided to initiate a safeguard investigation on detergent powder.[40] A safeguard is a trade policy measure that is applied to 'protect domestic industries from competition with imports causing or threatening to cause serious injury to them."[41] When a country initiates a safeguard investigation, it seeks to determine whether increased imports of a product are causing, or threatening to cause, serious injury to a domestic

39 Aliyu Modibo Umar, former Nigerian Minister of Trade. *See* Kingsley Ighobor, *Trade Between Two Unequal Partners,* Africa Renewal (Aug. 2014), https://www.un.org/africarenewal/magazine/august-2014/trade-between-two-unequal-partners.

40 *Madagascar – Notification Under Article 12.1 (A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It*, WTO/ G/SG/N/6/MDG/3 (Jan. 9, 2019). Madagascar also initiated safeguard notifications with respect to pasta and oils. The safeguard on pasta was notified on July 22, 2019 having been initiated on July 18, 2019. On oil (lubricating oil, and on vegetable oils and margarines), the country notified the Safeguard Committee on August 27, 2019 having been initiated on August 14, 2019. Madagascar levied additional duties on the products for a month, and then withdrew them in September, pending further investigations.

41 Yong-Shik Lee, *The Agreement on Safeguards, in* The World Trade Organization: Legal, Economic and Political Analysis 749–98, 749 (2005).

industry. The WTO Agreement on Safeguards[42] can be applied to any category of imported products and, together with Article XIX of the General Agreement on Tariffs and Trade (1994), it sets out the general terms pursuant to which WTO members may apply safeguard measures.

Generally, under WTO law trade, members cannot exceed the quotas and tariffs contained in their schedules of concessions. However, members can be allowed to bypass this rule where increased imports are causing or threatening to cause serious injury to a domestic industry. Thus, safeguard measures protect domestic industries over a short period of time from sudden and acute problems caused by import competition.

Madagascar claimed that its domestic detergent powder industry had provided evidence showing that imports of detergent powder had increased at a rate of 254% both in absolute terms and relative to domestic production during the period 2013–2017. This rise in imports, they claimed, had adverse consequences on domestic producers of detergent powder, in particular regarding levels of production, market share, capacity utilization and sales, and had caused their losses to accumulate. The compound effect was an imminent collapse of domestic production. Therefore, they argued that the application of a safeguard measure would enable the domestic industry to have time to make necessary adjustments in terms of the competition that it faced from imported detergent powder.

Similarly, on March 4, 2019, South Africa notified the Committee on Safeguards of the initiation of a safeguard investigation into the surge of imports of threaded fasteners of iron or steel.[43] The application, lodged by the South African Iron and Steel Institute (SAISI) on behalf of the South African Fasteners Manufacturers' Association (SAFMA) and its members, claimed that the product was being imported into the Southern African Customs Union (SACU) market in such increasing quantities that it was causing serious injury to the SACU industry.[44] As a result, producers were experiencing serious injury in the form of a decline in sales volumes, market share, gross profit, net profit

42 *Agreement on Safeguards,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods (1994) [hereinafter SA].

43 *South Africa – Notification Under Article 12.1(A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It*, WTO/ G/SG/N/6/ZAF/7/ (Mar. 4, 2019).

44 South Africa is in the Southern African Customs Union along with Botswana, eSwatini, Lesotho and Namibia. The countries adopt a common external trade policy.

and low capacity utilisation for the period from July 1, 2014 to June 30, 2018. On this basis, the SACU industry was suffering serious injury which could be causally linked to the surge in the volumes of imports of the subject products.

Morocco also notified the Committee on Safeguard of the initiation of a safeguard concerning imports of hot-rolled sheets.[45] According to Morocco, imports of hot-rolled sheets rose by 54% during the 2014–2018 review period, and by 31% in 2018 in relation to 2017. This, it argued, had caused serious injury to the domestic hot-rolled sheet industry, resulting in the fall in sales volume, output, productivity and production capacity utilization, and a decline in financial performance. The investigation was initiated by the Ministry of Industry, Investment, Trade and Digital Economy following a petition submitted by the company Maghreb Steel, on behalf of the domestic hot-rolled sheet industry. The Committee on Safeguard was notified on May 29, 2019.

Nigeria Closes Border with Neighbours

In August 2019, Nigeria closed its border with Benin, Niger and Cameroon, effectively banning all trade—import and export—with these countries. Of the three neighbouring countries, the Benin-Nigeria border is a major trading route for the sub-region because of the volume of goods that pass through it, as well as the direct access to Lagos, Nigeria's main economic and commercial hub. Though border closures are not unusual among African countries, for instance, during the height of the Ebola outbreak, Rwanda briefly closed the border with the Democratic Republic of the Congo and since the global lockdown caused by the COVID-19 pandemic, other countries have closed their borders.[46] However, this was the first time that a country had done so for trade-related reasons.

The primary objective of the border closure was to curb the smuggling of illicit goods as well other legal products, particularly poultry, in order to strengthen Nigeria's agricultural sector. Further, the Nigerian government believed that smuggling, via the land routes of its neighbours, negatively affected the payment of custom duties. As a result, the border closure was intended as a means to

45 *Morocco – Notification Under Article 12.1(A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It,* WTO/ G/SG/N/6/Mar/11 (May 29, 2019).

46 Tom Wills, *Coronavirus in Africa: How deadly could COVID-19 become?,* Deutsche Welle (DW) (Apr. 24, 2020), https://www.dw.com/en/coronavirus-in-africa-how-deadly-could-covid-19-become/a-53230519.

restore customs revenue through Nigeria's ports. According to Nigeria, the border closure was as a result of the high volume of goods smuggled, particularly agricultural products from Benin. The World Bank, for instance, estimates that about 80% of all imports into the port of Cotonou, Benin's commercial capital, are destined for Nigeria.[47] Meanwhile, in 2013, when Nigeria set a tariff on rice imports at 70%, Benin reduced its tariff on rice imports from 35% to 7% the following year.[48] This made it easier for smugglers (and even legitimate importers) to import rice into Benin at low cost and then traffic it into Nigeria to sell at a much higher profit margin – a process known as entrepôt trade.[49]

The negative impact of the border closure has been severe on small-and-medium sized enterprises (SMEs) in the informal sector, particularly given the COVID-19 pandemic. Many small and medium size businesses who depend on the trade route between Nigeria and Benin are the hardest hit because of the closure. These businesses, as a result of crumbling ports and expensive customs duties, history and weak border enforcement, have come to rely on the ease of the movement of goods along the Nigeria-Benin route. According to the Brookings Institute, the informal sector throughout West Africa, and particularly in Benin, represents approximately 50 percent of GDP (70 percent in Benin, in fact) and 90 percent of employment.[50] However, since the border closed many of these SMEs have experienced a fall in sales of up to 70 per cent.[51] Thus, even though the aim of the border closure was to reduce smuggling, it also disrupted the businesses of many traders who transacted legitimate cross-border trade. As a result, the domestic implication for this disruption in the informal sector was an increase in the number of people falling below the poverty line.

47 Signé & van der Ven note, *supra* note 17. *See also* Woubet Kassa & Albert Zeufack, *Nigeria's border closure: a road block or a speed bump on the road to a successful AfCFTA?,* World Bank Blogs (2020), https://blogs.worldbank.org/africacan/nigerias-border-closure-road-block-or-speed-bump-road-successful-afcfta.

48 *Id.*

49 Kassa & Zeufack, *supra note 47. See also Stephen Golub, Ahmadou Aly Mbaye & Christina Golubski, The Effects of Nigeria's Closed Borders on Informal Trade with Benin,* Brookings Blog (2019), https://www.brookings.edu/blog/africa-in-focus/2019/10/29/the-effects-of-nigerias-closed-borders-on-informal-trade-with-benin/.

50 Stephen Golub, Ahmadou Aly Mbaye & Christina Golubski, *The Effects of Nigeria's Closed Borders on Informal Trade with Benin,* Brookings Blog (2019), https://www.brookings.edu/blog/africa-in-focus/2019/10/29/the-effects-of-nigerias-closed-borders-on-informal-trade-with-benin/.

51 Neil Munshi, *Nigerian Border Closures Cut Smuggling but Drive Up Prices,* Financial Times (2019), https://www.ft.com/content/ce7abd04-0d10-11ea-bb52-34c8d9dc6d84.

Another side effect of the closure was the rise in food prices and food scarcity. The border shutdown pushed up prices, notably of rice and livestock, thus fuelling rapid inflation. This hit consumers hard in a country where the majority of household budgets are spent on food. For instance, the price of food increased by 11.2% in September of 2019, after falling to a 3 1/2-year low in the preceding month.[52] With Nigeria having the highest number of people living in poverty between the two countries, inflation and food scarcity will likely exacerbate the situation.[53]

Beyond these short-term effects, however, the more fundamental question remains whether the closure will help curb smuggling and increase local production. While the shutdown might lessen smuggling in the interim, it will not help to address its root causes, which includes, but not limited to, price differentials between Nigeria and its neighbours, the high demand for goods as a result low levels of domestic production, porous borders, corruption and incoherent customs policies. Until Nigeria tackles these issues, border closures will remain an inefficient policy tool.

2020 World Investment Report

The 2020 World Investment Report by the United Nations Conference on Trade and Development (UNCTAD) indicates that global foreign direct investment will fall significantly as a result of the COVID-19 pandemic. According to the report, global FDI flows are forecast to decrease by up to 40 per cent in 2020 from their 2019 value of $1.54 trillion to below $1 trillion.[54] For Africa, the report is grim. The COVID-19 crisis has arrived at a time when FDI was already in decline, with the continent having experienced a 10% drop in inflows in 2019 to $45 billion.[55] The impacts of the pandemic as well as low prices of commodities, especially oil will further exacerbate the FDI decline. In particular, FDI is forecasted to further fall by 25 to 40 per cent in 2020,

52 National Bureau of Statistics. *See Nigeria Inflation Rate at 3-Month High of 11.2%,* Trading Economics (Oct. 15, 2019), https://tradingeconomics.com/articles/10152019105702.htm.

53 Olabisi D. Akinkugbe, *What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution,* Afronomicslaw.org (Apr. 9, 2019), https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/.

54 United Nations Conference on Trade and Development, World Investment Report 2020 (2020), https://unctad.org/en/PublicationsLibrary/wir2020_overview_en.pdf.

55 *Id. at 9.*

and sectors such as aviation, hospitality, tourism and leisure, will be most affected.[56] Additionally, the lockdown measures will slow investment projects while multinational corporations will reconsider new projects due to prospects of global recession. National governments, as a result of the economic and financial fall out of the pandemic, will place new restrictions on investments.

CONCLUSION

Despite the grim WTO report, there is hope for the recovery of investment flows to the continent in the medium to long run. The entry into force of the agreement establishing the AfCFTA, which provides deepening regional integration, could mitigate the extent of the investment decline as well as help initiate a stabilization and recovery in the aftermath of the pandemic. Furthermore, increasing economic ties to the continent by major global economies such as the UK-Kenya FTA and the new Cotonou Agreement, promoting investment in infrastructure, public–private partnerships, and industrial development could help the continent recover in 2021 and beyond.

56 *Id.*

Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)

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This case commentary uses the in-depth case study and thick-description approach to analyze and comment on two important cases from the East Africa Court Justice (EACJ) and the OHADA Common Court of Justice and Arbitration (OHADA CCJA). The cases are the British American Tobacco v Attorney General of Uganda (EACJ), 2019 (BAT case) and GETMA International v The Republic of Guinea (OHADA CCJA arbitral award), 2014 (GETMA case). The BAT case is the first case decided by the EACJ on a purely international trade and commercial law subject matter. This is significant since the EACJ's docket has since its first decision in 2006 been dominated mainly by human rights, rule of law, opposition politics, and employment cases. The GETMA case on the other hand is renowned because of the action of the arbitrators in the OHADA CCJA arbitration to request a significant increase in their arbitration fees over the amount set under the OHADA arbitration rules. Outside of this controversial issue in the GETMA case, this commentary delves deep into the other accompanying cases involving the same parties in International Center for the Settlement of Investment Disputes (ICSID) and the enforcement proceedings in the US Federal Court in DC. The two cases thus present many lessons for future litigants, stakeholders, commentators, academics, and students in the East African regional integration process and in OHADA harmonization of business laws and arbitration.

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General Introduction

The case commentaries analyzed in this contribution come from two important international courts in Africa: The East Africa Court of Justice (EACJ) and the OHADA Common Court of Justice and Arbitration (OHADA CCJA). Both international courts are sub-regional courts established in East and West Africa respectively. They are part of the wider economic and political integration, and business law harmonization processes in East and West Africa. Both decisions analyzed are important in their different economic, political, and legal contexts. The *British American Tobacco (U) LTD v The Attorney General of Uganda*, EACJ Reference No. 7 of 2017 decision is special because it is the first case on a purely international trade and commerce question that the EACJ has determined. It is therefore the inaugural case where the economic obligations of the Partner States of the East Africa Community embedded in the East African Community (EAC) integration treaty and protocols are tested in active litigation. This is significant considering that the one of the main reasons for the formation of the East Africa Community is economic integration. The second case, *GETMA International v the Republic of Guinea* (I), Case No. 001/2011/ARB is an arbitral award issued by the OHADA CCJA tribunal. OHADA is the French acronym for the Organisation pour l'Harmonisation en Afrique du Droit des Affaires, which is a group of seventeen (17) mainly Francophone West African countries that signed a treaty on the Harmonization of Business Law in Africa. The OHADA CCJA is OHADA's judicial organ and is the first supranational regional system in Africa with binding laws for all its member States.

This contribution, unlike most traditional case commentaries or case reviews, uses a different analytical approach. Most traditional case commentaries are normally limited and cursory presentations of the important aspects of the case and in many cases restrained in terms of depth and breadth of analysis. This commentary is radically different and is influenced by Professor James Gathii's analytical framework on the performance of international courts in Africa: the in-depth case study and thick description approach.[1]

1 James T. Gathii, *Introduction: The Performance of Africa's International Courts, in* The performance of Africa's International Courts (James T. Gathii, ed., forthcoming Oxford University Press, 2020).

"This approach emphasizes thick description and analysis on how the cases enable, spur, and embolden political and legal mobilization."[2] While the contrast of this approach is the measurement of impact of courts based on set defined and discrete variables, this case commentary foregrounds and presents the particular and localized contexts in which these cases are litigated. It analyzes and draws linkages that these cases have with other similar cases litigated in other forums while maintaining the in-depth and thick description approach. This case commentary broadens the analysis from the State-centric approach that easily influences most cursory case commentaries through the presentation of the role of the many different stakeholders involved in these two cases at the micro and macro level. Another aspect of the in-depth case study and thick description approach is to maintain an analysis that does not take comparisons with European supra-national institutions as a baseline for evaluating performance of Africa's international courts.[3] This case commentary analyses the two cases presented on their own merits and demerits without unduly focusing on any comparators with any European supra-national institutions as baseline comparators. Finally, this approach has the advantage of bringing life names of individuals, their commitments, places, and groups in ways that a cursory case review or analysis cannot easily do.

Additionally, the in-depth case study and thick description approach broadens the aspects under review. Unlike traditional case reviews, which decontextualize cases by only emphasizing on doctrinal dilemmas and theoretical quandaries — what Professor James Gathii refers to as "the plain vanilla or colorblind scholarship and practice",[4] the in-depth case study and thick description approach contextualize cases to laying bare the many facets. This commentary thus focuses on the many aspects that the decisions have both at a systemic macro level and at the contextual micro-level. As seen above, this approach allows us to unlock the many vital names, facts, places, and figures that would ordinarily not be revealed in cursory summary commentaries. There are many lessons that the many stakeholders inside and outside of these courts can draw from this in-depth and thick description approach on the factual and legal analysis that will assist in the future trajectories of these courts specifically

2 *Id.*

3 *Id*. *See also* Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism 9 (1996) (arguing that the dependency theory came to view most understandings of developing countries as based on binary opposites creating a form of history by analogy).

4 James T. Gathii, *Beyond Color-Blind National Security Law,* Just Security (Aug 3, 2020), https://www.justsecurity.org/71769/beyond-color-blind-national-security-law/.

and for international law generally. This is especially true because in mainstream circles, these international judiciaries have been ignored and underappreciated as sources of robust jurisprudence that shapes the course of international law.[5] As these case commentaries reveal, this notion is inaccurate and these African international courts, despite their numerous challenges, offer an important avenue for the creation, discussion, and dissemination of robust international law knowledge and practice.[6]

This contribution proceeds as follows: the first part covers the commentary on the first international trade law case in the EACJ: BAT v The Attorney General of Uganda. This section covers a specific introduction to this case and to the EACJ, the facts and procedural history of the case, the specific determinations by the court, detailed sections of commentary on these determinations, a commentary on how this case is part of a concerted effort by "big tobacco" corporations to protect their dwindling fortunes because of the health hazards involved in the use of tobacco, and finally a conclusion on how this case might have the consequence of emboldening other transnational companies in the EAC to use the EACJ as a vehicle for ensuring the Partner States do not circumvent trade liberalisation commitments in the EAC Community law. The second part covers the commentary on the GETMA International v The Republic of Guinea and like the first part it addresses the following: a general introduction to the case and to OHADA, the facts and procedural history of the dispute, the determinations of the tribunal, specific commentary on the arbitral award, the cascading cases in the International Centre for Investment Disputes (ICSID) and the US Federal District Court of District of Columbia, the vexed question of the increase of arbitrator's fee and a conclusion that the arbitrators' unilateral request to increase fees outside the OHADA arbitration rules torpedoed GETMA International's arbitration win but strengthened the fact that the OHADA CCJA remains one of the legitimate centers for the resolution of investment disputes in West Africa even though some commentators see the case as repellent for investment in the OHADA region.

5 James T. Gathii, *The Promise of International Law: A Third World,* 2020 American Society for International Law Grotius Lecture (July 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509.

6 *Id.*

I. COMMENTARY ON THE FIRST TRADE CASE BY THE EACJ: BRITISH AMERICAN TOBACCO (U) LTD V THE ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 7 OF 2017

A. Introduction

The *British American Tobacco (U) LTD v The Attorney General of Uganda*, EACJ Reference No. 7 of 2017 (BAT Case) is a significant milestone in the process of judicialization of trade, business and commercial disputes in the East African Community Court of Justice (EACJ).[7] It is the first case addressing a purely international trade question (internal taxation of goods) that the court has adjudicated since it was inaugurated in 2001. This case offers ample opportunity to assess the preparedness of the court and its current and potential litigants to address, present, and litigate questions of international trade law for the first time. The Applicant in this case is British American Tobacco (BAT), a multinational company with great economic and political muscle internationally. BAT eventually won the case with the court declaring that the imposition of excise duty of cigarettes manufactured in Kenya and imported into Uganda was in violation of provisions in the Treaty for the Establishment of the East African Community (EAC Treaty),[8] the EAC Customs Union Protocol,[9] and the EAC Common Market Protocol.[10] This commentary presents an in-depth case study analysis of the decision and its implications for the Court, future litigants, and the EAC integration process. The case was filed in 2017 and in 2018 the Applicant had already bagged its first win in the preliminary application for the preservation of interim orders. Thus, this commentary focuses on the main decision issued in March 2019 that effectively decided the case on its merits.

It is important to note that "business actors in general and the East African Business Council (EABC) in particular have eschewed litigating before the EACJ."[11]

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7 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, East African Court of Justice [EACJ] (Mar. 26, 2019).

8 Treaty for the Establishment of the East African Community, Nov. 30, 1999, 2144 U.N.T.S. 255.

9 Protocol on The Establishment of The East African Customs Union, Mar. 2, 2004, https://www.eac.int/documents/category/eac-customs-union-protocol.

10 Protocol on The Establishment of The East African Community Common Market, Nov. 20, 2009, http://www.minecofin.gov.rw/fileadmin/templates/documents/Common_Market_Protocol.pdf.

11 James T. Gathii, *The East African Court of Justice: Human Rights and Business Actors Compared*, *in* International Court Authority 60 (Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen eds., Oxford University Press, 2018).

This is because not a single case had been presented before the EACJ that dealt with the international movement of goods and services prior to this BAT case. Prof James Gathii argues that this lack of trade cases is surprising given that economic integration is the primary goal of the EAC.[12] Since this is the first case that the court has decided on an international trade law question, there are many lessons that can be drawn from the decision at both micro and macro levels. This case commentary will analyze these lessons as follows: at the micro-level, the Court still has many lessons to learn on how to address international trade law cases vis-à-vis other types of cases that involve other subject matter areas such as human rights, domestic opposition politics, or employment disputes. First, the court interpreted its jurisdiction correctly as wide enough to capture cases that have no relation to the East African Community law specifically but are of an international law character generally and that also involve the violation of a Partner State's domestic law. Second, the Court misapplied Article III: 2 of GATT 1994 and its relationship to the EAC Treaty and also substantively erred in its interpretation and application of the World Trade Organization (WTO) law on *de jure* and *de facto* discrimination. Third, the court implied an overbroad application of a source of Community Customs law provision in a manner that would make any Common Market Protocol violation a violation of the EAC Treaty, and finally the Court broadened its remedial powers by granting some mandatory orders over and above the declarations it normally issues, thus ordering the rescinding and withdrawal of payments on receipts already made. At the macro level, this dispute shows how powerful multinational tobacco companies are willing to use all types of regimes, including triggering the EACJ trade dispute jurisdiction, at both domestic and the international level to win economic gains and safeguard their transnational capital.[13]

Finally, it is important to offer a small description on the general framing of the case. Interestingly, even though the applicants framed the case as one that involves the violation of the EAC Community integration pillars on the elimination of tariff and non-tariff barriers (NTBs), the case should be correctly characterized as a trade liberalization (non-discrimination principle: national treatment principle) violation case involving internal taxation. The case has nothing to do with tariff or non-tariff barriers in the EAC. In other words, but for the fact that an individual company—in this case BAT—was suing in its own capacity, if the case were presented on behalf

12 *Id.* at 60, 62.

13 Sergio Puig, *Tobacco Litigation in International Courts*, 57 Harvard J. Int'l L. 383 (2016); James T. Gathii & Cynthia Ho, *Regime Shift of IP Lawmaking and Enforcement from WTO to the International Investment Regime*, 18 Minn. J. L. Sci. & Tech. 427 (2017).

of Kenya or any other member of the WTO, it would easily be accepted within the jurisdiction of the World Trade Organization (WTO) Dispute Settlement System. This consequently means that the dearth of cases that deal with the elimination of tariff and NTBs to trade in the EACJ continues despite this important case.[14] Despite the fact that under-judicialization of NTBs related disputes still continues in the EACJ, another case on trade liberalization by Tanzanian glass manufacturer Kioo Limited is now in the offing.[15]

B. Facts and Procedural History

This case was instituted by British American Tobacco Uganda Limited (BAT) challenging the legality of section 2 (a) and (b) of the Republic of Uganda's Excise Duty (Amendment) Act No. 11 of 2017.[16] BAT contended that Uganda's Excise Duty Amendment Act contravened provisions in the Treaty for the Establishment of the East Africa Community (EAC Treaty), the Protocol on the Establishment of the East African Customs Union (Customs Union Protocol), and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol).[17] BAT is a company limited by shares that manufactures and otherwise deals with tobacco and tobacco products incorporated and domiciled in Uganda.[18] It restructured its business and operations to have its sister company in the Republic of Kenya (British American Tobacco Kenya Limited) manufacture and supply it with cigarettes for sale on the Uganda market.[19]

Both Uganda and Kenya are members of the East Africa Community and have signed and ratified the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol.[20] The Republic of Uganda enacted the Excise Duty Act No. 11 of 2014 that sought to consolidate the laws applicable to excise duty and related matters. Uganda subsequently introduced the Excise Duty (Amendment) Bill No. 6 of 2017 to have all tobacco products manufactured within the EAC region to have a uniformly applicable excise duty rate with an increment of the duty chargeable on

14 *See* Gathii, *supra* note 10, at 62.

15 Kioo Limited v Attorney General of the Republic of Kenya, Reference No. 13 of 2020, East African Court of Justice [EACJ].

16 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 1, East African Court of Justice [EACJ] (Mar. 26, 2019).

17 *Id.*

18 *Id.* at para. 2.

19 *Id.*

20 *Id.* at para. 4.

soft cap cigarettes from Ushs. 50,000 per 1,000 sticks to Ushs. 55,000 for the same number of sticks.[21] It is this bill that Uganda eventually passed into the Excise Duty (Amendment) Act No. 11 of 2017 with amendments to create differential treatment between goods 'locally manufactured' in Uganda and 'imported' goods, with higher duty chargeable on 'imported' goods.[22]

After the enactment of the Excise Duty (Amendment) Act, the Uganda Revenue Authority (URA) issued BAT with tax assessment notices that re-classified as imported goods the company's cigarettes that had been up to this point categorized, assessed and taxed as locally manufactured products.[23] BAT filed this case claiming that this differential treatment of the excise duty applicable to goods that originate from Uganda as opposed to like goods from elsewhere in the region was discriminatory and a violation of the EAC Treaty, the EAC Customs Union Protocol, and EAC Common Market Protocol.[24] Specifically, BAT contended that section 2 of the Excise Duty (Amendment) Act is unlawful, discriminatory and negates the purpose for which the EAC treaty was promulgated, and the same legal provision violates Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the EAC Treaty; Articles 15 (1) and (2) of the EAC Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the EAC Common Market Protocol.[25] BAT took issue with both the enactment of the Act which violates the EAC Treaty and the two Protocols provisions and its implementation as it poses a threat to its business operations, condemning it to the payment of exorbitant excise duty simply on account of its cigarettes being manufactured in Kenya.[26] Additionally, BAT argued that the Act violates section 23 (Prohibition of incentives or privileges to tobacco businesses) of the Ugandan Tobacco Control Act. No. 22 of 2015.[27]

Uganda responded to the claims above by stating that when Uganda's Parliamentary Committee on Finance, Planning and Economic Development considered the Excise Duty (Amendment) Bill, it recommended the differential treatment for locally manufactured viz imported goods to bring it in tandem with the practice that purportedly prevails in other countries in the region, as well as to counteract the practice of smuggling and its adverse effects on locally manufactured cigarettes, cigarette prices

21 *Id.* at para. 6.
22 *Id.* at para. 7.
23 *Id.* at para. 8.
24 *Id.* at para. 9.
25 *Id.* at para. 11.
26 *Id.*
27 *Id.* at para. 13.

in those countries being lower than Uganda. In the same vein the committee sought to promote the growth of local industries, encourage more companies to invest in Uganda and promote the consumption of locally manufactured cigarettes.[28] Additionally, the Respondent State contended that the impugned law was passed in good faith, was well intentioned and was intended for the benefit of the Republic of Uganda and the EAC as a whole, and accordingly sought to have the reference dismissed with costs.[29]

C. The EACJ's Broad Infringement Jurisdiction

The Court begun its decision by addressing certain important preliminary jurisdictional questions. First, Article 27(1) of the EAC Treaty defines the jurisdiction of the Court as jurisdiction on 'interpretation and application of the Treaty.' Article 30(1) then demarcates the acts that would give rise to a cause of action before the court. Citing *Simon Peter Ochieng & Anor v Attorney General of Uganda*, EACJ Ref. No. 11 of 2013 and *B.E Chattin (USA) v. United Mexican States*, 1927 UNRIAA, vol. IV, p 282 at 310, the court concluded that there are two categories of acts that would give rise to sustainable cause of action before the court: "first, a claim arising from an act that contravenes and thus calls for the interpretation and application of any Treaty provision, and secondly a claim that arises from an act that violates any law – international or municipal."[30] This is an expansive interpretation of the court's jurisdiction. Article 30(1) of the EAC Treaty grants the Court jurisdiction to receive from any person who is resident in the Partner State cases on the determination of the legality of any Act, regulation, directive, decision or action of Partner State or an institution of the Community on the grounds that such Act, regulation, directive, or decision is unlawful or is an infringement of the provisions of the treaty. The Court construed this provision by dividing the last section into two requirements: unlawfulness and infringement. The Court found that "whereas a treaty violation would give rise to a fairly obvious cause of action, what is envisaged as an unlawful act under Article 30(1) is not readily apparent."[31] The court then found that such unlawful act would "arise from violation of any other laws–domestic or international."[32]

D. Commentary

28 *Id.* at para. 15.
29 *Id.* at para. 16.
30 *Id.* at paras. 29, 30, 31.
31 *Id.* at para. 29.
32 *Id.* at para. 29.

This interpretation, while it grants the court close to limitless jurisdiction, is textually and legally sound based on the general rule of interpretation of treaties in Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).[33] This means that unlike other international courts whose judicial review on unlawfulness might be limited to the establishment treaty and community law,[34] the EACJ has one of the broadest subject matter jurisdictions an international court can have. This means that any Act, regulation, directive, or decision that is unlawful in the sense that it violates either domestic or international law by a Partner State or an institution of the Community is amenable to EACJ's jurisdiction.[35] The breadth of the domestic law or international law is not circumscribed in any way and thus the EACJ hears a broad swarth of cases in terms of subject matter, from international trade to human rights and any matter or question in domestic law including the constitutional review of Acts of Parliament and executive decisions. Indeed, Uganda had claimed the violation of Objective xxiii(i)(b) of the Ugandan Constitution and section 23 of Uganda's Tobacco Control Act—claims the Court dismissed for not having been pleaded.[36]

The cases the Court used to support this broad jurisdictional view require further commentary. The EACJ decision in *Simon Peter Ochieng & Anor v Attorney General of Uganda*, EACJ Ref. No. 11 of 2013 only makes reference to national laws as the Court correctly notes: "where a matter was held to justiciable before this Court if it was one *the legality of which is in issue viz the national laws of Partner States, or one that constitutes an infringement of any provision of the Treaty.*"[37] To fortify its view on violation of international law, the Court is contented to cite a 1927 US-Mexico General Claims Commission decision in *B.E Chattin (USA) v. United Mexican States*, 1927 UNRIAA, vol. IV, p 282 at 310. This is indeed a far-fetched decision since it fetches authority from an international arbitration tribunal established in 1923 by a bilateral treaty to "settle and adjust amicably claims by the citizens of each country against

33 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

34 For Regional Human Rights Systems, the European Court of Human Rights (European Court) and the InterAmerican Court of Human Rights (Inter-American Court) restrict the mandate of the supervisory bodies to the interpretation and application of the European Convention on Human Rights (European Convention) and the Inter-American Convention of Human Rights (Inter-American Convention) respectively.

35 *See* Alade v. Nigeria Suit, ECW/CCJ/APP/05/11, para. 25, Judgment (June 11, 2012) (the ECOWAS Court of Justice finding that that its human rights mandate extended beyond the African Charter and encompassed UN human rights instruments to which ECOWAS member states are parties).

36 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 35, East African Court of Justice [EACJ] (Mar. 26, 2019).

37 *Id.* at para. 30.

the other."[38] The US-Mexico General Claims Commission also has its legacy tied to the early twentieth century imperial tendencies and invocation of different standards of civilization of Mexico through denial of justice by the US.[39] Its subject matter jurisdiction was to cover the "Law of Nations, in particular 'standards of civilization', an uncodified body of jurisprudence that included the writings of international jurists, the decisions of international tribunals, and the actions of states deemed to be civilized."[40] It is unlikely the EACJ First Instance judges closely checked the implications of citing this arbitral decision to affirm its position that the EACJ had jurisdiction over acts by Partner States that infringed a rule of international law. It is not clear how far or where such rule of international law should be found whether in binding treaties, customary international law, or even general principles of law recognized by civilized nations. Since the EACJ is a standing international court and not an arbitral tribunal and since the subject matter of the despute was not analogous to the claims in the US-Mexico Claims Tribunal, this reference by the court perhaps shows a lack of in-depth understanding and appreciation of the substance, nature, and jurisprudence of international courts and arbitral tribunals. Despite the cited decision being far-fetched and maybe raising some curiosity, the implication and lesson in this finding is that the EACJ can hear Investor-State Dispute Settlement (ISDS) cases involving investors resident in any of the EAC Partner States and using the substantive law of any binding bilateral or multilateral investment treaty.

Additionally, if the infringement jurisdiction of the EACJ under Article 30(1) of the EAC Treaty covers any Act or decision by a Partner State or institution of the Community that violates any law both municipal and international, then it further broadens the jurisdiction of the Court to receive human rights cases where international human rights treaties have been violated. This easily adds to the arsenal and fortifies the human rights jurisdiction of the Court which the Partner States have challenged but the Court has affirmed since its celebrated decisions in *Katabazi v. Secretary General of the EAC*, Ref. No. 1 of 2007; *Rugumba v. Secretary Gen. EAC*, Ref. No. 8 of 2010; and *Independent Medical Legal Unit v. Attorney General of Kenya,* Ref. No. 3 of 2010.[41]

38 United Nations, *Reports of Arbitral Awards, General Claims Commission (Agreement of September 8, 1923) (United Mexican States, United States of America)*: *Volume IV*, at 11 (2006).

39 Allison Powers Useche, *The Standard of Civilization on Trial at the United States/Mexico Claims Commission* 1923-1937, 1 Jus Gentium: J. Int'l Legal Hist. 391 (2016).

40 *Id.* at 393.

41 *See* James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 Duke J. Comp. & Int'l L. 249 (2013).

E. EAC Treaty Principles and Free Movement of Goods

On the first issue, the Court conclusively found violation and negation of the EAC Treaty objectives. It held that the Uganda Revenue Authority (URA) misconstrued the term 'import' and thus infringed Article 1 of the EAC Treaty and Article 1(1) of the Customs Union Protocol.[42] Additionally the court held that this misconstruction also negated the objectives of the Treaty in Articles 2(2), 5(2) and 8(1)(c) of the EAC Treaty.[43] The Court reasoned that if the URA had read the definitions of 'imports' in section 2 of Uganda's Excise Duty Act, 2014 and section 1(j) of the Value Added Tax Act, Cap 349 together with the same definitions in the Article 1 of the EAC Treaty and Article 1(1) of the Customs Union Protocol, it would have reached the conclusion that a 'foreign country' under Uganda's law does not include Kenya which is an EAC Partner State.[44] The court stated, "it is manifestly clear that the intention of the framers of the EAC Treaty and Customs Union Protocol was to establish the Community as a single economic area characterized by the free movement of goods, and in which goods from any of the partner States were not treated as imports."[45] The Court cited the doctrine of *pact sunt servanda* in Article 26 of the VCLT and the doctrine of non-invocation of domestic law for the violation of international law in Article 27 of the VCLT to fortify this position.[46] The Court also correctly defines a "Custom Union as region or geographic area in which the cooperating (partner) states engage in trade amongst themselves that is free from tariff and non-tariff barriers, and apply a common external tariff on goods from non-partners, while a Common Market is a customs territory that is characterized by free trade as underscored under a Customs Union, the free movement of goods, capital, labour, services, and person, as well as EAC nationals' right of residence and establishment.[47]

The Applicant also argued that the enactment and application of section 2 of Excise Duty (Amendment) Act No. 11 of 2017 infringed on Article 6(d) and (e) of the EAC Treaty which cover fundamental principles of the of the Community such as good governance, democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, promotion of human and peoples'

42 British American Tobacco (U) LTD v The Attorney General of Uganda, EACJ Reference No. 7 of 2017, para. 45.
43 *Id.*
44 *Id.* at paras. 39, 40, 41.
45 *Id.* at para. 41.
46 *Id.* at para. 42.
47 *Id.* at para. 46.

rights, and equal distribution of benefits.[48] Specifically, on Article 6(d) and (e) of the EAC Treaty, the Applicant contended that the principle of equal opportunities and equitable distribution of benefits is the specific obligation that has been violated.[49] The Court then proceeds to use the Collin English Dictionary and Uganda's Equal Opportunities Commission Act, 2007 to find the definition of 'equal opportunity' under the Treaty.[50] The court using these two definitions concludes that the concept of 'equal opportunity' is meant to curtail discrimination in person's access to social services on account of various factors such as age, gender, race, and creed. The court found that since the dispute accrues purely from a commercial transaction as opposed to the socio-political thrust of the considerations in the notion of equal opportunities, the claim under Article 6(e) is disallowed.[51] It is also, surprisingly, on this basis that the claims on the impugned law are dismissed as being at cross-purposes with the establishment of the Customs Union or Common Market as objectives of Article 2(2) and 8(1)(c) of the EAC Treaty or the removal of barriers and constraints to market development in Article 127(2)(b) EAC Treaty.[52]

F. Commentary

The first concern over this ruling is whether a fundamental principle of the Community can be a specific legal obligation of a Partner State. Since the human rights cases have already answered this question in the affirmative,[53] and was actually the basis for the human rights decisions of the EACJ, it is not surprising that the Court does not tackle this question. Unlike human rights cases, for trade and commercial cases, there are specific legal obligations spelt out in the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol. These include international trade law obligations like the national treatment obligation in Article 75(6) of the EAC Treaty which forms the crux of this dispute.[54] This means that the substantive obligations on EAC integration on trade and commerce are found in the EAC Community law and

48 *Id.* at paras. 48–49.
49 *Id.* at para. 65.
50 *Id.* at para. 66.
51 *Id.* at para. 67.
52 *Id.*
53 Rugumba v. Secretary Gen. EAC, Ref. No. 8 of 2010, EAC (2012); Democratic Party v. The Secretary General of the EAC & 4 Others, Ref. No. 2 of 2012, EAC (2012) (finding that fundamental principles had binding effect).
54 EAC Treaty, Article 75(6) (The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States).

unlike for human rights cases, the EAC Summit in its 15th Ordinary Summit of Heads of State extended the Court's jurisdiction over trade, investment, and cases arising under the EAC Monetary Union treaty to the Court.[55] There are therefore some good reasons why the Court should have refrained from judicializing fundamental principles in trade and commerce cases. The Court's decision, is however, still acceptable for having bitten the bullet in the human rights jurisdiction cases and, with the parties having developed 'a stable normative expectation'[56] scaling back these jurisprudence would not have been credible.

Secondly, having found the fundamental principles justiciable, using the Collins English dictionary and the Uganda's Equal Opportunities Commission Act, 2007 to find that the term 'equal opportunity' covers only socio-political notions goes against the rule of treaty interpretation in Article 31 of the VCLT. This is because for trade and commerce cases, 'equal opportunity' would ordinarily mean 'equal commercial or trading opportunities' not equality of opportunity in relation to socio-political aspects. Thus the 'equal opportunity' in Article 6 (d) and 'equitable distribution of benefits' in Article 6 (e) of the EAC Treaty when read in good faith textually, in their context, and in light of the object and purpose of the EAC Treaty might have led to the conclusion that the equality here most probably referred to equality of competitive commercial and trading opportunities.

Additionally, while erroneously terming the interpretation rule under Article 31 of the VCLT literal,[57] the court cites the case of *Rwenga Etienne & Another v The Secretary General of the East African Community* (case involving recruitment quotas in the EAC), EACJ Ref. No. 5 of 2015 to support the finding that the term 'equitable distribution of benefits' in Article 6(s) denotes a fair and just allotment that seeks to redress apparent imbalances.[58] The court found that the notion of 'equitable distribution of benefits' alludes to the elimination of imbalances that could accrue

55 EAC, Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, ¶ 9 (Feb. 20, 2015), http://repository.eac.int/bitstream/handle/11671/547/COMMUNIQUE%2016TH%20ORDINARY%20EAC%20HEADS%20OF%20STATE%20SUMMIT%2018TH%20FEB%202015-1.pdf?sequence=1&isAllowed=y; *EACJ Gets New Judges and Deputy Principal Judge*, East African Court of Justice (Dec. 4, 2013), http://eacj.org/?p=1754.

56 Armin Von Bogdandy & Ingo Venzke, *On The Functions of International Courts: An Appraisal In Light of Their Burgeoning Public Authority*, 26 Leiden J. Int'l L. 49–72 (2013).

57 The Rule of Interpretation in Article 31 of the VCLT is much more holistic covering aspects of textualism and teleological interpretation.

58 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 68, East African Court of Justice [EACJ] (Mar. 26, 2019).

from the very existence of the EAC that are not necessarily trade-related.[59] The court justifies this position by stating that trade-related provisions are covered under Article 7(1)(a) on 'market-driven cooperation' in the EAC Treaty and Article 77 of the Treaty.[60] This effectively means that the EAC fundamental principles in these provisions cannot be applied in trade or commercial cases. This is a narrow position especially considering that one of the main reasons for EAC integration is economic integration through the creation of equality of trade and commercial opportunities.

G. Violations of the EAC Treaty

i. Violation of Article 7(1)(c) and 80(1)(f) of the EAC Treaty

On the claim of violation of Article 7(1)(c) of the EAC Treaty (principle of the community to achieve the objective of the establishment of an export oriented economy with free movement of goods, persons, labour, services, capital, and information technology) and 80(1)(f) of the EAC Treaty (Partner states to take measures to harmonise and rationalize incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the community as a single investment area), the court found that the gist of these provisions is to impress it upon Partner States to establish an export-oriented economic dispensation in the EAC region and pursue such investment policies as would entrench the EAC as a single investment area.[61] The Court begun answering this issue by affirming the principle of Variable Geometry and Asymmetry encapsulated in Article 7(1) of the EAC Treaty that ensures that economies that were relatively less developed were not swamped by goods from relatively better economies.[62] The Principle of Variable Geometry is encapsulated in Article 7(1)(e) of the EAC Treaty as an operational principle that 'allows for progression in cooperation among groups within the community for wider integration schemes in various fields and at different speeds.' The Principle of Asymmetry is captured in Article 1(1) of the Customs Union Protocol to mean 'the

59 *Id.* at para. 70.
60 *Id.* at paras. 70–71.
61 *Id.* at paras. 72–73.
62 *Id.* at para. 74 (citing Leonard Obura Aloo, *Free Movement of Goods in the EAC, in* East African Community Law: Institutional, Substantive and Comparative EU Aspects 306 [Emmanuel Ugirashebuja, John Eudes Ruhangisa et al., Brill 2017).

principle which addresses variances in the implementation of measures in an economic integration process for purpose of achieving a common objective."[63]

Giving the example of Article 10 and 11(1) of the Customs Union Protocol on progressive elimination of internal tariffs and other charges,[64] the Court found that the provisions on intra-regional trade are anticipated to be progressive, and some instances differential.[65] Additionally, the Court makes reference to section 111(1) of the East African Community Customs Management Act of 2004 that acknowledges the interim tariff in Article 11 above and also provides that "goods originating from the Community shall be accorded Community tariff treatment in accordance with the Rules of Origin provided for under the (Customs Union) Protocol."[66] The Court then, interestingly makes the following observation: "that whereas it is well recognized that Article 11 of the Customs Union Protocol represents a transitional arrangement the import of which should not be legally tenable any more, it is hoped that that is indeed the position in practice in the Community."[67] The Court secondly gives the example of Article 25(1) of the Customs Union Protocol that provides for the establishment of Export Promotion Schemes and Article 25(2)(b) that permits the levying of duties and other charges upon the goods benefiting from export promotion schemes in the event that they are sold within the Partner States.[68] These two provisions according to the Court relate to the promotion of an export-oriented economy as stipulated in Article 7(1)(c) of the Treaty.[69] The Court in this instance found that since both parties to the dispute did not avail any evidence in proof, rebuttal or clarification of the seeming avenues under which the imposition of 'qualified' duties may be permissible under the EAC Community regime, the Court is unable to determine whether in fact the impugned law violates the principles enumerated in Articles 7(1)(c) and 80(1)(f) of the Treaty.[70] The Court thus ruled that the Applicant did not meet the onus of proof for the violation of these provisions.[71]

63 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 74, East African Court of Justice [EACJ] (Mar. 26, 2019).
64 *Id.* at para. 75.
65 *Id.* at para. 74.
66 *Id.* at para. 76.
67 *Id.*
68 *Id.* at paras. 77–78.
69 *Id.* at para. 77.
70 *Id.* at para. 78.
71 *Id.* at para. 79.

ii. Commentary

Since Article 7(1)(c) of the EAC Treaty sets out a principle for establishment in the EAC export-oriented economies and free movement of goods, persons, labour, services, capital, and information technology, and the BAT case deals specifically with differential internal taxation by one Partner State, it is easy to see how the court would have dismissed this claim without entering the issue of the Principle of Variable Geometry and Asymmetry. The Court would thus have avoided this claim much more easily than it did in this instance. This view could also easily apply to the claim on Article 80(1)(f) which is a harmonization obligation for the establishment of a single investment area. Since these issues were not well pleaded and the facts that could help the Court rule on them were not presented, it would have been better for the Court to stir away from making the *obiter* observation that it hopes these provisions are actually being implemented.

iii. Violation of Article 75(1), (4) and of the EAC Treaty

Article 75(1) provides that the Partner States agree to establish a Customs Union, details of which shall be contained in a Customs Union Protocol which shall include the elimination of internal tariffs and other charges of equivalent effect and the elimination of tariff barriers. Article 75(4) provides that effective on a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the community and shall transmit to the Secretariat all information on any tariffs for study for the relevant institutions of the community.[72]

The Court begun here by stating that the primary obligation upon the Partner States in Article 75(1)(b) and (c) is to conclude a Customs Union Protocol that would make provision for the elimination of internal tariffs and other charges of equivalent effect, as well as non-tariff barriers.[73] The Court took judicial notice that a Customs Union Protocol was concluded by the Partner States in 2004 and thus the Court was hard pressed to find a violation of this primary obligation.[74] The Court for this reason disallowed this claim. On the claim of Article 75(4) the Respondent argued that this provision places an obligation upon the Partner States that is conditional upon the Council of Ministers designating a date of which such obligation accrues.[75]

72 *Id.* at para. 80.
73 *Id.* at para. 81.
74 *Id.*
75 *Id.* at para. 82.

The Court found that no evidence was furnished by the Applicant to demonstrate that the Council of Ministers have ever designated such a date of accrual.[76] Thus, the Applicant had not discharged its burden of proof and the claim was dismissed.[77]

iv. Commentary

Article 75(4) of EAC Treaty provides that "With effect from a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Community and shall transmit to the Secretariat all information on any tariffs for study by the relevant institutions of the Community." Despite the fact that the date for the accrual of this provision has not been made, it is unclear whether the taxes referenced here include internal taxes. It is clear that such taxes include tariffs and duties at the border. The EAC Customs Union requires elimination of tariffs and other non-tariff measures at the border but not the elimination of internal taxes. This provision seems to require that Partner States refrain from imposition of new (internal) taxes or increase existing ones in respect to products traded within the Community. It is quite unlikely that the Partner States would limit their internal taxation flexibility *de facto* despite the fact that the EAC Establishment sets out this requirement. This might explain why the Council of Ministers has not set up such a date.

H. Violation of the National Treatment Obligation in the EAC Treaty and the EAC Customs Union Protocol

The Applicant on violation of the national treatment obligation argued that the impugned Act was indicative of Respondent State's perceived disregard for its obligation under Article 75(6) of the EAC Treaty to refrain from enactment of laws or administrative measures that have the effect of discrimination against like products from within the EAC.[78] Additionally, Article 15(1) of the EAC Custom Union Protocol provides that the Partner States shall not: "(a) enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; or (b) impose on each other's products any internal taxation of such nature as to afford indirect protection to other products." Additionally, Article 15(2) adds that "No Partner State shall impose, directly or indirectly, on the products of other Partner States any internal taxation of any kind in excess of that imposed,

76 *Id.*
77 *Id.*
78 *Id.*

directly or indirectly, on similar domestic products." The Court noted that Article 15(1)(a) of the Protocol is identical to Article 75(6) of the Treaty save that the Protocol is couched in conclusively mandatory terms.[79] A reading of these provisions shows that in both, the word 'shall' is used to impose the obligation on the Partner State and therefore both provisions are actually mandatory if the word 'shall' is interpreted as setting a mandatory obligation.

The Court noted that both legal provisions explicitly prohibit the enactment of legislation that has the effect of discriminating against like products originating from other Partner States.[80] The Court construed Article 75(6) of the Treaty and 15(1)(a) of the Customs Union Protocol to delegitimize discrimination not so much attendant on the process of promulgating a law *per se*, but that in respect of the substance and content of the law is ultimately formulated.[81] The Court then dismissed the Applicant's claim on the challenge on the law-making process using the case of *Mangin v Inland Revenue Commissioner*.[82] The reasoning here, according to the Court, is that this case involved the interpretation and application of tax laws to deduce the intention of the law-makers as the incidence of a tax obligation while this case involves the interpretation of treaties which should be done in accordance with the VCLT.[83] Despite this correct, conclusion and finding, the Court stated that for completion it will evaluate the Applicant's argument on the Hansard and thus does not fault the Applicant for citing this as indicative of the Houses' position on the issue of differential tax rates.[84] The Court found that the predisposition of the House sufficiently demonstrates the intent of the Honorable members of Parliament to discriminate against the Applicant's cigarettes.[85]

The Court does not stop there. It admonishes the Ugandan Parliament for being oblivious of Uganda's treaty obligations or the dictates of Community Law as appositely encapsulated in *Burundi Journalists Union v The Attorney General of Burundi*, EACJ Ref No. 7 of 2013.[86] Despite this, the Court found that this parliamentary intention did not provide evidence that the impugned law introduced differential treatment in the

79 *Id.* at para. 84
80 *Id.*
81 *Id.* at para. 85.
82 *Id.*
83 *Id.*
84 *Id.* at para. 86.
85 *Id.* at para. 87.
86 *Id.*

taxation of domestic and imported goods contrary to Article 75(6).[87] This reasoning is based on the fact that a plain reading of section 2 of the impugned law does not establish for a fact that cigarettes from any of the Partner States would be classified as imported goods so as to impute discrimination.[88] The court noted that it is only after the definition of imported goods is read within the ambit of Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol that the discrimination becomes evident.[89] On a plain reading, the law is neither discriminatory nor unlawful.[90] The court emphasized this position using the literal interpretation of tax statutes from *Mangin v Inland Revenue Commissioner* which they had previously dismissed since it was not the statute they were interpreting but the Treaty.[91] It is on the conclusion that the impugned law does not have a provision that succinctly demarcates goods from Partner States as imported goods that the court found that Article 75(6) or Article 15(1)(a) of the Customs Union had not been violated.[92]

I. Commentary

It is important to unbundle Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol in order to understand the Court's position here. These two provisions are general national treatment obligations requiring Partner States to refrain from enacting legislation or applying any administrative measures which directly or indirectly discriminate against the same or like products of other Partner States. For purposes of a rigorous interpretation based on Article 31 of the VCLT, these provisions cover any enacted legislation or applied administrative measures, which directly (on face value) or indirectly (neutral but with disparate effects) discriminate against same or like products of other Partner States. It seems as if the legislation covered under these provisions does not distinguish between internal regulatory legislation and internal taxation legislation like Article III of the General Agreement on Tariff and Trade (GATT) 1994 does. The implication here is that tax legislation can be easily covered under Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol. On the second part of direct versus indirect discrimination, the Court focused on the process of enactment versus the substantive provision of the impugned Act instead of focusing on the substantive provision of the Act and how it

87 *Id.* at para. 88.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.* at para. 89.
92 *Id.*

is applied. By focusing on the process of enactment, they reach the conclusion that the intention of the parties does not matter— rather, the substantive provision of the impugned Act is the focus. However, they ought to have gone further to question the "design, architecture, revealing structure, operation, and application"[93] of the Act as required by applying the administrative measures standard. Looking at the Act more wholesomely and not rigidly as a tax statute and using the *Mangin v Inland Revenue Commissioner* standard of construing tax legislation literally, the Court might have reached a different conclusion on this provision. It is actually curious that the Court rejects the use of *Mangin v Inland Revenue Commissioner* in another instance and uses the same standard in this analysis. Thus, the manner of application and operation of the statute despite being neutral substantively would have easily constituted indirect discrimination in this case.

J. Violation of Article 15(2) of Customs Union Protocol: National treatment in Internal Taxation

Moving on to Article 15(1) (b) & (2) of the EAC Custom Union Protocol, the Court begun by drawing instruction from World Trade Organization (WTO) Law. The Court stated that "Article 1" of GATT provides the most favoured nation (MFN) obligation while "Article 3" provides for the National Treatment obligation.[94] Here, by the Court referring to GATT provisions in Arabic numerals, we see an uncharacteristic application by the Court of the normal practice and usages in international trade law since the GATT 1994 text itself and WTO law and practice, these provisions are normally referred to as Roman numerals.[95] The Court correctly notes that it is the National Treatment obligation that is in question in the case.[96] The Court then cited the Appellate Body decision in *Brazil – Certain Measures concerning Taxation and Charges*, AB report, 2018, p. 29 on the interpretation of Article III:2 first sentence.[97] The Court thus deduced a two-part test from this case: whether the taxed imported and domestic products are 'like' products; and whether the taxes applied to the imported

93 World Trade Organization, Report of the Appellate Body: United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, para. 182 (Apr. 4, 2012) (In analyzing discrimination for purposes of the TBT Agreement, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue.").

94 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 90, East African Court of Justice [EACJ] (Mar. 26, 2019).

95 This might indicate the little exposure that the Court has had with International Trade Law.

96 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 90, East African Court of Justice [EACJ] (Mar. 26, 2019).

97 *Id.* at para. 91.

products are 'in excess' of those applied to like domestic products.[98] The Court then found that Article 15(1)(a) of the Customs Union Protocol and Article 75(6) are acutely similar in form and substance to the provisions of Article III:2 of GATT.[99] Citing *Brazil — Certain Measures concerning Taxation and Charges*, the Court found that the Applicant is required to satisfactorily prove that the implementation of the impugned law resulted in *de jure* tax discrimination: that an overall assessment of the *actual* tax burdens imposed on its cigarettes yields differential and discriminatory treatment vis-à-vis the tax rates applicable to like cigarettes that are locally manufactured in Uganda.[100] The court found evidence that there is actual additional charges in evidence on the same batch of cigarettes.[101] The court does this in lieu of the likeness test analysis. On the 'in excess of' test, the court found a disparity in evidence of excess taxation applicable to like cigarettes that are locally manufactured in Uganda.[102]

It is at this point that the Court pointed out without any analysis that the re-classification of the Applicant's cigarettes as imported was done in absolute oblivion and in disregard for the provisions of Article 15(2) of the Customs Union Protocol.[103] The Court noted correctly that this provision forestalls the imposition of any tax liability on goods from other Partner States that is in excess of the tax imposed on similar or like domestic goods.[104] The Court reached the interesting conclusion that the letter of the impugned law *per se* did not impute an obligation upon URA to apply the differential tax rate to the Applicant's cigarettes.[105] Rather in complete disregard to Community Law, URA seemingly misconstrued its own Excise Duty Act and VAT Act to suggest that goods from EAC Partner States would correspond to the definition of imports.[106] To that extent, the Court found that the URA misapplied Ugandan tax laws, stepped out of its legal purview and the ambit of its legal mandate and thus its attempt to implement the impugned law becomes tantamount to a purely administrative measure or intervention.[107] It is only after calling URA's action an administrative measure that the court found a violation of Article 75(6) of the Treaty

98 *Id.* at para. 92.
99 *Id.* at para. 93.
100 *Id.*
101 *Id.* at paras. 95–96.
102 *Id.* at para. 97.
103 *Id.* at para. 98.
104 *Id.* at para. 98.
105 *Id.*
106 *Id.*
107 *Id.*

and Article 15(1)(a) of the Customs Union Protocol.[108] The Court then also found that the Respondent's interpretation and implementation of section 2 of Excise Duty (Amendment) Act No. 11 of 2017 violates Article 15(2) of the Custom Union Protocol and was flawed and unlawful.

K. Commentary

The Court here makes a number of errors in interpreting the EAC Treaty, the EAC Customs Union Protocol on one hand and the provisions of GATT Article III on the other. The first acute error is to find that: "Article 15(1)(a) of the Customs Union Protocol and Article 75(6) are acutely similar in form and substance to the provisions of "Article 3.2" of GATT."[109] This is a misreading of the form and substance of Article III:2 of GATT. First, in terms of form, unlike Article III:2 of GATT, both Article 75(6) of the EAC Treaty and Article 15(1)(a) do not have an overall anti-protectionism provision similar to Article III:1 of GATT.[110] Secondly, unlike GATT III:2 which is divided into two separate sentences which have legal implications,[111] Article 75(6) of the EAC Treaty and Article 15(1)(a) are all in a single sentence. In terms of substance, while Article III:2 specifically refers to internal taxation, both Article 75(6) of the EAC Treaty and Article 15(1)(a) do not refer to internal taxation. It is in fact Article 15(1)(b) and (2) of the EAC Customs Union Protocol that refer to internal taxation that would have been closer substantively to Article III:2 of GATT. It is thus not possible to distill the two-pronged test the Court distills from the provisions of Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol but it is possible to do the same from the provisions of Article 15(1)(b) and (2) of the EAC Customs Union Protocol. Since the Court mixes up these provisions and equates them to Article III:2 of GATT, it found a violation of Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol in paragraph 99 of the judgment yet they had found non-violation of the same provisions in paragraph

108 *Id.* at para. 99.

109 *Id.* at para. 93.

110 The General Agreement on Tariffs and Trade, Article III:1 (1947) [hereinafter GATT 1947] (The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production).

111 *See* Robert Hudec, *"Like product": The Difference in meaning in GATT Articles I and III", in* Regulatory Barriers and The Principle of Non-Discrimination In World Trade Law 101–23 (Thomas Cottier & Petros Mavroidis eds., University of Michigan Press, 2000).

89 of the judgement. Despite this, the Court also found a violation of Article 15(2) of the Customs Union Protocol in paragraph 99. Curiously, Article 15(1)(b) of the Customs Union Protocol does not feature in the Court's analysis even though it has some similarity to anti-protectionism provision in Article III:1 of GATT and specifically mentions internal taxation which is at the core of the claim in this case.

The interpretation confusion above is further compounded by the Court's manifestly erroneous interpretation of *de jure* versus *de facto* discrimination. The Court in paragraph 93 found as follows: "The Applicant is required to satisfactorily prove that the implementation of the impugned law resulted in *de jure* tax discrimination: that an overall assessment of the *actual* tax burdens imposed on its cigarettes yields differential and discriminatory treatment vis-à-vis the tax rates applicable to like cigarettes that are locally manufactured in Uganda." This is erroneous and in fact what the Court refers to as *de jure* discrimination is *de facto* discrimination. *De jure* discrimination for both MFN and national treatment purposes is said to be discrimination in law, that is when it is clear from reading the text of the law, regulation or policy that it treats products from different [Partner States] differently, while *de facto* discrimination or 'in fact' discrimination occurs when reviewing all facts relating to the application of the measure, it becomes clear that it treats, in practice or in fact, the product from one [Partner State] differently.[112] It is therefore possible to say that direct discrimination equates to *de jure* discrimination while indirect discrimination equates to *de facto* discrimination. Read this way, Article 15(1)(b) and (2) of the Customs Union Protocol would be *lex specialis* law for any national treatment that involves internal taxation. This would thus leave Article 15(1)(a) of the Customs Union Protocol and Article 75(6) of the EAC Treaty to cover any other form of internal regulations more in the style of Article III:4 of GATT 1994. It is possible that if the litigants and judges in the EACJ's First Instance Division in this case were well attuned to the WTO *acquis* and practice, they would have been more rigorous and careful in their analysis of these provisions. This would have easily avoided a conclusion that has internal inconsistencies on the law even though the outcome might have still been similar. As a first case of international trade law and based on the errors above, it might be a prudent recommendation for the judges in the EACJ First Instance Division to go through some substantive training in WTO law.

112 Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization: Texts, Cases and Materials (Cambridge University Press, 4thED. 2017).

L. Violation and Infringement of Article 4, 5, 6 and 32 of the Common Market Protocol

On claim in relation to the Common Market Protocol, the Applicant argued that Article 4 (on widening and deepening cooperation among Partner States and providing the specific objectives of the common market); Article 5 (on elimination of tariff, non-tariff and technical barriers to trade, harmonization and mutual recognition of standards to implement a common trade policy for the community); Article 6 (on the free movement of goods in the Community being governed by the Customs Law of the Community as specified in Article 39 of the Customs Union Protocol); and Article 32 (the Partner States undertaking to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the community) were violated.[113] On the claim in Article 32, the Respondent counteracted by arguing that the invoked provision provides for progressive harmonization of tax policies and laws and the removal of distortions, an undertaking that is 'work in progress' and 'cannot happen overnight.'[114] The Court found that the Applicant had not presented any evidence on the record to show the violation of the progressive realization obligation for tax harmonization and the elimination of tariffs and non-tariff barriers to trade in Article 4(1), (2), (3), and Article 36 of the Common Market Protocol.[115]

The Court also dismissed the Applicant's claims of violation of Article 5(2)(a) on elimination of tariffs and non-tariff and technical barriers since the Applicant did not present any proof that the cooperation between Kenya and Uganda required in this provision had been breached.[116] This finding is premised on the view that this obligation is preconditioned on cooperation between Partner States as prescribed in Articles 2(4) and 5(1) of the Protocol.[117] On the claim in Article 6, which the Court views as the sum collection of the laws applicable to the free movement of goods, the Court found that URA's interpretation and application of Ugandan Tax laws to the exclusion of the Respondent State's obligation under Community Law is misconceived and not legally tenable.[118] The Court reiterated Article 27 of the VCLT that a State's domestic law cannot be invoked as a justification for the failure to perform a treaty

113 *Id.* at para. 101.
114 *Id.* at para. 102.
115 *Id.* at para. 103.
116 *Id.* at para. 104.
117 *Id.*
118 *Id.* at para. 106.

obligation.[119] The Court cited the 2014 World Bank/EAC Secretariat Scorecard to show how institutional barricades are a problem to the EAC integration process.[120] Additionally, the Court points out to Uganda's domestication of the Protocol in its section 3 of the East African Community Act No. 13 of 2002.[121] Since Article 39 of the Custom Union Protocol lists the Community law by dint of Article 6(1) of the Common Market Protocol, it means that any violation of the EAC Treaty, The Common Market Protocol and its Annexes, Regulations and directives made by the Council, Applicable decisions of the Court, Acts of the Community enacted by the Legislative Assembly, and relevant principles of international law would cause of violation of Article 6(1).[122]

M. Commentary

This is another problematic conclusion from the Court. Article 6 seems to be a provision pointing to the sources of EAC Customs Territory Law. Saying that since the Customs Union Protocol and the Treaty have been violated then this provision is violated is circular reasoning since then every time the EAC Treaty is violated then this provision stands violated. It is similar to saying that if a treaty under Article 38 of the International Court of Justice (ICJ) statute is violated, then Article 38 is also violated.[123]

N. Commentary on the Broader "Big Tobacco" Implications of the BAT Case

The BAT case in the EACJ heralds the commencement of tobacco litigation in a sub-regional African international court. The so called "Big tobacco" companies that included BAT and Phillip Morris International (PMI) still see Africa as an important frontier for generating transnational capital-based profits.[124] Sadly, "tobacco use remains the most preventable cause of death worldwide and is responsible for the deaths of approximately half of its long-term users."[125] Additionally, according to the American

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at para. 110.

123 Statute of the International Court of Justice, art. 38, http://www.icj-cij.org/en/statute ("The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part.").

124 Rachel Rose Bath, *Tobacco industry accused of 'intimidation and interference' in Kenya*, The Guardian (Mar. 2, 2015), https://web.archive.org/web/20190325154944/https://www.theguardian.com/sustainable-business/2015/mar/02/tobacco-industry-accused-intimidation-interference-kenya.

125 Evan Blecher & Hana Ross, *Tobacco Use in Africa: Tobacco Control through Prevention*, American Cancer Society (2013), https://pdfs.semanticscholar.org/cdca/3abed84b9cd3ae5cbb8ede-

Cancer Society, the inequalities in tobacco use and tobacco-attributable death in the developed and developing world are likely to get even worse.[126] Between 2002 and 2030, tobacco-attributable deaths are projected to decline by 9% in high income countries (HICs) but are expected to double from 3.4 million to 6.8 million in Low and Middle Income Countries (LMICs).[127] In Kenya for example, BAT controls 70% of the tobacco market in a country with the highest recorded smoking prevalence at 10% of 13 to 15 year old's in sub-Saharan Africa.[128]

Consequently, there has been a number of cases in African domestic courts relating to tobacco regulation and challenging tobacco use. In Uganda, in *BAT Uganda Ltd v. Attorney General, et al*[129] the "BAT filed a lawsuit in the Constitutional Court of Uganda challenging the constitutionality of several key provisions in the Tobacco Control Act, 2015, including, but not limited to, the law's smoking ban, the 65% pictorial health warnings, the prohibition on the sale of electronic cigarettes, the prohibition on privileges and incentives of the tobacco industry, and other WHO FCTC Article 5.3 implementing measures. The Court dismissed the petition in its entirety and awarded costs to the government. The Court found that the Petition appeared to have been misconceived or brought in bad faith as part of a global strategy to fight tobacco control legislation."[130]

In Kenya, the litigation begun in 2016 when in *British American Tobacco Kenya Ltd. v. Ministry of Health*,[131] BAT claimed that Kenya's Tobacco Control Regulations were unconstitutional. The court ruled against BAT finding that the regulation that required the following: a 2% annual contribution by the tobacco industry to help fund tobacco control education, research, and cessation; picture health warnings; ingredient disclosure; smoke-free environments in streets, walkways, verandas adjacent

2188aeddf6bcd8.pdf.

126 *Id.*

127 *Id.*

128 Rachel Rose Bath, *Tobacco industry accused of 'intimidation and interference' in Kenya*, The Guardian (Mar. 2, 2015), https://web.archive.org/web/20190325154944/https://www.theguardian.com/sustainable-business/2015/mar/02/tobacco-industry-accused-intimidation-interference-kenya (Kenya's Tobacco Control Act 2007 took more than 13 years to be passed, largely due to what has been labelled by the Kenya Ministry of Public Health and Sanitation as "intimidation" and "interference" from the tobacco industry).

129 BAT Uganda Ltd v. Attorney General et al., Petition No. 46 of 2016, Constitutional Court of Uganda (May 28, 2019).

130 *See Litigation by Country: Uganda*, Tobacco Control Laws, https://www.tobaccocontrollaws.org/litigation/decisions/ug-20190528-bat-uganda-ltd-v.-attorney-gen

131 British American Tobacco Kenya Ltd. v. Ministry of Health, Petition No. 143 of 2015, High Court of Kenya (Mar. 24, 2016).

to public places; disclosure of annual tobacco sales and other industry disclosures; and regulations limiting interaction between the tobacco industry and public health officials were constitutional.[132] BAT appealed this ruling to the Court of Appeal in 2017 which upheld the High Court ruling. BAT was not satisfied and in 2017 decided to appeal the Court of Appeal ruling to the Supreme Court of Kenya which is the apex court in Kenya. The Supreme Court ruled in 2019 that the tobacco's company appeal had no merit, dismissed the petition in its entirety and affirmed the decision of the Court of Appeal.[133]

In South Africa, the high court ruled amidst (at the time of writing) the ongoing COVID-19 pandemic that the governments ban of sale of all tobacco sales was constitutional.[134] The South African government included the ban of the sale of tobacco on regulations designed to curb the spread of COVID-19 in March 2020. Furthermore, there have been many threats to fight tobacco regulations in domestic courts in other African countries like Namibia, Togo, Gabon, Democratic Republic of Congo, and South Africa.[135]

International Courts have also received many cases instituted by the "Big Tobacco."[136] Sergio Puig has typologized these claims by tobacco companies into four categories: (1) property rights claims (including intellectual property); (2) authority to regulate claims; (3) discrimination claims; and (4) unnecessary obstacles to trade claims.[137] For the property claims, he traces the fairly uncontroversial claims that involved expropriations under the famous Iran-US Claims Tribunal and the less

132 *Id.* (The court struck down a few minor elements of the regulations, ruling that (1) the tobacco industry is not required to provide evidence of its market share to the government; and (2) that penalties for violation cannot exceed the maximums authorized by law.).

133 British American Tobacco Kenya, PLC v. Ministry of Health, et al., Petition No. 5 of 2017, Supreme Court of Kenya (2019).

134 Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 246 (26 June 2020), https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market.

135 Sarah Boseley, *Threats, Bullying, Lawsuits: Tobacco Industry's Dirty War for the African Market*, The Guardian (July 12, 2017), https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market.

136 Sergio Puig, *Tobacco Litigation in International Courts,* 57 Harvard J. Int'l L. 383 (2016) (Listing ten different international courts and tribunals that have dealt with tobacco litigation: the European Court of Justice ("ECJ"), ISDS arbitration tribunals under the International Centre for Settlement of Investment Disputes ("ICSID") and the Permanent Court of Arbitration ("PCA"), the Court of Justice of the European Free Trade Association ("EFTA"), the Eritrea-Ethiopia and the Iran- United States Claims Tribunals, the Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina, or "TJCA") as well as the WTO, tribunals under its predecessor the General Agreement on Tariffs and Trade ("GATT"), and the Southern Common Market (Mercado Común del Sur, or "MERCOSUR")).

137 *Id.*

known Eritrea-Ethiopia Claims Commission (EECC).[138] More controversial cases have been adjudicated under Investor-State Dispute Settlement (ISDS) under the North-American Free Trade Agreement (NAFTA) in *Marvin Feldman v. Mexico*, where US investor lost an expropriation claim against Mexico's attempts to halt exports by resellers that deprived the government of tax revenue (gray market exports).[139] The now controversial Intellectual Property (IP) related claims brought by Phillip Morris (PM) which made trademark violation claims in relation to the use of brands and other symbols with respect to tobacco products against Uruguay's and Australia's[140] packaging and labeling regulations. Australia has prevailed in both the ISDS case and in the WTO case that had been instituted by Cuba, Indonesia, Honduras, and Dominican Republic.[141] Thus both the WTO panels and Appellate Body have confirmed that plain packaging is "apt to, and does, contribute" to Australia's objective of improving public health by reducing tobacco consumption and exposure to tobacco smoke.[142]

On the second types of claims that relate to claims over authority to regulate, the Big Tobacco companies have challenged the authority over tobacco products or related services including the marketing of cigarettes.[143] "These claims have only occurred in nations that have delegated power to a supranational authority to seek deeper policy coordination or in the context of political integration."[144] This second category covers a few claims which mainly come from the EU. The third type of claims relating to discrimination, disparate effects, discriminatory intent, or violation of due process that provide an advantage to tobacco products or tobacco producers cover a large chunk of tobacco litigation. The EACJ BAT Case falls squarely within this category since these claims are covered under Non-discrimination provisions in free trade agreements (FTAs). The cases can also be brought under the fair and equitable treatment provisions in bilateral investment treaties (BITs) in the case of ISDS.

138 *See* Sean D. Murphy, Won Kidane & Thomas R. Snider, Litigating War: Mass Civil Injury and The Eritrea-Ethiopia Claims Commission (Oxford University Press, 2013).

139 Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, (Dec. 16, 2002).

140 Philip Morris Asia v. the Commonwealth of Australia, Notice of Arbitration (Nov. 21, 2011); World Trade Organization, Reports of the Appellate Body: Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R; WT/DS441/AB/R (June 9, 2020).

141 World Trade Organization, Reports of the Appellate Body: Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R; WT/DS441/AB/R (June 9, 2020).

142 *Id.*

143 Sergio Puig, *Tobacco Litigation in International Courts*, 57 Harvard J. Int'l L. 383 (2016).

144 *Id.*

Even though governments can make arguments on the exceptions in some of these agreements that involve the protection of human, animal, or plant, life or health,[145] this is only possible after appropriate balancing on proportionality and effectiveness tests are passed.[146] In the EACJ BAT Case, there was very little discussion on the tensions created between trade liberalization and the public policy goal of protection of health despite Uganda's feeble attempt to invoke the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

In response to the first issue in the BAT Case, The Respondent State referred to its being a signatory to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC).[147] Article 6 of the WHO FCTC recognizes that price and tax measures are effective and important means of reducing Tobacco consumption. Since the Guidelines under Article 6 of the WHO FCTC recognize the sovereign right of (states) parties to determine their own tax policies, but also encourage such taxes and prices as would inhibit tobacco consumption for health reasons, the Respondent State's increase of the excise duty on both locally and imported cigarettes to protect young, vulnerable groups from consumption.[148] Additionally the Respondent argued that the law helped tackle smuggling as per Article 15 of the WHO FCTC. Responding to the discrimination of section 2 of Excise Duty (Amendment) Act No. 11 of 2017, the Respondent argued that the Tax law should be considered on an 'as is' basis and there was nothing in the impugned Act to suggest discrimination as alleged.[149] The Applicant responded to this argument by arguing that a law that treats cigarettes from Kenya differently from cigarettes from Uganda seemingly suggests that cigarettes from Uganda are less harmful to consumers' health than those from Kenya.[150]

The Court dismissed the response by the Respondent in relation to Article 6, Article 15 and the Guidelines to Article 6 of the WHO FCTC by recognizing that Article

145 General Agreement on Tariffs and Trade, art. XX, 61 Stat. A-11, Oct. 30, 1947, 55 U.N.T.S. 194; EAC Customs Union Protocol, art. 22 (a Partner State may, after giving notice to the Secretary general of her intention to do so, introduce or continue to execute restriction or prohibitions affecting: the protection of human life, the environment and natural resources, public safety, public health or public morality; and the protection of animals and plants).

146 Sergio Puig, *Tobacco Litigation in International Courts*, 57 Harvard J. Int'l L. 383 (2016).

147 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 23, East African Court of Justice [EACJ] (Mar. 26, 2019).

148 *Id.* at para. 23.

149 Mangin v Inland Revenue Commissioner, 1 ALL ER 179 (1971), https://www.casemine.com/judgement/uk/5b2897cf2c94e06b9e19b876.

150 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 26, East African Court of Justice [EACJ] (Mar. 26, 2019).

15 of the WHO FCTC acknowledges a nation states' sovereign right to develop and implement national laws in addition to sub-regional, regional, or global agreements to which they are party.[151] The Court concluded that since the EAC Treaty is undoubtedly one such Treaty, the obligations accruing from it must be observed by each EAC Partner State.[152]

The Court here interestingly ignores BAT's argument that Uganda was using the WHO FCTC as a fig leaf since it was not treating other Ugandan tobacco produces similarly. The argument sounds similar to the GATT Article XX *chapeau* argument that the state was using the measure [impugned Act or its implementation] as an arbitrary or unjustifiable discrimination between countries where similar conditions prevail or disguised restriction for international trade.[153] Instead the Court uses a general curve out provision from the WHO FCTC itself to dismiss Uganda's defense. This is a weaker route for dismissing Uganda's public health claim because it means that trade liberalization goals will always or easily prevail over public health concerns like those present in the WHO FCTC. It is easy to see that the Court does not take the WHO FCTC defenses seriously, but it is also possible that Uganda did not plead them as vigorously. Even if they had, the case shows in the Ugandan Hansard that some legislators in Uganda were not happy that BAT Uganda had moved its manufacturing from Uganda to Kenya.[154] So there is a high probability that they would have lost the case on disguised protectionism.

O. Conclusion

The BAT Case fits the narrative of the aggressive and litigious "Big Tobacco" companies global strategy of resistance through litigation of any form of government regulations related to tobacco use and consumption. BAT has triggered the EACJ's trade jurisdiction and the EACJ Court of First Instance has rendered its inaugural trade case. This commentary has delved deep into the various issues addressed in the case and made a commentary of some doctrines that the EACJ had already confirmed previously and some that are new. The broad jurisdiction of the Court is not new since the human rights cases in the court have already firmly established this trend. It is the first time,

151 *Id.* at paras. 45–47.

152 *Id.* at paras. 45, 46, & 47.

153 General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

154 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, paras. 58–59, East African Court of Justice [EACJ] (Mar. 26, 2019).

however, that the Court addresses the trade liberalization aspects of the EAC Customs Union Protocol and the EAC Common Market Protocol and makes a specific ruling on the national treatment obligation in the EAC Treaty and the EAC Customs Union Protocol. The judges in a number of instances seemed to struggle with international trade law concepts and made erroneous interpretations and applications stated in some instances. It is important to note that these errors would not have changed the outcome of this case, but for purposes of legal rigor and accuracy, the judges and potential litigants in the court would benefit from more training in the law, substance and practice of international trade. The judges' writing on and interpretation of WTO law specifically and international trade law generally comes out as insufficient and in need of concerted capacity building for future purposes. This is important because at the time of writing, a Tanzanian glass manufacturer Kioo Company Limited has sued the Kenya Revenue Authority (KRA) in the EACJ over the introduction of a 25% excise duty on imported glass from Tanzania.[155] It therefore seems that the "Big Tobacco" industry has now emboldened another industry to present another case that bears very close similarities to the BAT Case. If this is an indication of future trajectory, then the Big Tobacco industry will see the regional economic courts as an additional avenue to continue with their relentless litigation on tobacco regulation. Other industries and business actors will also now see the BAT win as an indicator that the court will play an important role in dealing with any EAC Partner States violation of the trade liberalization obligations of the EAC Community law. The EACJ therefore needs to be prepared to apply its broad jurisdiction in a way that shows the judges and potential litigants have a real appreciation, understanding and commitment to international trade law that is both persuasive, balanced, and relevant for the EAC Community. If the BAT Case is anything to go by, one of the biggest lessons we draw from the case is that the EACJ, at least the First Instance Division, is not yet fully prepared to effectively adjudicate on international trade/commercial law cases.

II. COMMENTARY ON *GETMA INTERNATIONAL V. REPUBLIC OF GUINEA* (I) CCJA CASE NO. 001/2011/ARB (OHADA COMMON COURT OF JUSTICE AND ARBITRATION'S (OHADA CCJA)

155 Kioo Limited v Attorney General of the Republic of Kenya, Reference No. 13 of 2020, East African Court of Justice [EACJ]; *See* Luke Anami, *Tanzanian Glass Company takes KRA to Court over a 25% Import Tax*, The East African (June 7, 2020), https://www.theeastafrican.co.ke/business/Tanzanian-glass-company-takes-KRA-to-court/2560-5572644-g0engkz/index.html.

A. Introduction

The OHADA Common Court of Justice and Arbitration (OHADA CCJA) like other African international courts is neither well known nor its jurisprudence well appreciated by many scholars both in the global South[156] and in the global North.[157] Embedded in a supranational legal system of an innovative kind for Africa, the OHADA CCJA "functions as a supranational Supreme (or Cassation) court tasked with ensuring the common interpretation and application of OHADA laws."[158] For this reason, it is important to offer a general introduction of this court which has been one of the most active international courts in Africa having heard over 500 cases since its formation in 1998. The case under review, *GETMA International v. Republic of Guinea* (I) CCJA CASE NO. 001/2011/ARB (GETMA case) is one of the most publicized and controversial decisions of the OHADA CCJA that emanates from both an OHADA administered arbitral tribunal and the court's supervisory jurisdiction over arbitration. The notoriety of the decision is tied mainly to the actions of the arbitrators in the case and not the substantive decision itself. Additionally, the decision gained further attention after the OHADA CCJA decided to annul the OHADA administered arbitral award and a US Federal District Court in the District of Columbia refused to allow recognition and enforcement based on OHADA CCJA's annulment. This commentary will address both the substance of the arbitral case which is an investor-state dispute settlement (ISDS) case and its tumultuous aftermath. First, a general introduction to the OHADA CCJA.

156 For a notable exception, see James T. Gathii, *The Under-Appreciated Jurisprudence of African Regional Trade Judiciaries*, 12 Or. Rev. Int'l L. 245 (2010) (showing how African Regional Trade Agreements (RTAs) judiciaries have received little acknowledgement in the academic literature).

157 *See* Robert Howse & Héléne Ruiz-Fabri et al., The Legitimacy of International Trade Courts and Tribunals (Cambridge, 2018) (Lacking a chapter on OHADA but including WAEMU and COMESA Court of Justice). For notable exceptions, see Karen J Alter, The New Terrain of International Law: Courts, Politics, Rights 335–43 (Princeton Univ. Press, 2014) (covering the OHADA CCJA but stating that to her knowledge arbitration mandate of the OHADA CCJA is not used); Claire Moore Dickerson, *OHADA Common court of Justice and Arbitration: Its Authority in the formal and Informal Economy, in* International Court Authority (Karen J. Alter, Laurence R. Helfer, Miakel Rask Madsen eds., Oxford University Press, 2018); James T. Gathii & Harrison O. Mbori, *Chapter Eight: Reference Guide to Africa's International Courts: An Introduction*, *in* The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change (James T. Gathii ed., Oxford University Press, forthcoming 2020).

158 *20 years of OHADA Arbitration: Coming of age for Arbitration in Africa*, Ashurst (Oct. 16, 2019), https://www.ashurst.com/en/news-and-insights/legal-updates/20-years-of-ohada-arbitration---coming-of-age-for-arbitration-in-africa/.

Sixteen mainly francophone West Africa states signed the treaty on the Harmonization of Business Law in Africa (OHADA treaty) on 17 October 1993 in Port Louis, Mauritius.[159] The acronym OHADA translates to its French title, *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*. The organization currently has seventeen members after the Democratic Republic of Congo (DRC) joined in 2012.[160] This means that OHADA currently has seventeen member states mainly within the CFA Franc zone[161] and are thus largely civil law-based francophone countries.[162] The OHADA treaty is, however, open to membership by any State of the African Union (AU).[163] OHADA connects countries in both the West African Economic and Monetary Union (WAEMU), which mainly covers the West Africa CFA Franc zone and the Central African Economic, and Monetary Community (CEMAC) covering the Central African CFA Franc zone. It is the West African CFA Franc Zone that has recently announced the change of name of its currency from the CFA Franc to the Eco.[164] The first sixteen members revised the OHADA treaty in Quebec, Canada on 17 October 2008. One of the amendments to the OHADA treaty increased the official languages of OHADA from one, French, to four: French, English, Spanish, and Portuguese.[165] The OHADA treaty establishes the Organization for the Harmonization of Business Law in Africa (OHADA),[166] with the objective of harmonizing business law in State Parties by developing and adopting simple, modern, and common rules, adapted to their economies, setting

159 Preamble, Treaty on the Harmonization of Business Law in Africa, Organization for the Harmonization of Business Law in Africa (Nov. 24, 2016), http://www.ohada.com/content/newsletters/3247/jo-ohada-se-nov2016-official-translation.pdf (The sixteen members were Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Brazzaville), Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, & Togo.) [hereinafter Treaty on the Harmonization in Africa of Business Law, Official Translation].

160 *OHADA History: Table of Ratifications*, OHADA, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique (accessed on Feb 12, 2020).

161 These countries use the CFA franc as their currency and are former French colonies within a colonially established monetary cooperation policy created in the late 1930s.

162 All members are Francophone except Cameroon (bilingual English-French and English common law applies), Equatorial Guinea (Spanish), and Guinea-Bissau (Portuguese).

163 Article 53, Treaty on the Harmonization in Africa of Business Law, Official Translation.

164 Ange Aboa, *West Africa renames CFA Franc but keeps it pegged to Euro*, Reuters (Dec 21, 2019),https://www.reuters.com/Article/us-ivorycoast-france-macron/west-africa-re-names-cfa-franc-but-keeps-it-pegged-to-euro-idUSKBN1YP0JR#:~:text=ABIDJAN%20(Reuters)%20-%20West%20Africa's,creation%20soon%20World%20War%20Two.

165 *Id.* art. 42.

166 *Id.* art. 3.

up appropriate judicial procedures, and encouraging recourse to arbitration for the settlement of contractual disputes.[167]

The OHADA treaty establishes four organs: the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration (OHADA CCJA), and the Permanent Secretariat.[168] The treaty also declares the headquarters or official seat of OHADA to be Yaoundé, Cameroon and that this location is transferable by the decision of the Conference of Heads of State.[169] The OHADA CCJA as a separate organ has its seat in Abijan, Côte d'Ivoire, though the court can rove in the territories of any of the seventeen members and in recent years has held sessions in several member states.[170] OHADA harmonizes business laws among its State Parties through the enactment and adoption of Uniform Acts (UAs).[171] It currently has nine Uniform Acts that override national legislation in areas including general commercial law, law of commercial companies and of economic interest grouping, law of sureties, law of cooperative societies, arbitration, and mediation.[172] The OHADA CCJA is thus established as an organ of this *de-novo* and innovative supranational regionally binding law-making system.[173]

The OHADA CCJA has four types of jurisdiction: interpretive and dispute settlement jurisdiction in contentious cases; advisory jurisdiction, appellate jurisdiction from national courts, and supervisory jurisdiction over OHADA administered arbitrations. First, the OHADA CCJA has the jurisdiction of verifying OHADA draft Uniform Acts (UAs) and issuing opinions to the other OHADA organs.[174] Second, it has advisory jurisdiction over consultations or questions presented by any State Party or the Council of Ministers on any questions within the scope of the OHADA treaty, regulations, UAs, or other decisions.[175] Third, the OHADA CCJA has appellate jurisdiction to receive appeals from the national appellate courts of State Parties on all matters

167 *Id.* art. 1.
168 *Id.* art. 3.
169 *Id.* art. 3.
170 *Presentation of the CCJA*, OHADA, https://www.ohada.org/index.php/fr/cour-commune-de-justice-et-d-arbitrage-ccja/ccja-en-bref (accessed Jul 17, 2020).
171 *Id.* art. 4.
172 *OHADA History,* OHADA, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique (accessed Feb. 12, 2020).
173 *See* Regis Y. Simo, *Regional Integration in Africa through Harmonization of Laws, in* Regional Integration and Policy Challenges in Africa 118 (Adam B. Elharaika, Allan C.K Mukungu & Wanjiku Nyoike eds., Palgrave Macmillan 2015).
174 Article 7, Treaty on the Harmonization in Africa of Business Law, Official translation.
175 *Id.*

over the application of the UAs, regulations, except those decisions administering criminal sanctions. Finally and importantly for the GETMA decision, the OHADA CCJA supervises both inter-state arbitration and investor-state OHADA administered disputes.[176] The OHADA CCJA can also exercise its appellate jurisdiction on decisions from national courts, which are not appealable to their national court of appeal.[177] The court has compulsory jurisdiction and acts as the apex judicial entity on OHADA law.

The OHADA system can administer two types of arbitrations: a OHADA CCJA administered arbitration and a Uniform Act arbitration. Under a OHADA CCJA arbitration, the CCJA operates as the administering body and is subject to OHADA CCJA Arbitration rules.[178] In such cases, the CCJA has a dual role where it functions both as an arbitral institution and as a supervising court.[179] Its role as an arbitral institution entails stipulation of the applicable procedural rules and playing an administrative role.[180] As a supervisory court, it has authority to hear and deal with applications to annul an award rendered under a CCJA Arbitration.[181] OHADA CCJA acts as an arbitration centre or institution for arbitrations invoked pursuant to an arbitration clause in a contract or by agreement. In a Uniform Act arbitration, the court can assume arbitral jurisdiction where any of the parties is domiciled or has his usual place of residence in the territory of a State Party, or where the contract is performed or will be performed wholly or partly in the territory of one or more State Parties.[182] It is not the OHADA CCJA itself that hears the arbitration in both instances but rather the court appoints or confirms arbitrators who then keep the court informed of the progress of the proceedings and submit the draft award to the court for approval in conformity with Article 24 of the treaty.[183] The court acts as an appointing authority where the parties fail to agree on a slate of arbitrators within a period of thirty days, or where the parties fail to agree on a sole arbitrator.[184] The treaty mandates also empowers the court to approve the arbitrators the parties choose.[185] The court selects arbitrators from a list of arbitrators updated annually and also finally decides any

176 Articles 2 & 3, OHADA Uniform Act on Arbitration (2017).
177 *Id.*
178 Kwadwo Sarkodie & Joseph Otoo, *GETMA v Republic of Guinea – implications for African arbitration*, 33 Arbitration Int'l 167, 168 (2017).
179 *Id.*
180 *Id.*
181 *Id.*
182 Article 21, Treaty on the Harmonization in Africa of Business Law, Official translation.
183 *Id.* art. 21.
184 *Id.* art. 22.
185 *Id.* art. 22.

challenge of appointment of arbitrator made by a party to a dispute.[186] The treaty also empowers the court to verify the form of arbitral awards before the arbitral tribunal.

B. Facts and Procedural History

The parties to the dispute were GETMA International, a company registered in the Register of Commerce and Companies RCS of Paris, France as Claimant and the Republic of Guinea as the respondent.[187] The arbitral tribunal was made up of Juan Antonio Cremades, Spanish appointed by the Claimant, Eric Teynier, French appointed by the Respondent, and Professor Ibrahim Fadlallah, French/Lebanese appointed jointly by the co-arbitrators.[188] The OHADA CCJA affirmed the appointment of the three arbitrators between November 2011 and January 2012 in accordance with Articles 2 and 3 of the Arbitration Rules of the OHADA CCJA.[189]

The dispute emerged from the termination of a "Concession agreement for the Container Terminal of the Port of Conkary, its expansion and the development of a railway station" (the Concession Agreement) signed by the Republic of Guinea and GETMA International on September 22, 2008.[190] The process begun in February 13, 2008 when the council of Ministers of the Republic of Guinea decided to launch a call for bids for "work item No. 1 pertaining to the expansion of the Container Terminal."[191] The call for bids was intended "exclusively for candidates with lengthy and solid experience in designing, financing, building, operating and maintaining container terminals."[192] GETMA International applied for the bid and on April 7, 2008 the General Manager of the Autonomous Port of Conkary (Société Nationale du Port Autonome de Conakry) informed GETMA International that it had been short-listed.[193] Three other companies were also short listed: Africa Marine (group Maritime TCB), Bolloré Group, and Maersk (APM terminal).[194]

The bid opening was done on July 31, 2008 in the presence of the bidders, the National Commission for Major Supply Contracts represented by various ministers

186 *Id.* art. 22.
187 GETMA International v. Republic of Guinea (I), Case No. 001/2011/ARB, para. 1 & 2, Award, Common Court of Justice and Arbitration of OHADA [CCJA] (Apr. 29, 2014).
188 *Id.* at para. 3.
189 *Id.*
190 *Id.* at para. 4.
191 *Id.* at para. 27.
192 *Id.*
193 *Id.* at para. 29.
194 *Id.*

and administrations., and two members from the Autonomous Port of Conkary.[195] The National Commission for Major Supply Contracts selected GETMA International as provisional successful bidder.[196] After negotiations between the parties, the Concession Agreement was signed on September 22, 2008.[197] The Concession in Article 7 stipulated that an operating company for the Container Terminal was to be set up in Guinea and controlled by GETMA International for a period of at least fifteen (15) years.[198]

Consequently, and even before the agreement took effect, GETMA's selection and contents of the Agreement were subject to sharp criticism in the press, reports, and internal Government.[199] In the political front, on December 22, 2008 the President of the Republic of Guinea Mr. Lansana Conte died and the next day the government and constitution were suspended.[200] A National Council for Democracy and Development was established by the members of the Army and on December 24, 2008 Captain Moussa Dadis Camara was named President.[201] After communication between the various government departments including the President, the Agreement was amended on November 7, 2009 adjusting the time frames stipulated in the agreement.[202] In December 2009, another political change occurred after an assignation attempt on Moussa Dadis Camara.[203] He was replaced as President by General Sekoub Konate who organized presidential elections that led to the election of Professor Alpha Condé as President in December 2010.[204] From January 4, 2011 the new Minister of Transport summoned the concessionary with intentions of reviewing the Agreement.[205]

Eventually the new President of Guinea Prof Alpha Condé by decree issued on March 8, 2011 terminated the concession "for failure by the Concessionary to fulfill its obligations" with Concession being awarded to the Bolloré Group with immediate effect.[206] On March 18, 2011, GETMA received official notification of the termination and requisition decrees.[207] It sent the Minister of Public Works and Transportation

195 *Id.*
196 *Id.* at para. 30.
197 *Id.*
198 *Id.* at paras. 31 & 40.
199 *Id.* at para. 33.
200 *Id.* at para. 34.
201 *Id.*
202 *Id.* at paras. 34–36.
203 *Id.* at para. 37.
204 *Id.*
205 *Id.*
206 *Id.* at paras. 4 & 38.
207 *Id.* at para. 5.

a notice of protection served on March 22, 2011.[208] GETMA attempted to reach amicable settlement and stated that this failed.[209] It therefore resorted to arbitration and filed its request with the OHADA CCJA on May 10, 2011. Concurrently, on September 29, 2011, GETMA International and its Group NCT NECOTRANS, filed a request for arbitration against the Republic of Guinea with International Centre for Settlement of Investment Disputes (ICSID).[210] By award concerning competence of the OHADA CCJA tribunal dated December 29, 2012, the arbitral tribunal decided:

1. This tribunal is not competent to rule on the effects of the termination of the Concession Agreement with regard to the four Claimants.
2. This tribunal is competent to rule on the effects of the requisition and other alleged violations of the Investment Code that do not come within the framework of the Concession Agreement with regard to the four Claimants.

Article 31 of the Concession Agreement contained the Arbitration Agreement provided as follows:

> "This clause will survive the termination of the agreement.
>
> The OHADA treaty and its subsequent uniform acts apply to this agreement. All disputes or differences arising from this agreement or its amendments will be settled amicably.
>
> If no amicable settlement can be reached within three (3) months following the dispute, the Parties may resort to arbitration in the manner stipulated below:
>
> - The claim, dispute or difference will be permanently and irrevocably settled through arbitration proceedings subject to the Arbitration Rules of the Common Court of Justice and Arbitration of the OHADA ("The CCJA Arbitration Rules").
> - The arbitration commission will be made up of three (3) arbitrators, one appointed by the Grantor, the second by the Concessionary and the third by mutual agreement of the two arbitrators. If a Party does not appoint an arbitrator within thirty (30) days of receipt of a request to do so from the other Party, or if the two arbitrators cannot agree on the selection of the third arbitrator within thirty (30) days (of the appointment of the last

208 *Id.*
209 *Id.* at para. 42.
210 *Id.* at para. 43.

arbitrator to be appointed), the Common Court of Justice and Arbitration will substitute for the Parties in accordance with the CCCA arbitration rules.

- Each of the Parties will bear the cost of the arbitrator it appoints. The other costs incurred for arbitration will be shared equally by the Parties.

The arbitration will be conducted in French in Abidjan, Republic of Côte d'Ivoire.

> The Granting Authority expressly waives claiming any sovereign immunity for itself and for its property in order to evade the enforcement of an award rendered by an arbitration commission set up in accordance with this clause."[211]

The Claimant submitted a request for arbitration to the secretariat of the OHADA CCJA on May 10, 2011 and the Respondent despite not answering the request for arbitration, appointed Eric Teynier as its party chosen arbitrator on December 1, 2011.[212] The first hearing was held on March 12, 2012 in Paris.[213] The report of this first meeting confirmed that the arbitration is governed by the provisions of title IV of the OHADA treaty, the Rules of Procedure of the Court and its annexes and also contains the parties' claims and requests.[214] Additionally, the report confirmed that the seat of arbitration would be Abidjan, Republic of Côte d'Ivoire, but states that hearings and meetings may be held in any location that the arbitral tribunal deems advisable, that the language of arbitration would be French, that the law applicable to the Concession Agreement is the OHADA Treaty and its subsequent Uniform Acts (UAs), as well as regulations and agreements in force in the Republic of Guinea.[215]

The Claimant and Respondent after this submitted their documents including statements of claims, statement of replies, rejoinders, counterclaims, letters, and exhibits starting from June 18, 2012 to December 27, 2012.[216] The discovery of documents took place from December to June 2013.[217] During the proceeding, the Claimant also sent a copy of an award concerning the competence of the arbitral tribunal formed under the authority of the International Centre for the Settlement of Investment Disputes (ICSID) dated December 29, 2012 as exhibit.[218] The tribunal then issued the following eight procedural orders covering mainly rulings and decisions of production

211 *Id.* at para. 5.
212 *Id.* at paras. 6–7.
213 *Id.* at para. 11.
214 *Id.* at para. 12.
215 *Id.*
216 *Id.* at paras. 13–14.
217 *Id.* at para. 15.
218 *Id.* at para. 16.

of documents and exhibits including on the authority of the ICSID arbitral tribunal. The tribunal then held hearings for the witnesses and expert witnesses in Paris on May 27, 28, and 29, 2013.[219]

A penultimate hearing was held on July 8, 2013 where the Parties' counsel presented their arguments and a final hearing was held on December 16, 2013.[220] By procedural order 11 of January 8, 2014 the tribunal decided to reserve its decision on the Respondent's request to obtain a 4-month period to gather evidence of the corruption it had alleged. By this order the tribunal also declared the proceedings closed pursuant to Article 15.4 of OHADA CCJA Arbitration Rules.[221] Despite the Respondent's complaining of the close of proceedings, the tribunal pursuant to Article 23 of the OHADA CCJA Arbitration Rules, sent a draft of the final award to the General Secretariat of the CCJA on January 13, 2014.[222] GETMA International had made the following request for reliefs:

(a) Decide and rule that the termination of the Concession Agreement by the President of the Republic of Guinea is illegal and null and void;
(b) Find that, because of the new Concession Agreement granted on March 11, 2011 to Bolloré Group, or to any other company of the Bolloré group, a return to the "status quo ante bellum" is now impossible:
(c) Dismiss the counterclaim of the Republic of Guinea.
(d) Order the Respondent to compensate the Concessionary for the damages suffered as a result of the termination of the Concession Agreement, and order it to pay the sum of €42,005,221 broken down as follows:
    a. Lump-sum Termination Compensation
    €20,884,966
    b. Termination compensation (relative to the Property Granted)
    €3,616,394
    c. Compensation for the Entrance Fee
    €14,201,096
    d. Compensation for repatriated employees
    €172,874
    e. Compensation relating to invoices to be issued
    €589,418

219 *Id.* at para. 23.
220 *Id.* at para. 24.
221 *Id.*
222 *Id.*

f. Compensation relating to the property returned €2,095,790

g. Compensation relating to the contracts not terminated €185,849

h. Compensation relating to crisis management expenses €258,834

All with interest compounded annually at the Central European Bank rate plus one point as of March 9, 2011;

(e) Award to the Respondent all expenses, costs and professional fees, particularly attorneys' fees and other advisors' fees borne by the Claimant for the Arbitration proceedings."[223]

The Republic of Guinea on the other hand requested the tribunal to:

> "Find and rule the immediate and uncompensated termination of the Concession Agreement for the Container Terminal of the Port of Conakry and of its Amendment No. 1 regular and justified; Dismiss all of the requests made by GETMA International against the Republic of Guinea; Order GETMA International to assume all costs of these arbitration proceedings, including attorneys' fees and all other expenses incurred by the Republic of Guinea for the needs of its defense."[224]

C. The OHADA CCJA administered Arbitral Award

GETMA International asserted that the "failures to fulfill the concessionary's obligations" referenced by the decree terminating the Concession Agreement are merely a pretext for the decision of the President of the Republic to award the concession to a "friend."[225] Additionally, GETMA argued that the termination Decree was a legal act imposed on it with immediate effect and without any possible return to prior *status quo* because of the signing of the contract with a new concessionary.[226] GETMA thus applied the provisions of Article 32.5 of the Agreement relative to "Changes of Law and Acts of Public Authority impeding the smooth operation of the Activities Granted."[227] It proceeded with a Preliminary Notification of Change of

223 *Id.* at para. 56.
224 *Id.* at para. 57.
225 *Id.* at para. 59.
226 *Id.*
227 *Id.*

Law, to which the respondent did not respond, and with a final notification after 60 days.[228] Therefore, GETMA argued that Article 32.5 for the Concession Agreement required compensation in case of termination resulting from a change of Law and Acts of Public Authority that impede the smooth operation of the Activities Granted.[229] GETMA thus requested for the compensation as required under Article 32.3 in case of the violation of Article 32.5 or a minimization of the effects of the Change of Law of the Acts of the Public of Authority.[230]

In response to these arguments, the Republic of Guinea justified its immediate termination of the Agreement on the seriousness of GETMA's behavior.[231] The State argued that in the bidding stage, GETMA allegedly deliberately invoked a false partnership with Mediterranean Shipping Company (MSC) and Europe Terminal and provided inaccurate financial information about its financial capabilities and the profitability of the project to favour its chances of being selected as the successful bidder.[232] Additionally, the State argued that GETMA at the time of Amendment of the Concession Agreement in 2009 refrained from indicating its ability to raise the financing and thus the bidding procedure was manipulated.[233] Thus the Respondent State argued that GETMA's tactics constitute fraud, and since GETMA was unable to finance the expansion of the container Terminal due to the lack of MSC's support, it failed to fulfill its investment obligations and delayed the expansion work for the terminal.[234] This seriousness of GETMA's behaviour justified the termination of the Concession Agreement without prior notification.[235] According to the tribunal, the Republic of Guinea cited corruption in view of obtaining the Concession from the start of the proceedings and returned to this argument in 2013 when it requested for extra time to produce proof of the corruption invoked.[236] In the alternative, the Respondent State contested the principle and/or amount of the damages for which GETMA was requesting reparation.[237]

Accordingly, the Tribunal ruled that it had to decide on five specific areas:

228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.* at para. 60.
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 *Id.*

1. The Corruption allegation
2. The Applicable Law
3. The Validity of the Termination Agreement
4. The Right to Compensation
5. The amount for Relief

i. Corruption

The tribunal dismissed the allegation on corruption as unverifiable on the ground that the evidence presented by one Mr. Steven Fox was not direct or indirectly witnessed.[238] The tribunal found that he referred to unreported statements from witnesses, which he characterized as direct or indirect and whose identity he refused to reveal and he also refused to refer to any documents.[239] Additionally, the witness did not directly challenge GETMA and does not make any references to any account it held that was used to make illegal payments.[240]

ii. Applicable Law

On applicable law, despite the parties having accepted the applicable law to be in accordance with Article 31(2) of the Concession Agreement, that is the OHADA treaty and its subsequent Uniform Acts (UAs), the claimant introduced a different argument all together.[241] The Claimant argued that the Concession Agreement at issue is an internationalized State contract whose termination cannot be governed by internal Guinean law.[242] GETMA relied on the opinion of Professor Mathia Audit for this view and also cited in support a resolution of the International Law Institute (ILI) (Athens, 1979; Rev. crit. DIP 1980.427) which states that, if such is their desire, the parties to a State contract may decide to exclude it from the exclusive application of a determined internal law, particularly for problems of contractual liability raised by the exercise by the State of its sovereign powers against a commitment that it made toward the co- contractor.[243] Additionally this view is premised on the idea that the express reference of the Agreement to the OHADA Treaty, coming under public international law, the wording of the choice of law clause gives precedence to the stipulations of the Agreement and relates Guinean law to a subsidiary role, and

238 *Id.* at para. 70.
239 *Id.*
240 *Id.*
241 *Id.* at para. 84.
242 *Id.* at para. 85.
243 *Id.*

above all, the Article 32.5 of the Agreement, which subjects the exercise of the State's normative power to compensation.[244] Accordingly, the Claimant argued that the Parties agreed to apply the contractual stipulations and the principles of international law including the principle of good faith and the principle of "*venire contra factuum proprium.*" (To come against one's own fact (is not allowed)).[245] Here the claimant cited international investment scholarship from C. McLachlan, L. Shore, M. Weininger, R. Dolzer and C. Schreuer, E. Gaillard and ICSID case law *Ioannis Kardassopoulos v. Georgia*, *SPP v. Egypt*, *Innaris v. Ukraine*, *Desert Line Project v. Yemen*, *Fraport v. Philippines*.[246]

The Republic of Guinea on the other hand claimed that Article 17 of the OHADA CCJA Arbitration Rules establishes the autonomy of the Parties concerning the determination of the law applicable to the merits of the dispute.[247] This was accordingly specified in Article 3 of the Agreement, which stipulates that the OHADA Treaty and its subsequent Uniform Acts apply and in Article 5 of the specifications, which subject the concession "to the laws, regulations and agreements in force in the Republic of Guinea."[248] This position, the Respondent argued is also reiterated in the arbitration agreement (this is the report made when the arbitral process had begun) of March 12, 2012.[249] Additionally, the Respondent State argued that GETMA did not indicate any reservations concerning the designation of the applicable law when the agreement was signed.[250] Thus using the same ILI Resolution cited by Claimant, the Respondent stressed that the Parties are subject to the rules of law that they chose and may, in this regard, designate in the contract.[251] The Resolution mentions the possibilities of choice: "either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law."[252] This means that since the Arbitration Agreement do not refer to the principles of international law, GETMA cannot ignore the law expressly formulated which is Guinean law.[253]

244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.* at para. 87.
248 *Id.*
249 *Id.*
250 *Id.*
251 *Id.*
252 *Id.*
253 *Id.*

They also rebutted the view that reference to the OHADA Treaty is reference to international law arguing that the reference to the OHADA Treaty does not exclude Guinean law.[254] According to the Respondent, the OHADA Uniform Acts are, in reality, directly incorporated into the internal law (Art. 10 of the OHADA Treaty) in the limited domain of business law and this is not a complete system of standards that could be substituted for Guinean law or internationalize the contract.[255]

The arbitral tribunal held that the stipulations in Article 31 and Article 5 of the Concession Agreement clearly referenced Guinean law.[256] It additionally held that this covers the OHADA Uniform Acts that constitute pieces of uniform legislation incorporated in the internal law of the OHADA member states, or "the laws, regulations and agreements in force in the Republic of Guinea" and no other legislation, no other normative system is mentioned.[257] The tribunal also rejected GETMA's view that the wording of Article 5 relegates Guinean law to a subsidiary position and that this would open the door to the priority application of principles governing State contracts.[258] The tribunal thus correctly found that the Concession Agreement is subject to the laws, regulations and Agreements of the Republic of Guinea.[259]

iii. The Validity of the Termination Agreement

The Claimant's claim here was that Professor Alpha Condé the newly elected President of the Republic of Guinea in 2010 had personally decided to reconsider the Concession Agreement in order to award it to the companies of his friend Vincent Bolloré who had supported him financially during his opposition years, and during the election campaign.[260] The Claimant referenced a France 24 interview in which the President had told friends that had supported him that he would cancel the Agreement.[261] The Claimant thus argued that this termination that was done without any notification was illegal.[262] It characterizes the termination as a change of law and act of public authority impeding the smooth operation of the granted activities in Article 32.5 of

254 *Id.*
255 *Id.*
256 *Id.* at para. 91.
257 *Id.*
258 *Id.*
259 *Id.*
260 *Id.* at para. 96.
261 *Id.* at para. 97.
262 *Id.*

the Concession Agreement which entitles it to the compensation set forth in Article 32.4 of the Concession Agreement.[263]

The Respondent State responded to this argument by citing the seriousness of GETMA's behavior when the Concession Agreement was signed and then throughout its performance.[264] They first respond by accusing GETMA of fraud for claiming to have entered into a partnership with Mediterranean Shipping Company (MSC), one of the world leaders in maritime transport, for the performance of the Concession Agreement.[265] Second, the Respondent State states that GETMA supplied false financial information in its bid stating an anticipated 100 million Euros yet the anticipated funding amounted only to 20 million Euros through equity capital.[266] Third, the Respondent State argues that the involvement of the German firm of Inros Lackener in the capacity of Consultant of the Bid Evaluation was made for the benefit of GETMA and constituted manipulation of the bid.[267] Fourth, still with regard to fraudulent acts, the Respondent claimed that GETMA renewed its commitment to make investments in full knowledge of its inability to finance them, given the Group's indebtedness, its ineligibility for a dedicated bank loan and the depletion of equity funds.[268] Fifth, the Respondent claims, in substance, that all the work experienced delays, and in particular, the new Terminal for which the delay was, on the date of the termination Agreement, 5 or 11 months depending on whether the execution schedule is calculated based on GETMA's bid or the work schedule appended to the Agreement.[269] Sixth, the Respondent argued GETMA was unable to obtain the dedicated loan that would have allowed it to finance the several hundred millions of Euros it agreed to obtain during the first five years of the Concession Agreement.[270] Seventh, the Respondent argued that GETMA had not fulfilled its commitments relative to the opening up of transport to and from Mali.[271] Finally, Respondent argued that GETMA did not facilitate the acquisition of a stake in the capital of the Société du Terminal à Conteneurs de Conakry (STCC) as required call for bids.[272]

263 *Id.*
264 *Id.* at para. 99.
265 *Id.* at para. 101.
266 *Id.* at para. 102.
267 *Id.* at para. 104.
268 *Id.* at para. 105.
269 *Id.* at para. 107.
270 *Id.* at para. 108.
271 *Id.* at para. 109.
272 *Id.* at para. 110.

The arbitral tribunal found that the decree of termination issued by the President violated both procedural and substantive requirements for termination. First, the tribunal found that the 60 day notification was not fulfilled and the Respondent did not cite the alleged contractual breaches which are conditions for termination required in Article 32.2 of the Concession Agreement.[273] Thus, the termination decree was doubly defective procedurally since it did not fulfill the legal requirements of notification and presentation of the allegations of breach against the Claimant.[274] The arbitral tribunal finds that this procedural defect was enough to make the termination illegal but out of concern of thoroughness, the tribunal still went ahead to rule on the substantive conditions of termination.[275] The arbitral tribunal rejected the argument that seriousness of the actions of the Claimant waived the 60-day notification requirement.[276] On the substantive claims, for which the arbitral tribunal devoted a lengthy analysis of the eight substantive arguments presented by the Respondent State for the termination of the Concession Agreement above, the tribunal rejected most of the arguments as justifications for termination of the Concession Agreement.[277] Importantly, the tribunal rejected GETMA's argument that the claims of fraud, if they existed, were done prior to the signing of the Agreement and thus the tribunal lacks competence to arbitrate over them since they did not arise from the Agreement.[278] This view was tied to the language of Article 31 of the Concession Agreement that: "Any dispute or difference stemming from this Agreement or from its amendments."[279] The tribunal found that the words "to stem" express a natural or logical link for which the term "to result" is a synonym.[280] The tribunal rejected all of the Respondent's arguments on fraud in the process of bidding and on the breaches of conditions that would occasion termination.[281]

iv. The Right to Compensation

The arbitral tribunal noted that Article 32.5 of the Concession Agreement (Changes of law and Act of Public Authority impeding the proper functioning of the Granted

273 *Id.* at paras. 112–20.
274 *Id.*
275 *Id.* at para. 121.
276 *Id.* at para. 118.
277 *Id.* at paras. 128–87.
278 *Id.* at para. 125.
279 *Id.* at para. 126.
280 *Id.* at para. 127.
281 *Id.* at paras. 128–87.

Activities) on which GETMA based its compensation requests, provides that "In case of termination due to a Change of law and Acts of Public Authority impeding the proper functioning of the Granted Activities, the Licensee shall receive the compensation provided under Article 32.3 of the Agreement."[282] Article 32.3 provides for four types of compensation: the lump-sum termination compensation; the termination compensation, for the property granted under concession; the compensation for the entry; and the amount of any termination compensation.[283] After assessing and analyzing the compensatory claims of the Claimant, the arbitral tribunal found that the Respondent should pay a lump-sum termination compensation of €20,884,966; A termination compensation for the property granted under concession of €3,234,995; The unamortized amount of the entry fee of €14,201,096; and further compensation for the unreturned inventory of €210,070.[284] This adds up to a total of €41,531,127 plus interest at the discount rate of the European Central Bank plus once percent, from the date of the arbitration request dated May 10, 2011 until complete payment. Finally, the arbitral tribunal determined that the parties pay each pay its legal costs and orders that parties to equally bear the arbitration costs at CFA Francs 100,480,332 (Appx €152,000) and the arbitrators fee of CFA Francs 40,480,332 (Appx €61,000).[285] This final arbitral award was dated April 29, 2014.

D. Commentary

Before delving into some specific commentary over this arbitral award, it is important to note that the award itself as we have seen did not mention anything about the most controversial aspect of the case: the question of increase of arbitrators' fees. The arbitrators even in this final award assessed their arbitrators fee at appx €61,000. The changes of this amount as we will see is what has given the GETMA case more notoriety and elevated it to "saga level."[286] The first important lesson from the arbitral award and what in my assessment is a strength of the OHADA arbitration system is the value of non-internationalization of concession agreements that the OHADA system upholds and that this arbitral award affirms.

282 *Id.* at para. 192.
283 *Id.* at para. 193.
284 *Id.* at paras. 192–278.
285 *Id.* (operative provisions).
286 *GETMA v Guinea: The saga Continued*, Herbert Smith Freehills (June 16, 2016) https://hsfnotes.com/arbitration/2016/06/16/GETMA-v-guinea-the-saga-continued/.

As part of internationalizing the Concession Agreement in this case, GETMA argued that the Concession Agreement with the Republic of Guinea was governed by public international law.[287] Thus, accordingly any change of this agreement or dispute revolving around it should be governed by international law and not domestic law. According to M. Sornarajah, this rule that GETMA was propounding "is aimed at conferring maximum protection upon the foreign investor and at ensuring that the initial bargain and the terms last through the period of the contract."[288] The alternative to this is to insert a "stabilization clause" in the Concession Agreement to ensure that future changes in laws of the host state do not affect the agreement.[289] Article 32.5 of the Concession Agreement between GETMA and the Republic of Guinea that provided: "In case of termination resulting from a Change of Law and Acts of Public Authority impeding the smooth operation of the Activities granted, the Concessionary will receive the compensation set forth in Article 32.3 of the Agreement" is a good example of a stabilization clause.

The basic idea behind internationalization is that the host State's laws and judicial system are inadequate for the resolution of foreign investor's disputes.[290] Thus the foreign investor wants to settle its disputes at a different forum other than the local courts and under a law different from the host State's law.[291] The OHADA arbitration system deals with the first concern by allowing arbitration thus removing the dispute from the local courts but maintains the use of domestic laws in this case the OHADA Uniform Acts and domestic law of the member State. Though as this case shows, the dispute is wholly resolved around the contract without any reference to any OHADA Uniform Acts or Guinean domestic laws. It means that idea of delocalizing the dispute is still present even in this contract-based arbitration. While OHADA arbitration maintain subject-matter localization, this can still be easily avoided by contractual terms that maintain broad foreign investor interests such as stabilization clauses. Yet there is risk in arbitration even though valorized as neutral, for the selection of arbitrators and the application of rules to be manipulated to serve interest of power.[292]

287 GETMA International v. Republic of Guinea (I), Case No. 001/2011/ARB, para. 87, Award, Common Court of Justice and Arbitration of OHADA [CCJA] (Apr. 29, 2014).

288 M. Sornarajah, *The Myth of International Contract Law*, 15 J. World Trade L. 187 (1981).

289 Roland Brown, *Choice of Law Provisions in Concession and Related Contracts*, 39 Modern L. Rev. 625, 628 (1976).

290 Jan ole Voss, The Impact of Investment Treaties on Contracts between Host States and Foreign Investors 25 (Martinus Nijhoff Publishers, 2011).

291 *Id.*

292 M. Sornarajah, Resistance and Change in International Law on Foreign Investment 82 (Cambridge University Press, 2015).

Additionally, it is easy to see the possibility of increased cultural bias in the GETMA cases (the OHADA and ICSID cases) since all the arbitrators and a large number of the litigation teams are from the global North in a dispute that has its locus in Africa.[293]

Consequently, M. Sornarajah has argued that the objective of capital exporting countries has been for a long time to ensure "the freezing of the conditions prevailing at the time of the bargain and their subsequent immutability despite any changes in the economy or the policies of the host government."[294] Accordingly, this immutability through stabilization clauses or internationalization of concession agreement "represents an instance of the norms of international law created during colonial times to further the interests of European powers continuing to survive and justify the perpetuation of a situation of dominance by erstwhile colonial powers."[295] Sornarajah presents this claim based on the fact that many concession agreements have been for the exploitation of resources in developing countries and mainly those in the global South. He argues that East European and the socialist bloc countries rejected such notion outright.[296] In this case, Guinea's goose seemed to have been cooked in terms of not winning this, at least at this stage, way before it signed the concession agreement. This is because the template of negotiation for such concession agreements would follow the path of fomenting interests of European powers in a continual economic dominance from colonial times. It does not seem to matter that the upholding of non-internationalization is in favour of Guinea because the stabilization clause forestalls any possibility of non-compensatory termination or expropriation.

Despite this doomed outlook for the Republic of Guinea, it is important to note that the structure of the OHADA arbitration system is fundamentally contractual. Thus, the consent for arbitration in the Concession Agreement points to the choice of law as the OHADA Uniform Acts and Guinean law. This system therefore eschews treaty-based protections and remedies in bilateral and multilateral investment treaties (BITs/MITs) that have become the bedrock of the current Investor State Dispute Settlement (ISDS) regime. While the OHADA system maintains the contractual arbitration system, the ICSID system enforces treaty arbitration and thus the possibility

293 *See* Won Kidane, The Culture of International Arbitration (Oxford University Press, 2017); Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (The University of Chicago Press, 1996).

294 Sornarajah, *supra* note 291, at 188.

295 *Id.*

296 *Id.*

of duplication emerges. Indeed, like in the *Fraport v Philippines* case,[297] where there was an International Chamber of Commerce (ICC)[298] and ICSID simultaneously, in GETMA, there was also a simultaneous ICSID case instituted.[299] The cost for this litigation exceeded over US$ 58 million for Philippines and considering the cost for the arbitration for Guinea in the OHADA administered arbitration was €115,000 before the change of arbitrators' fee upwards and without including the legal cost (lawyer fees), the ICSID, and the US federal district court enforcement decisions it is easy to see that the cost for all the GETMA cases would be close to or even exceed those in the *Fraport v Philippines* case. M. Sornarajah argues that contract-based arbitration is the precursor for the current version of treaty-based arbitration that pervades ISDS and both systems are built on system that flies in the face of fundamental theoretical premises of international law.[300] Thus he views the whole international investment legal system as it stands today a feature of imposition through power by former imperial powers.[301] This is of course one of the main themes of the scholarship generated by Third World Approaches to International Law (TWAIL), that is, the colonial origins of foreign investment law.[302] Thus, the international investment law system embodies "the continuities of what existed under colonialism but now supported through a substantial positive law of treaties." This means that both contract-based and treaty-based arbitrations are products continued colonial imposition for the protection of transnational capital.[303]

E. The Vexed Question of Arbitrators' Fees

In April 2013, while the OHADA administered proceedings were underway, the

297 Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, Case No. ARB/03/25, Award, ICSID (Aug. 16, 2007).

298 Philippine International Air Terminals Co., Inc. (Philippines) v. The Government of the Republic of the Philippines (Acting through the Department of Transportation and Communications and the Manila International Airport Authority), Case No. 12610/TE/MW/AVH/JEM/MLK, Final Award (May 10, 2011).

299 GETMA International and others v. Republic of Guinea [II], Case No. ARB/11/29, Award, ICSID (Aug. 16, 2016).

300 M. Sornarajah, Resistance and Change in International Law on Foreign Investment (Cambridge University Press, 2015), 79.

301 John Linarelli, Margot E Salomon & M. Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy 154 (Oxford University Press, 2018).

302 Antony Anghie, Imperialism, Sovereignty and International Law 224 (Cambridge University Press, 2005).

303 *See* Bhupinder S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. 1–37 (2004).

tribunal sought and was granted permission of the CCJA Secretary General to ask the parties for consent to increase the set fees.[304] The suggested fee increase by the arbitrators was significant (approximately from €62,000 to €450,000) and the parties did not initially consent. However, the parties consented after repeated request from the tribunal and an indication that the tribunal might reconsider its involvement if consent was not forthcoming.[305] In August 2013, the CCJA made it clear that only the CCJA could set the tribunal's fees in relation to a CCJA Arbitration and that any separate fee agreement should be considered void.[306]

In 2014, the tribunal reached a decision and notified the CCJA that it would include within the award a demand for €450,000 in arbitrators fees.[307] The CCJA Secretary General prohibited the tribunal from seeking a fee increase from what had been set by the CCJA, stating that doing so had the likelihood of invalidating the award.[308] As presented in detail above, in April of 2014, the arbitral tribunal ruled in favour of GETMA International, ordering Guinea to pay over €40 million in damages, plus interest.[309] The tribunal excluded references to its increased fees in the award and in fact indicated the OHADA set fee of €62,000 yet in the background it continued to pursue the payment of the sum (€450,000) from the parties. GETMA made payments (€225,000) to the arbitrators but Guinea refused to pay any increased arbitrators fees. Instead, it made an application to the CCJA for setting aside of the award on the grounds that the arbitral tribunal had not fulfilled its mandate and had breached CCJA rules by entering into a private fee agreement with the parties.[310]

Article 23.2 of the OHADA rules on CCJA Arbitration grants the CCJA the authority to determine tribunal fees.[311] Furthermore, in 1999, a decision by the CCJA affirmed that arbitrators' fees are exclusively set by the Court in accordance with its Rules and that any separate agreements are void. The function of setting arbitrators' fees falls under the CCJA's role as an arbitral institution.[312] The tribunal fees are established

304 Sarkodie & Otoo, *supra* note 177, at 168.

305 Sarkodie & Otoo, *supra* note 177, at 169.

306 Sarkodie & Otoo, *supra* note 177, at 169.

307 Sarkodie & Otoo, *supra* note 177, at 169.

308 Sarkodie & Otoo, *supra* note 177, at 169.

309 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875.

310 *Id.*

311 *Id.*

312 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, Kluwer Arbitration Blog (May 12, 2016), http://arbitrationblog.kluwerarbitration.

by the CCJA Assembly and approved by the OHADA Council of Ministers.[313] This ensures that there is a degree of foreseeability in relation to arbitrator costs as well as ensuring that costs are proportional to the sums in dispute.[314] After arbitration commenced in October 2011, the CCJA set the tribunal's fees. It is worth noting that Article 24.3 of the OHADA Rules also grants the CCJA the authority to set arbitrator fees at a higher or lower rate than those set out in the schedule in 'exceptional' and 'necessary' circumstances.[315]

F. OHADA CCJA Annulment of OHADA CCJA administered Arbitral Award

On 19 November 2015, the CCJA ruled that the award should be set aside on the grounds that the arbitrators had exceeded their mandate by entering into a separate fee agreement with the parties.[316] According to CCJA Arbitration, the CCJA has an administrative role of governing the conduct of arbitrations, including setting arbitrator's fees. Direct negotiation with the parties over the fees was a breach of CCJA rules and a 2011 court order issued by the CCJA which limited arbitrators' fees to approximately €62,000.[317] In December 2015, the three arbitrators responded by writing an 'open letter' to the arbitration community which was published in *Jeuene Afrique*, a French publication focused on Africa.[318] The letter publicly criticized the decision of the CCJA and called for their colleagues' support.[319] The letter alleged that the CCJA had been hostile towards the tribunal and that the award set by the CCJA failed to take into account the significant time put in by the tribunal.[320] The letter stated that the CCJA's decision did not reflect the agreement reached by the parties

com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375.

313 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.584337949752807617187 5.

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, Kluwer Arbitration Blog (May 12, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375.

319 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.584337949752807617187 5.

320 Sarkodie & Otoo, *supra* note 172, at 169.

and courts assurance that the fees could be revised if the parties were in agreement. It also criticized the CCJA for not barring Guinea from instituting annulment proceedings.[321] The arbitrators also alleged that the CCJA's decision on annulment was influenced by the interests of OHADA member States.[322]

Despite the setting aside of the award, GETMA commenced proceedings to enforce the arbitral award in the US Courts on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[323] GETMA argued for the enforcement of the award on the basis that the parties had agreed to the increase of the tribunal's fees. It further argued that the CCJA, through the Secretary General, had 'encouraged' the tribunal to consult with and solicit an agreement from the parties regarding increased arbitrators' fees, only to reverse its position subsequently.[324]

G. The GETMA ICSID Arbitration

The ICSID Arbitration also involved GETMA International as first Claimant but in addition had NCI Necotrans as second Claimant, GETMA International Investissements as third Claimant, and NCT Infrastructure & Logistique as fourth Claimant.[325] The ICSID decision on jurisdiction stated that NCT Necotrans is the group leading holding company owning directly or indirectly 100% of three other Claimants, and financed the investment in Guinea.[326] Additionally on the Claimants, GETMA International was the Concessionary of the container terminal while GETMA International Investissements was an intermediary holding company controlled by GETMA International and controlling the Guinean Company STCC which is the company which operates the terminal, and NCT infrastructure & Logistique was NCT Necotrans' technical subsidiary responsible for the work of extending the terminal.[327] The arbitral tribunal was composed of Mr. Bernardod M. Cremades of Spain, Prof Pierre Tercier of Switzerland, and Mrs. Vera Van Houtte of Belgium.[328]

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321 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875.

322 *Id.*

323 *Id.*

324 Sarkodie & Otoo, *supra* note 172, at 170.

325 GETMA International and others v. Republic of Guinea [II], ICSID Case No. ARB/11/29, paras. 1–4, Decision Regarding Jurisdiction, ICSID (Dec. 29, 2012).

326 *Id.* at para. 26.

327 *Id.*

328 *Id.* at paras. 8–10.

All the arbitrators had been appointed by January 20, 2012,[329] and the request for arbitration was filed on September 29, 2011.[330] Considering that the OHADA CCJA administered arbitration was instituted on May 10, 2011, these arbitrations started only four months apart. Unlike the OHADA administered arbitration, the ICSID arbitration relied on Article 28 of the of Court Order no.00/PRG/87 of January 3,1987, amended by law no L/95/029/CTR in of June 30,1995 governing the Investment Code of the Republic of Guinea.[331] This provision grants ICSID jurisdiction to foreign nationals on disputes concerning the application or interpretation of the Code.[332] The facts in this case were in fact identical to those on the OHADA CCJA administered arbitration.[333]

As expected, one of the arguments by the Respondents in this case was that the ICSID Tribunal lacked jurisdiction for the following reasons: first since the OHADA CCJA arbitration acted as a contrary agreement as required under the Guinean Investment Code, and second, the parties and facts to this case were identical to the OHADA CCJA administered administration.[334] The tribunal rejected both arguments, first by reasoning that by granting jurisdiction to the OHADA CCJA, the arbitration clause in Article 31 of the Concession Agreement did not specify that this jurisdiction replaces that of ICSID nor did it explicitly exclude the ICSID's jurisdiction.[335] Additionally, the clause did not specifically attribute jurisdiction to the OHADA CCJA to settle disputes "pertaining to the application and interpretation of the Investment Code."[336] Thus disputes "resulting from this agreement" were not *a priori* necessarily the same as those "pertaining to the application and interpretation of the Investment Code."[337] The tribunal cites the jurisprudence of ICSID in *Vivendi v Argentina*, annulment decision, Case ARB/97/3, para 96; *Bayindir v Pakistan*, decision on jurisdiction, Case. ARB/03/29, para 148; and *Impregilo v Pakistan*, decision on jurisdiction, April 22, 2005, Case. ARB/03/3, para 258 to reject Claimants views of lumping together contract claims and treaty claims.[338] Thus upholding the view that

329 *Id.* at para. 10.
330 *Id.* at para. 24.
331 *Id.* at para. 12.
332 *Id.* at para. 12.
333 *Id.* at paras. 13–63.
334 *Id.* at para. 60.
335 *Id.* at para. 105.
336 *Id.*
337 *Id.*
338 *Id.* at para. 106.

the same fact can constitute both a breach of contractual obligation and a violation of the Investment Code, and that the same maybe subject to two different courts.[339]

To deal with the question of parallel jurisdiction and double damages, the tribunal rendered itself as follows:

> "…In as much as an act of the state would constitute both a breach of the contract and a violation of the Investment Code, there would then be the parallel jurisdiction of the two Tribunals. However, it would not be competitive, given that the focus of the jurisdiction of each Tribunal would depend on the respective legal grounds of each request, the rights violated, the parties injured, the prejudice sustained and the entitlement to respective compensation under the Concession Agreement, or the Investment Code. The fact that the parallel jurisdictions can lead to a double collection of damages, does not mean that each court will not be called upon to exercise its own jurisdiction. It is in the handling of the merits and in particular at the time of the verification of the evidence of the prejudice, that the double collection of compensation shall be avoided."[340]

The tribunal found that the Concession Agreement constituted as "contrary agreement" pursuant to which the jurisdiction of the OHADA CCJA tribunal replaces that of ICSID as per Article 28 of the Investment Code but the scope of the application of such an agreement is strictly circumscribed by the terms of Article 32.5 of the Concession Agreement.[341] This meant that there would be no competing jurisdiction between the two tribunals for requests based on the termination of the agreement as a result of the act of Public Authorities, but at the very most the ICSID tribunal would have additional jurisdiction if the Concessionary deemed that an act of the Public Authorities constituted a violation of the Investment Code and has entailed damaging consequences other than those of the termination of the agreement.[342]The tribunal thus eventually finds that it has jurisdiction to entertain and to rule on the effects of the requisition and other alleged breaches of the Investment Code which do not fall into the framework of the Concession Agreement with respect to the four claimants.[343]

After the decision on jurisdiction, the ICSID proceedings were suspended midway

339 *Id.*
340 *Id.* at para. 108.
341 *Id.* at para. 125.
342 *Id.*
343 *Id.* at para. 180.

between October 2013 and June 2014, pending the award from the OHADA tribunal.[344] The proceedings then resumed after 2014 when the OHADA CCJA administered award was rendered. The case continued against the background of the annulment of the OHADA CCJA administered award by the OHADA CCJA in 2015. The Claimant appointed arbitrator Mr. Bernardo Cremades wrote a dissenting opinion annexed to the final ICISD award signed by the all the arbitrators by August 6. 2016. Mr. Cremedes mainly disagreed with the majority's view that the annulment of the OHADA CCJA award did not constitute denial of justice.[345] He summed up his views as follows:

> "Consequently, if one takes account: of the letter from the Claimants to the Arbitral Tribunal following the annulment of the CCJA award, in which the Claimants announce the denial of justice that such a situation implied for them, as well as the possible exclusive responsibility of the members of the CCJA Tribunal concerning the amount of the fees and the total annulment of the [OHADA CCJA] award to the sole prejudice of the parties, it is not possible to conclude, simply, that the Claimants can initiate another arbitration before an institution which no longer enjoys the parties' trust as regards their fundamental procedural guarantees. Contrary to that which was asserted by the majority of the Arbitral Tribunal, the consideration of a possible denial of justice alleged by the Claimants concerns this Arbitral Tribunal."

This is a position, as we will see, was rejected by the majority and thus does not form part of the tribunal's holding that the OHADA CCJA award annulment constituted a denial of justice claim. Yet the dissenting arbitrator did not dissent on the tribunal's decision on jurisdiction or the tribunals distinction between contract and treaty claims which formed important positions on the tribunal's ultimate decision of rejecting GETMA's expropriation claims.

Expectedly, like in the OHADA CCJA's award, the claims of corruption and fraud by the Respondent State in the process of acquiring the Concession Agreement were dismissed.[346] After finding the burden of proof on claims of corruption is no higher than in other cases,[347] the tribunal found that the direct testimonies by the

344 GETMA International and others v. Republic of Guinea [II], Case No. ARB/11/29, paras. 20–26, Award, ICSID (Aug. 16, 2016).

345 GETMA International and others v. Republic of Guinea [II], Case No. ARB/11/29, Appendix B, Award, ICSID (Aug. 16, 2016) (Dissenting opinion of Mr. Bernardo Cremades).

346 *Id.* at paras. 185–218.

347 *Id.* at paras. 181–84.

Respondent's witnesses and the documentary evidence adduced was not clear or convincing of the corruption it alleged against GETMA International.[348] Similarly, the tribunal rejected the fraud allegations that GETMA had obtained the concession through misrepresentation of its relationship with the MSC group.[349] On a detailed analysis of the tendering process and the evidence presented, the tribunal found that GETMA would have won the concession in any event.[350] Additionally, the tribunal rejected the Respondent's argument that in 2008 the corruption in Guinea was so endemic that the Concession Agreement must have been procured through corruption.[351] The tribunal reasoned that: "Even widespread corruption does not permit one to consider that a specific alleged corruption is proven. Inversely, the absence of widespread or endemic corruption does not permit one either to neutralize proof of a specific instance of corruption. Even if one accepts that corruption is plausible, in a specific case because it is endemic in the country, this does not prove that it effectively exists."[352] The tribunal also found that GETMA International was not fraudulent in its expression of interest for the bid and the tactics it used in its expression of interest were nothing but commonplace commercial tactics that were not fraudulent.[353]

On the substantive claim of expropriation, the Claimants argued that the decree of termination constituted expropriation based on loss of profits as a consequence of termination.[354] The tribunal rejected this claim reasoning that the Claimants distinction between "termination" and "the act of termination" was not warranted.[355] It was not because the manner in which the termination was carried out, in this case by decree, which is explicitly stipulated in Article 32.5 that the termination does not constitute a breach of the contract and would become a violation of the Investment Code.[356] The tribunal thus found that an irregular termination constitutes a *fortiori* a breach of contract and that the ensuing litigation falls within the jurisdiction of the court stipulated in the contract.[357] Thus the claimants insistence that the termination of the Concession Agreement constituted expropriation is all in vain since expropriation

348 *Id.* at paras. 218–26.
349 *Id.* at paras. 232–67.
350 *Id.*
351 *Id.* at paras. 227.
352 *Id.* at paras. 228.
353 *Id.* at paras. 268–76.
354 *Id.* at paras. 311–14.
355 *Id.* at para. 316.
356 *Id.*
357 *Id.*

is included in Article 32.5 of the Concession Agreement.[358] The tribunal also ruled that the claims of *res judicata* in relation to the annulment of the CCJA award were valid since the contractual claims did not seize to exist with the annulment.[359] Thus the annulment of the CCJA award would not trigger the jurisdiction of the ICSID award as the contractual jurisdiction clause which contractualized the Acts of Public Authorities, impeding the execution of the agreement was still valid.[360] The tribunal thus held that, "this contractualization also comprises the limitation of the damages following the termination of the agreement. The issues of the validity and applicability of this limitation are contractual issues which continue to fall within the jurisdiction of a CGA Tribunal.[361]

The ICSID tribunal thus affirmed the fact that even if GETMA International had never submitted the OHADA CCJA claims, the tribunal would still have declared its lack of jurisdiction.[362] The reasoning is that the claims of loss of profit as expropriation result directly from the termination of the concession agreement which is a prejudice purely resulting from the contract. And that the annulment of the OHADA CCJA award could not grant the ICSID tribunal jurisdiction it never had.[363] The tribunal also rejected the claim by the Claimants which is supported by the dissenting opinion of Mr. Bernardo Cremades that the ICSID tribunal was "the last bastion separating the claimants from a denial of justice."[364] The tribunal suggested that the claim could then be brought from start and that the Claimants are not deprived of all access to the courts systems.[365] Despite this finding, the tribunal awarded claimants €449,000 (plus interest) for actions of Public authorities that were not necessary for the termination of the agreement.[366] This includes the presence of police and soldiers in front of GETMA's offices on the eve of March 8, 2011,[367] and the temporary requisition of GETMA's property.[368]

358 *Id.*
359 *Id.* at para. 345.
360 *Id.*
361 *Id.*
362 *Id.* at para. 346.
363 *Id.* at para. 347.
364 *Id.* at para. 348.
365 *Id.*
366 *Id.* at para. 378.
367 *Id.* at paras. 353–79.
368 *Id.* at paras. 381–88.

H. The US Federal District Court of District of Columbia Refusal of Enforcement

In June 2016, the US Federal Court of the DC refused to confirm and enforce the arbitral award in favour of GETMA.[369] The court held that while the New York Convention confers courts discretion to enforce an award notwithstanding its annulment, the discretion was narrowly confined.[370] Discretion could only be exercised in extraordinary circumstances in order to prevent a violation the US' 'most basic notions of morality and justice'.[371] The court held that the parties had agreed, under the Concession Agreement, to be bound by the CCJA arbitration Rules and that the CCJA had the ultimate discretion on the fees.[372] The court noted that in accordance with the CCJA's 1999 precedent and the CCJA Arbitration Rules, it was the CCJA and not the Secretary General who held ultimate authority and discretion to set and/or adjust the tribunal's fees.[373] The judge concluded that there was no reason to discredit the annulment and thus the award could not be enforced.[374]

Commentators have argued that the decision of the CCJA may have implications on the willingness of international arbitrators to sit as arbitrators in arbitrations governed by CCJA rules.[375] This is because low fees will not attract experienced arbitrators who sit in tribunals of global North-based arbitration institutions. The fees in *GETMA v Guinea* (€62,000) have been considered low in comparison to other arbitral institutions specifically located in the global North.[376] Future CCJA arbitrators may refrain from increasing fees without approval of the CCJA, however, the low fees may not appeal to international arbitrators that would prefer to sit in arbitrations where there fees would be higher.[377] The possibility of not attracting international arbitrators may be considered detrimental to the OHADA CCJA. However, it also presents an opportunity for advancement for African arbitrators who have less opportunities in international

369 Sarkodie & Otoo, *supra* note 172, at 167.

370 Sarkodie & Otoo, *supra* note 172, at 170.

371 Sarkodie & Otoo, *supra* note 172, at 170.

372 Parker Chris, Shore Laurence and Maguelonne de Brugiere, *GETMA v Guinea: The saga continued*, Herbert Smith FreeHills (June 16, 2016), https://hsfnotes1.com/arbitration/2016/06/16/GETMA-v-guinea-the-saga-continued/.

373 Sarkodie & Otoo, *supra* note 172, at 170.

374 Sarkodie & Otoo, *supra* note 172, at 170.

375 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875.

376 *Id.*

377 *Id.*

arbitral institutions.[378] This, according to some commentators, is a double-edged sword as international investors who would want international arbitrators to settle their disputes might consider the CCJA a less attractive arbitral institution.[379] This commentary seems to be a move to influence change to the OHADA system in a direction that favors private transnational capital interests.

Additionally, some commentators have also argued that *GETMA v Guinea* undermines the principle of party autonomy as it overruled on an agreement between the parties to increase the tribunal fees.[380] The argument on party autonomy takes two forms. On the one hand, the argument is that where parties have agreed (e.g through a dispute settlement clause in a contract) to subject themselves to a particular system or institution, they agree to the rules under the institutional set up and should thus follow it without undermining the system. This is particularly because arbitral institutions, including the OHADA CCJA, have carefully crafted provisions to maintain institutional integrity. One way of doing so is by safeguarding or regulating arbitrator conduct such as timelines on rendering awards, disclosure obligations, and regulation of arbitrator fees.[381] Such regulation is particularly important where there is a likelihood that the tribunal might jeopardize the case for example through an indication that the tribunal might not be able to continue mid-arbitration, as was the case in *GETMA v Guinea*. On the other hand, the argument is that parties should have the autonomy to determine matters related to their dispute and where they agree, this agreement between the parties should not be undermined.[382] This line of argument contends that parties should remain free to agree fees once the dispute has occurred.[383] It has been argued that the expression of autonomy in the first instance should supersede a subsequent exercise of autonomy.[384]

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378 *The ICSID Caseload, Statistics, Special Focus–Africa*, ICSID 28 (May 2017), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20(English)%20June%202017.pdf.

379 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875.

380 Sarkodie & Otoo, *supra* note 172, at 171.

381 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, Kluwer Arbitration Blog (May 12, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375.

382 Sarkodie & Otoo, *supra* note 179, at 171.

383 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?,* Kluwer Arbitration Blog (Feb. 10, 2016), http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875.

384 Sarkodie & Otoo, *supra* note 179, at 171.

According to Rogers, one of the most fundamental obligations of arbitrators is to apply the arbitral rules agreed by the parties including those rules by the institution governing the arbitration.[385] She emphasizes that arbitrators simply do not have an option of substituting their personal preferences for the institution's decision. Where there is a disagreement between arbitrators and the institution, she contends that the arbitrator should resign, in a timely manner, on a well-founded basis.[386] The arbitrators in *GETMA v Guinea* have also been criticized on the approach of their criticism of the CCJA. Where critiques against institutions are welcome, they are generally proper only outside the context of individual, pending cases.[387] This is because arbitrators should not be seen as attempting to influence outcomes in cases in which they preside, especially where not only arbitrator's conduct is in question but also where such conduct involves obtaining compensation.[388]

I. Conclusion

This case commentary has offered a detailed in-depth case study of the OHADA CCJA tribunal award in the GETMA case and a commentary of how the case was influenced by a similar case in the ICSID tribunal. Additionally, the commentary has offered an in-depth rendition of the chronological events that occurred in the complex web of arbitral awards, cases, and extra-judicial actions involved in the GETMA case. Apart from the issue of the unilateral increase of arbitrators' fees which is the specific issue that the case is mostly known for, this commentary has addressed other lesser known issues and lessons that the case presented. It has thus been important to present the case with this wide panoramic view but also with a detailed microscopic view to understand both the legal and extra-legal aspects of the case that are normally ignored in snapshot commentaries.

As we have seen, the GETMA cases are a series of cases straddling the OHADA CCJA to ICSID and finally to the US Federal District Court in DC. They are of great significance not only to the African international courts' jurisprudence but also for ISDS generally. The cases shows how different regimes can be invoked by a foreign investor to assert protections for actions of a host State. The OHADA CCJA tribunal actions

385 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, Kluwer Arbitration Blog (May 12, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375.

386 *Id.*

387 *Id.*

388 *Id.*

which can only be described as factored on arbitrators' unilateral actions might have essentially barred any possibility for GETMA to win the fruits of the OHADA CCJA arbitral award which was in their favor. The attempts of GETMA to characterize their contractual dispute as a treaty claim are also effectively rejected by a well-reasoned judgement by the ICSID tribunal that renders its ruling after the OHADA CCJA. It is in fact only in the OHADA CCJA annulled award that GETMA International wins in these series of cases. This shows how disastrous the unilateral action of requesting a significant increase in fees out of the OHADA rules by the OHADA CCJA tribunal was for GETMA. While the GETMA counts it many loses, it is also clear that the Republic of Guinea bore the great burden in terms costs in defending all these cases. The case thus has great lessons for arbitrators, future litigants and African States as they think of ways of reforming and better structuring the future of ISDS.

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