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Introduction to *Issue 2* of the African Journal of International Economic Law (AfJIEL)

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

Welcome to the Second Issue of the African Journal of International Economic Law (AfJIEL). The on-going COVID-19 global pandemic provides an important background for this volume. It is therefore unsurprising that a central theme that runs through the articles in this issue is the impact of the pandemic on the states and peoples of the Global South. Indeed, the articles by Katrin Kuhlmann, Chris Changwe Nshimbi, and Okanga Okanga & Lyla Latif emerged in part from the Symposium on '*Vulnerabilities in the Trade and Investment Regimes in the Age of COVID-19*' convened by Olabisi Akinkugbe and Clair Gammage on the Afronomicslaw Blog.

The second issue of the AfJIEL furthers our commitment to centering critical analysis of international economic law as they relate to Africa and the Global South. There are five lead articles, a feature analysis of African practice in international economic law, a case note, and two book reviews in this issue. The articles cover a broad range of issues including digital regulation of Africa's female farmers, debt sustainability and the reform of the International Monetary Fund, informality and the future of work in Africa, tax vulnerability in an era of inclusive global governance as well as the comparative lessons that the regulation of trade and development in Africa offers for the global regime. Our African Practice of International Economic Law analyzes developments at the regional, sub-regional and national levels that are worthy of note in the 2020-2021 calendar. The Case Note analyzes the Panel Report of the World Trade Organization in the Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia. Building on our feature essays in the inaugural issue, this Issue includes two Book Reviews.

The first article by Uchenna Felicia Ugwu titled *Advancing the Use of Digital Technology by Africa's Female Farmers: Shortcomings in Data Protection Regulations* examines the role of digital data and information and communication technologies in advancing agricultural production. Ugwu's article focuses on the role of women farmers as generators and users of data by articulating the issues at intersection of intellectual property rights, digital data regulation and the development of female smallholder farmers in Africa. Ugwu argues that existing studies have not focused enough on female smallholder farmers as active participants in the innovative process. More specifically, she applies an interdisciplinary research method to examine the question: 'How can intellectual property and data protection regulations related to agriculture be adjusted to be more inclusive of the needs of female smallholder farmers in Africa?' The article concludes with recommendations that could advance inclusiveness of Africa's women farmers interests in data protection regulations.

The second article by Karina Patricio Ferreira Lima titled *Reforming the International Monetary Fund's Debt Sustainability Assessments towards Achieving the UN's Sustainable Development Goals (SDGs): A Crucial Post-Pandemic Recovery Agenda* was initially written as part of the African Sovereign Debt Justice Network Paper Series. Lima examines the role of the International Monetary Fund's (IMF) Debt Sustainability Assessments (DSAs) in achieving the United Nation's Sustainable Development Goals, (SDGs), which is a crucial agenda towards a resilient, sustainable, and inclusive post-pandemic recovery. Lima argues that a 'debt sustainability framework that is unable to appropriately account for sovereign insolvency problems effectively legitimises unsustainable debt service by draining vital public resources from IMF member countries. Thus, the DSA has crucial distributive, economic, and ecological implications both within debtor states and across the globe.' As Lima argues, the DSA framework is both legally and macroeconomically biased towards conducting assessments that underestimate sovereign insolvency problems. In her view, the underestimation of insolvency problems is a persistent pattern in the IMF's debt sustainability analyses that underpins the widespread trend of post-pandemic austerity in the global South. This renders the DSA a core legal infrastructure in the international financial architecture that needs to be reformed in the years ahead. Her article offers some way forward in this regard.

The third article by Katrin Kuhlmann is titled *Mapping Inclusive Law and Regulations: A Comparative Agenda for Trade and Development*. In this article, Kuhlman builds on her previous Blog contribution on Afronomicslaw and argues that the crises which the global economic order confronts presents an opportunity to craft and implement more diverse legal and regulatory approaches that could improve the vulnerabilities that the marginalized parts of the globalized order confront. Kuhlmann's article thus engages in a comparative and socio-legal analysis that maps the trade and economic rules by focusing on seven dimensions at the international and national levels that would facilitate an inclusive and sustainable development. In particular, the article focuses on the different dimensions of inclusive law and development that a redesign of trade's "legal ground rules" will need to take into account in light of systemic and stakeholder-driven vulnerabilities. Her analysis concludes with a discussion of seven possible aspects that could be addressed to address potential shocks that may arise from future vulnerabilities.

The fourth article by Chris Changwe Nshimbi is titled *Reforming the International Monetary Fund's Debt Sustainability Assessments towards Achieving the UN's Sustainable Development Goals (SDGs): A Crucial Post-Pandemic Recovery Agenda*. The article is situated within the narratives or debates on post-Fordism, a form of economic governance which entrenches neoliberal globalization. Nshimbi argues that post-Fordism intensified the casualization of labor in Africa and, therefore, contributes to informality on the continent. In contrast, he argues that the fourth industrial revolution (4IR) – and the disruption caused by the Covid-19 pandemic – provide opportunities to catapult Africa's development. Importantly, his article engages with an expansive literature including that on Fordism, post-Fordism, neoliberal restructuring as well as globalization and its impacts on developing countries. The article examines these literatures and how they conceptualize and understand the informal economy in Africa. The article concludes by reflecting on the future of informal workers in Africa in an era of 4IR.

The fifth article co-authored by Okanga Okanga & Lyla Latif is titled *Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance*. They situate the vulnerability theme in the tax context noting that the rules governing international taxation have largely been developed by a handful of Western countries resonating their own economic purposes. This fraught historical emergence Okanga and Latif argue, has resulted in a regressive relationship that overlooks African perspectives in the creation of tax norms. The COVID-19 pandemic has spelled further trouble for African countries as it aggravates their revenue constraints and widens the chasm of inequality that already exists between African countries and their developed counterparts as well as cause a dramatic fall in foreign direct investment. Okanga and Latif therefore call for developing countries in Africa to participate effectively in the development of an international tax regime. In their view, African countries will derive more from a global tax system that centers inclusivity and development. African states should be part of the process from the center and not the margins.

The sixth article co-authored by Tsotang Tsietsi and Akinyi J. Eurallayah is titled *African Practice in International Economic Law 2020-2021*. This second instalment of the section discusses some of most significant developments in international economic law on the African continent. From regional trade matters, such as the launching of trade under the African Continental Free Trade Agreement, to investment dispute resolution involving African governments, as well as urgent imperatives surrounding intellectual property rights law. The section updates readers on some of the issues that were captured in the Inaugural Issue, and which are ongoing. It also provides an overview of significant milestones in international economic law in Africa over the past twelve months.

The seventh item in this issue, is a case note, co-authored by Oluyori Ehimony and Maryanne Kamau focuses on the WTO *Panel Report in Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia.* This is the first intra-African trade dispute to be adjudicated by a World Trade Organization Panel after nearly 25 years. Ehimony and Kamau's analysis offer a bird's eye view of the Panel's findings on the (in)consistency of Morocco's measure with its WTO obligations and the legal issues in contention in that case. The article also discusses the likely implications of the case and the signals it sends concerning the participation of African countries in the WTO'd dispute settlement system.

The eight item in this issue is a book review by Talkmore Chidede of *Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe. Edited by Tinashe Kondo. University of Western Cape Press, 2021. Pp. 296."* In Chidede's review, 'the book critically evaluates Zimbabwe's investment obligations under bilateral investment treaties (BITs). The analysis reveals that investment protection provided under BITs, (concluded by Zimbabwe), is characterised by many shortcomings including, *inter alia*, limiting the right to regulate and biased towards investors. Kondo proposes the modification of certain provisions to allow investment liberalisation, adoption of more concise definitions of investors and investments, alignment of investor-state dispute settlement (ISDS) provisions with recent trends.'

The ninth and final item is a second book review by Nkechi Azinge of "*Combating Money Laundering in Africa: Dealing with the Problem of PEPs. By John Hatchard. Edward Elgar, 2020. Pp. 277".* Azinge's review, notes that 'Hatchard's scholarship deserves a wide readership and consideration by academics and stakeholders in the AML space. The book heralds the dominance of an existing voice, intertwining AML strategies and constitutional law, complex areas of law which the author simplifies. As this review has shown, the book's arguments are compelling.'

We hope that our readers enjoy the articles in our second volume. We thank all our authors (including those whose articles did not make it into this issue) and peer reviewers for their support in finalizing the second issue during a pandemic year. We hope to count on our reader's support as we march towards Volume Three of the AfJIEL.

Advancing the Use of Digital Technology by Africa's Female Farmers: Shortcomings in Data Protection Regulations

*Uchenna Felicia Ugwu**

Abstract: Over the past few decades, the nature of agricultural activity has been transformed by the development of digital technology, along with the creation of data protection rights in intellectual property agreements. While the potential of data and digital technologies to help Africa overcome food insecurity and poverty, and the importance of female small-scale farmers (FSF) in improving food security in Africa are generally acknowledged,[1] the legal and policy framework necessary for enhancing the use of digital technology by Africa's FSF remains relatively unknown. This paper helps to fill in the gap by examining the issues that affect the ability of African women to utilize digital technology for better agricultural productivity and how these are influenced by data protection regulations.

The paper highlights the need for an integrated approach to data regulation, that involves providing specific provisions for enhancing gender equality and inclusiveness for females, as key to closing the gender gap to accessing digitalization by female smallholder farmers in Africa. Further, by reviewing examples of best practices and policies of countries that have provisions for inclusivity in current data protection laws, the paper proposes a template for how the 'inclusivity' principle can be applied in designing data protection systems laws and policies that are suitable for advancing productivity by female smallholder farmers in Africa. Analysis is made of four issues: I. The Relationship between Data Protection, Precision farming and Female Smallholder Farmers in Africa; II. The Forms of Data Generated by Female Smallholder Farmers in Africa; III. Challenges in Data Protection Rules Inhibiting Utilization of Agricultural Data Technology by Africa's Female Smallholder Farmers; and IV. Recommendations for Integrating Africa's FSF's Needs within Data Protection Regulations.

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1 *See WFO Policy on Women in Agriculture*, World Farmers' Org. (last visited Nov. 23, 2021), https://www.wfo-oma.org/wp-content/uploads/2019/05/WFO_Policy_on_Women_in_Agriculture.pdf; U.N. Secretary-General, *The role of science, technology and innovation in ensuring food security by 2030*, delivered to ESCOR, ¶¶ 56-57, 73-75, U.N. Doc. E/CN.16/2017/3 (Feb. 27, 2017); SOFA Team & Cheryl Doss, *The Role of Women in Agriculture* (UN FAO Agrifood. Econ. Div. (ESA), Working Paper No. 11-02, 2011) [hereinafter ESA Working Paper], https://www.fao.org/3/am307e/am307e00.pdf; Wanjiru Kamau-Rutenberg, *Gender equality in African agriculture: An innovation imperative*, WIPO Mag. (Apr. 2018), https://www.wipo.int/wipo_magazine/en/2018/02/article_0006.html.

1 Introduction

Over the past few decades, the nature of agricultural activity has been transformed by the development of digital data technology. Digitalization has been defined as the use of digital technologies and data as well as their interconnection which results in new or changes to existing activities.[2] Agricultural technologies can provide information for farmers regarding potential weather changes, possible markets, improved agricultural processes and disease resistant varieties, that has the potential to advance agricultural production. Because data protection and information and communication technologies (ICT) regulations determine the condition for accessing digital technologies and related data useful for precision agriculture, they will affect sectors which utilize data, including agriculture, and influence rights connected to the sector such as food security and gender empowerment.

Agriculture is the most important sector of the African economy and will have to be its driving engine out of poverty. "It accounts for 65% of the continent's employment and 75% of its domestic trade."[3] It provides employment for about two-thirds of the continent's working population and for each country contributes an average of 30 to 60 percent of gross domestic product (GDP) and about 30 percent of the value of exports.[4] In contrast to developed countries, farming in Africa is dominated by smallholder subsistence farmers.[5] Women form a majority of the agricultural work force in African countries.[6] Thus, empowering FSF is especially important for sustainable economic growth.

Despite the potential that digitalization has for development, it has not been evenly accessible by all stakeholders. One group of people that have found it difficult to access digitalization is female smallholder farmers in Africa. *The Digitalisation of African Agriculture Report 2018-2019* estimates that in Sub-Saharan Africa (SSA) where 40–50% of smallholder farmers are women, only 25% are registered users of digitalization for agricultural solutions.[7] The data suggests that current IP and data related regulations are not sufficiently prioritizing gender and need to be re-designed to be more inclusive.

2 OECD, *Bridging the Gender Divide: Include, Upskill, Innovate* (2018), https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf.

3 Kandeh K. Yumkella (Dir. Gen. U.N. Ind. Dev. Org.), quoted in Imara Afr. Sec. Team, Agriculture – 'The most important sector of the African economy', How we made it in Africa (Aug. 25, 2012), https://www.howwemadeitinafrica.com/agriculture-%E2%80%93-the-most-important-sector-of-the-african-economy/19649/; *Agriculture and Food Security (West African Regional)*, USAID (last updated Oct. 6, 2021) [hereinafter *Agr. & Food Sec.*], https://www.usaid.gov/west-africa-regional/agriculture-and-food-security.

4 *See Agriculture of Africa*, Britannica (last updated Sep. 28, 2021), https://www.britannica.com/place/Africa/Agriculture.

5 *See* Daniel Callo-Concha et al., *Farming in the West African Sudan Savanna: Insights in the context of climate change*, 8 Afr. J. Agric. Rsch. 4693 (2013); *Agr. & Food Sec.*, *supra* note 3.

6 *See* D.E. Tempelman, *Africa*, *in* FAO, *Rural Women and Food Security: Current Situation and Perspectives* (1998), http://www.fao.org/3/W8376E/w8376e03.htm.

7 Ctr. Agric. & Rural Coop. & Dalberg Advisors, *The Digitalisation of African Agriculture Report 2018-2019: Executive Summary* 15 (2019), available at CGSpace, https://cgspace.cgiar.org/bitstream/handle/10568/103198/Executive%20Summary%20V4.5%20ONLINE.pdf.

Because women form a large percentage of the subsistence farmers who supply food in the continent, this gender gap can have dire consequences for agricultural production and food security in Africa. Further, female smallholder farmers play a vital role in innovation by sharing knowledge of agricultural products, based on traditional knowledge, on plant varieties and their therapeutic uses. Thus, they are not just users of information, but also producers of data used for innovation, whose privacy and data ownership rights should be protected.[8] The large gender gap in utilization of data and digital technologies by women, makes it important to design a more inclusive framework for data regulation suitable for the African context.

While studies exist examining the role of digital data and ICT in advancing agricultural production, little analysis has been made of the relationship between intellectual property rights (IPRs), digital data regulation and the development of female smallholder farmers in Africa. Existing studies focus on the role of women as users of information, technology and markets,[9] rather than on their role as active participants in the innovative process. *This article takes the alternative approach focusing on the role of women farmers as generators, as well as users of data*. It applies an interdisciplinary research method to examine the following question: How can intellectual property (IP) and data protection regulations related to agriculture be adjusted to be more inclusive of the needs of female smallholder farmers in Africa? Analysis is carried out in the following steps: First an interdisciplinary review is made of relevant socio-economic, agricultural and legal literature, to define the relationship between data protection, precision farming and its benefits to Africa's women smallholder farmers. Second doctrinal analysis is made of relevant laws to determine the shortcomings in inclusiveness for women farmers in contemporary data policies. Third, critical analysis is made of how data protection regulations affect sustainable and equitable agriculture. Fourthly, recommendations are made for advancing inclusiveness of Africa's women farmers interests in data protection regulations.

2 The Relationship between Data Protection, Precision Farming and Africa's Women Smallholder Farmers

2.1 The Nature of Precision Farming

Precision farming is an agricultural method that makes intensive use of data about specific geographical location and crop genetics to enhance production. In contrast to conventional agricultural methods, using precision farming can increase agricultural productivity while reducing the negative environmental effects of agriculture.[10]

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8 *See* Stella E. Igun, *Gender and National Information and Communication Technology (ICT) Policies in Nigeria*, *in* Blessing Maumbe & Julius J. Okello eds., Technology, Sustainability and Rural Development in Africa 284, 287 (2013).

9 *See* Julius J. Okello et al., *A Framework for Analyzing the Role of ICT on Agricultural Commercialization and Household Food Security*, 1 Int'l J. ICT Rsch. & Dev. Africa 38 (2010); Maumbe & Okello eds., *supra* note 8.

10 *See* Simone Geisler, *Digitisation in agriculture – from precision farming to farming 4.0*, Bioökonomie (Apr. 9, 2018), https://www.biooekonomie-bw.de/en/articles/dossiers/digitisation-in-agriculture-from-precision-farming-to-farming-40.

An example of precision farming is where sensors are used to provide data regarding soil properties, disease resistant crop varieties, temperature and moisture, that would help farmers know how to irrigate their farms while using less water. Hydroponics is another precision farming method where the plants are grown in a nutrient solution rather than in soil.[11] Hydroponic farming reduces the need for soil, eliminating soil-borne diseases and pests, weeds, and the use of herbicides and pesticides, while producing ten times the quantity of crops as traditional farming. Hydroponic systems also reduce water waste and the number of natural resources needed to grow while allowing greater control over climate, nutrients and growing conditions.[12] Utilising hydroponics in farming requires a vast amount of data regarding when to farm, the type and quantity of nutrients that can be used instead of soil, the temperatures required, and the seeds and conditions suitable for each individual crop.

What is precision farming technology?
A hypothetical example: A company has designed a mobile app for smallholders that is paired with cheap and easy to use soil sensors. The sensor uses light emitting diode (LED) signals to tell the farmer when it is time to irrigate their crops. The app uses the farmer's global positioning system (GPS) location data, and pairs it with the soil information collected by the sensors, and then provides recommendations to the farmer about the right fertilizers and seeds to use based on their individual particular needs. The app also includes a free texting service that responds to the farmer's questions about things like pests and disease control and provides information about market prices for the crops the farmer is growing. Farmers who have used this service can reduce their water usage, use the right inputs for their land and get better prices for their produce. An example of such technology is the Azure FarmBeats app being developed by Microsoft.[13]

2.2 What Kind of Data Does the Use of Precision Farming Generate?

Precision farming generates specific on-farm data regarding soil properties, water and fertilizer usage, crop varieties, weather and climate change patterns, seed viability, conservation, disease history, nutrition, and geography.[14] It also generates personal data relating to a farmer's expenditures, sales and marketing access. The right to use digitalized agrotechnology often requires farmers to sign a contract that

11 *See Hydroponic Systems*, U. Mass. Amherst (2009), https://ag.umass.edu/greenhouse-floriculture/fact-sheets/hydroponic-systems#:~:text=Hydroponics%2C%20in%20its%20most%20basic,basic%20system%20have%20been%20developed%3E (created by Umass Extension Greenhouse Crops & Floriculture Program, Ctr. Agric. & Env't.)

12 *See, e.g.*, *Hydroponic Supplies*, FarmTek (last visited Nov. 22, 2021), https://www.farmtek.com/farm/supplies/cat1a%3Bft_hydroponic_supplies.html.

13 *See FarmBeats: AI, Edge and IoT for agriculture*, Microsoft (last visited Nov. 22, 2021), https://www.microsoft.com/en-us/research/project/farmbeats-iot-agriculture/ (established May 14, 2015).

14 *See* Michael Kremer & Gilbert Fosson Houngbo, *Grow back better? Here's how digital agriculture could revolutionise rural communities affected by COVID-19*, World Econ. F. (July 9, 2020), https://www.weforum.org/agenda/2020/07/digital-agriculture-technology/.

grants ownership of data to the collector companies. Precision farming requires the aggregation of data from large number of farms, the surrender of custody of data from the farmer to the agricultural technology provider, and the use of data for purposes outside the farm. In practice, this means that collector companies can make money from the sale of farmers' data, but that the financial benefits from sale of the data is not shared with farmers. Farmers also cannot 're-access' their data that has been collected by a company, without paying an access fee to the collector company.

What data do farmers generate when they use precision farming technology? Who owns this data and can benefit from it?

An example: A company that has developed an app that gathers information from farms can sell data about the farmer's soil and location to fertilizer and seed companies, who can then send marketing representatives to the farm to sell the farmer inputs just in time for planting. The company can also sell the questions that the farmer asked via the texting service to companies that sell pesticides.

Because of the way most countries data and intellectual property laws are written, it is the company, not the farmer, who owns the data collected by the sensors and the app.

Why is this a problem? For two main reasons. Firstly, more often than not farmers do not get any of the money that the app developer makes in selling that data to third party seed, fertilizer and pesticide companies. Secondly, current data protection regulation limits the ability of women farmers to re-access the data to inform their decision making and farming practice. In this instance, the company would use the farmer's data to improve the company's (and third companies') services and products, but the farmer would not re-access their own data to improve their own farming practices.

Laws need to be better designed to ensure that farmers, especially women, can share in the benefits of the data and that it is not only restricted to the companies who collect it.

2.3 Benefits of Precision Farming for Africa's Women Farmers

Precision farming enables women farmers to save time and labour and to grow more food using less land.[15] These attributes are especially important for Africa's women farmers because they typically have: less access to and control of land than men; fewer financial resources; less capacity and knowledge of agricultural technology; less information regarding markets; and less time (as women face the triple burden of caring for the house, their children, and the farms) than their male counterparts. Growing more on less land would mean increased productivity and greater income for women farmers. In addition, precision farming would enable women to play a more active role in environmental protection, as technologies like GPS and satellites enable more

15 *See* ESA Working Paper, *supra* note 1.

reliable monitoring of the impact of farming on natural resources, like air and water quality. This could help to prevent deforestation from agricultural expansion and frees up land for conservation, reducing disruption of natural ecosystems. Precision farming also gives producers greater control over plant and animal production, processing, distribution, and storage, which results in: *greater efficiencies and lower prices; safer growing conditions and safer foods; and reduced environmental and ecological impact*.[16]

Though the use of precision farming technologies is more widespread in large commercial farms in high income settings, it is no longer solely focused on large-scale farmers in these countries. Today, its application is increasingly being designed for use in rural low-income areas. For example, precision farming practices – such as mobile-based advice, soil mapping, precise irrigation systems and the use of modern sensors – can be adopted at low cost and with ease by small-scale farmers in low-income countries.[17] Given this reality, it is important that data regulation keep ahead of the curve. With increased access to data technologies (e.g., mobile phone applications) in developing countries, and given the rapid speed of digital innovation, we are likely to see continued technology updates. It seems unlikely that low- and middle-income countries – where most women smallholder farmers live – will do better without active and deliberate policy interventions to keep up with these innovations. This will require as a first step national legislation, which should be informed by public debates involving rural small-scale women farmers.

The increased proliferation of precision farming technologies suitable for small-scale agriculture creates new questions and potential risks around who owns, and can benefit from, the data generated. Questions asked include: who owns the data generated on local farms? How will such data be re-accessed and shared? And, who is entitled to benefit from the value of the data?[18] Because contemporary data protection regulations favors agricultural technology providers, large scale farms, and crops with high economic value for export (sectors in which women farmers are not prominent), by granting them strong rights, with little obligatory provisions protecting the rights of data generators, traditional knowledge and local plant varieties, women farmers have raised concerns over privacy and ownership.[19] The following section helps answer these concerns by examining issues that affect the relationship between data protection, precision farming and female farmers in Africa.

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16 *See Agricultural Technology*, U.S.D.A. (last visited Nov. 22, 2021), https://nifa.usda.gov/topic/agriculture-technology.

17 *See* U.N. Int'l Fund Agric. Dev., Precision Agriculture to Support Inclusive Food System Transformation, at 2 ¶ 6, U.N. Doc. EB 2020/130/R.2 (2020), https://webapps.ifad.org/members/eb/130/docs/EB-2020-130-R-2.pdf.

18 *See* Leanne Wiseman & Jay Sanderson, *Farms create lots of data, but farmers don't control where it ends up and who can use it*, The Conversation (Apr. 16, 2019), https://theconversation.com/farms-create-lots-of-data-but-farmers-dont-control-where-it-ends-up-and-who-can-use-it-115228.

19 *See* Jody L. Ferris, *Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?* 18 Minn. J. L., Sci. & Tech. (2017), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1422&context=mjlst.

3 Shortcomings for Gender Protection in Africa's Human Rights and IP Protection Laws

A review of multilateral and regional agreements to which African countries are signatories indicates several provisions requiring protection of the socio-economic rights of women. Provisions requiring states to ensure lack of discrimination against people based on gender, and encouraging states to provide special supports for women as vulnerable people can be found in the human rights conventions, as well as the regional trade agreements signed by African countries. However, the fact that large gender gaps in agricultural production and utilization of agrotechnology continue to exist in many African countries, indicates shortcomings and gaps in current models. Some of such gaps are examined below.

3.1 Intellectual Property Rights and Data Protection Regulations

To understand how current data protection and IP laws prevent women smallholder farmers from benefiting from the data that they generate, it is important to know that data is generated through a three-step process which involves the contributors, collectors and consumers of data.[20] Contributors provide access to the phenomenon being captured. They are often farmers, landholders, and front-line workers. Collectors gather data and make it available. Typically comprised of firms, intermediaries, and governments, collectors are the legal owners of the data and are responsible for opening access through licensing.[21] Consumers use data to gain insights, develop applications, and make decisions. Contributors often consume data or benefit from the work of consumers. In IP law the contributor of data is not necessarily the owner of the resulting data set. When applied to agricultural data, this means that the farmer, as a data contributor, will not necessarily have rights in the resulting agricultural data set.[22]

Africa's female smallholder farmers (FSF) can be categorized mainly as both contributors to and consumers of data. As a resource which has mainly intangible value, ownership of data is governed by intellectual property rights (IPR) and data protection laws. Through their use of technology and application of intellectual property law, collectors hold proprietary ownership rights to data.[23] This may limit the ability of the FSF to access and manage important agricultural data which they actively contributed to. For example, the Oubli berry is a fruit of a plant native to the West African people of Gabon, who originally discovered and nurtured the plant,

20 *See* Lev Manovich, *Trending: The Promises and the Challenges of Big Social Data*, *in* Debates in the Digital Humanities 460-75, 504 (Matthew K. Gold ed., 2012).

21 *See* Jeremy de Beer, *Ownership of Open Data: Governance Options for Agriculture and Nutrition* 14, Glob. Open Data Agric. & Nutrition (2016), .

22 *See ADC study reveals future trends in Ag data sharing, storage*, Agric. Data Coal. (Apr. 30, 2020) [hereinafter *ADC study*], /.

23 *See* Jerimiah Baarbé et al., *A Data Commons for Food Security* 8 (Open Afr. Innovation Rsch., IASC 2017 Conf. Paper, Working Paper 7, 2017), https://openair.africa/wp-content/uploads/2020/05/WP-7-A-Data-Commons-for-Food-Security.pdf.

which was traditionally used by breastfeeding mothers to help their nursing infants during the process of weaning. The harvested plant was also a source of income for many Gabonese women. Upon observing the therapeutic use of the plant among the women, a researcher from the University of Wisconsin took samples of the plant to the university and carried out scientific analysis of its contents. The researchers from the University of Wisconsin identified the protein Brazzein in the Oubli berry as the source of its positive nutritional effects. They then obtained various patents for isolating and reproducing the protein Brazzein, which is 500 to 2,000 times sweeter than sugar and is used as a natural low-calorie sweetener.[24] Though the patent was developed based on the data contributed by women farmers in Gabon, provision was not made to recognize the women or to allow them to benefit from sales of the patented product. Further, the industrial large-scale production of the protein in the USA, at lower cost and using artificial materials, eradicated the need to cultivate and collect the plant in Gabon. This led to a drop in prices, sales and loss of income to many Gabonese women who planted and harvested the local Oubli berry plant.[25]

One method to avoid such misappropriation of farmers data is to require a disclosure of origin obligation in IP applications.[26] A disclosure of origin would require applicants for patent protection to: disclose the origin of any genetic resources and/or traditional knowledge used in their invention; evidence that they received prior informed consent from the indigenous people or originating countries to use their data; and evidence provision for fair and equitable benefit sharing in agreements.[27] This would support the rights and interests of Africa's women farmers. If applied in the Oubli berry case, a disclosure requirement would give the Gabonese women the right to share in the benefits of the patent obtained based on their data contribution of traditional knowledge.

The key areas of law relevant to agricultural data are IP laws on copyright and data protection. Specifically, Art. 10.2 of the World Trade Organization's *TRIPS Agreement* states that: "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."[28]

24 *See* Ghazaleh Jerban, *The SDGs and gender: The case of indigenous and local women's traditional knowledge* 1 (Ctr. Int'l Governance Innovation, Pol'y Brief No.3, 2019), https://www.cigionline.org/static/documents/documents/PB%20no.3.pdf.

25 *Id.*

26 *See TRIPS: Reviews, Article 27.3(b) and Related Issues*, WTO (last updated Nov. 2008), https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm; Meeting Documents, Intergovernmental Comm. Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Eighth Session, WIPO (June 6-10, 2005), https://www.wipo.int/meetings/en/details.jsp?meeting_id=7130.

27 *See* Convention on Biological Diversity arts. 8(j) & 15, Dec. 29, 1993, 1760 U.N.T.S. 79 [hereinafter CBD], available at https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf.

28 Agreement on Trade-Related Aspects of Intellectual Property Rights art. 10.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3 [hereinafter TRIPS], available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (entered into force Jan. 1, 1995).

Copyright grants the owners of data compilations the exclusive right to exploit and commercialize the data. While copyright law does not protect information, ideas, or mere facts (i.e., single data points), a collection of data (database) may be protected. *In IP law the contributor of data is not necessarily the owner of the resulting data set. When applied to agricultural data, this means that the farmer, as a data contributor, will not necessarily have rights in the resulting agricultural data set*.[29]

Copyrights and database rights do not accrue to the person about whom the data pertains, or the person who provided the data, rather such rights are owned by the entity that invested in the collection, selection, or arrangement of the data. Such data is legally controlled by the entity that holds IPRs to it, not the person it relates to (except for personally identifiable information). Data can only then be accessed through licenses based on terms and conditions established by the data owner, which leaves the ability of others to utilize data subject to the caprices of the data owner.[30] The equity of this allocation of rights is questionable, as data is created by persuading contributors, including for example rural communities and female smallholder farmers, to provide access to the desired phenomena. Organizations then invest in the collecting, selecting, and aggregating the data, thereby creating distinct legal rights in newly formed data sets. In this process, contributors lack enforceable data rights, which adds to inequality and lack of inclusiveness. This can lead contributors, especially Africa's women farmers, to be vulnerable to the whims of collectors that own the data. Scholars emphasize that for data to yield benefits for these groups, there must be a reconfiguration of the data governance structure that allows for more efficient and equitable appropriation and access to data by marginalized groups.[31]

This study proposes that because Africa's women farmers are active contributors to agricultural data, they should be considered as owners, like author's under copyright, who should continue to be able to access conclusions drawn based on data generated from their farms. This perspective is similar to Article 15 of the ICESCR which recognizes the right of authors of scientific, literary, or artistic works to benefit from their innovations. Allowing women to benefit from farm data can also be justified based on the human right to non-discrimination in Article 27.1 of the UDHR, which states that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Similarly, Article 18 of the Organization of African Unity's African (Banjul) Charter on Human and Peoples' Rights specifically mentions the obligation of African States to "ensure the elimination of every discrimination against women". The Charter's Protocol on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003. Discrimination encompasses any difference in treatment that intentionally or unintentionally disadvantages women.[32]

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29 *See ADC study*, *supra* note 22.
30 *See* de Beer, *supra* note 21, at 14.
31 *See* Baarbé et al., *supra* note 23, at 7.
32 *See* UN OCHR, Women's Rights are Human Rights 6-8, UN Doc. HR/PUB/14/2 (2014), available at https://www.ohchr.org/documents/events/whrd/womenrightsarehr.pdf.

3.1.1 The WTO's TRIPS Agreement: The first agreement to protect undisclosed data internationally outside of North America was the WTO TRIPS Agreement. Article 39.3 of TRIPS requires WTO Member States to protect test data submitted for the marketing approval of pharmaceuticals and chemical products for agriculture. Test data must be protected if national authorities require its submission. In addition, Article 39.3 does not require protection to be given to data that are already publicly available, but only to undisclosed data. Thus, agricultural data of farmers would not be recognized or protected under TRIPS provisions.

Furthermore, protection is mandated only for new chemical entities. WTO Members have considerable discretion in defining this concept. Finally, in order to grant protection, national regulatory authorities may request the applicant to prove that the information for which protection is sought is the result of significant investment. The investment of women farmers is often not significant in comparison to male farmers and multinational corporations. Article 39.3 requires countries to protect test data against "unfair commercial use". Thus, protection is to be conferred against dishonest commercial practices. Practices that reduce gender equality may be inequitable, but not unfair commercially.[33] For example, women often receive less pay for their labor than men. While this may be inequitable, it is commercially viable for companies who seek cheaper labor costs to maximize profits.

The fact that the TRIPS Agreement does not include any specific provisions on gender equality and does not support agricultural data or small and medium industries makes it less supportive of gender equality and the interests of Africa's women farmers.

3.1.2 The African Continental Free Trade Agreement (AfCFTA): The preamble of the AfCFTA contains explicit reference to the importance of gender equality for the development of international trade and economic cooperation, while article 3 (e) emphasizes the promotion of inclusive socio-economic development and gender equality as one of the general objectives of AfCFTA. These provisions indicate that gender equity is part of the development objective of the agreement. The main shortcoming of these provisions is that they are couched in general language using words like 'are' and 'should', rather than obligatory words like 'shall' used to describe the IPRs. Also, because they are contained in the preamble and objectives of the agreement, they are not mainstreamed into the substantive content of the laws.

In Article 27 of the AfCFTA, African countries commit to mobilizing resources to improve the export capacity of women entrepreneurs and women-owned SMEs. This provision is important, as mobilizing funds for gender-related commitments is fundamental for their implementation. In the absence of finance made available for this purpose, the resource-constrained African countries may lack sufficient resources to invest in the women-favoring promises they might have made in trade instruments.[34] In the absence of a provision or chapter on gender in AfCFTA the

33 *See* Kathleen Sexsmith, *Promoting Gender Equality in Foreign Agricultural Investments: Lessons from voluntary sustainability standards* 5-9, Int'l Inst. Sustainable Dev. (2017), https://www.iisd.org/system/files/publications/promoting-gender-equality-foreign-agricultural-investments.pdf.

gender-sensitive trade strategies advanced in Africa's regional economic communities shall be maintained until a comprehensive customs union agreement is negotiated.[35]

Considering the lack of provision for enforceable gender sensitive trade policies, to ensure that the gains from AfCFTA support gender equality and the sustainable economic empowerment of women, gender needs to be mainstreamed into AfCFTA's national strategies. Mainstreaming involves ensuring that gender perspectives and the objective of gender equity should be taken into consideration in the agreement.

3.2 Human Rights Agreements

Under Articles 13, 14 and 15 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),[36] governments have international obligations to protect and advance women's economic activities. The convention goes beyond civil and political rights, to affirm the economic, social and cultural rights of women (rights to work, health, property, education and financial credit). Article 14 of CEDAW is especially important to Africa's women farmers, as it demands that special attention be given to the problems faced by rural women, whose particular struggles and vital economic contributions authorize *special and differential treatment* in policy planning. Overlooking 'non-discrimination' and the 'equal rights' of women is justification for annulling contracts. This is highlighted in Article 15, CEDAW which proclaims that any legal instrument that has the effect of restricting the capacity of women "shall be deemed null and void."

Similarly, under Article 8 (Economic and social welfare rights) of the African Union's *Protocol on the Rights of Women in Africa* (Maputo Protocol),[37] states shall adopt and enforce legislative and policy measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, states shall: (e) Create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector.

Women's rights are closely linked to sustainable development. Under Article 18(2) of the Maputo Protocol (the right of women to live in a healthy and sustainable environment), States Parties shall take appropriate measures to: a) Ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels; b) Promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control; c) Protect and enable the development of women's indigenous knowledge systems.

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34 *See* Amrita Bahri, *Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Help?*, 23 J. Int'l Econ. L. 563, 576 (2020).

35 *See* Clair Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender Sensitive Trade Policies*, 1 Afr. J. Int'l Econ. L. 1, 32 (2020).

36 Convention on the Elimination of All Forms of Discrimination against Women arts. 13-15, Dec. 18, 1979, 1249 U.N.T.S. 13, available at https://treaties.un.org/doc/Treaties/1981/09/19810903%2005-18%20AM/Ch_IV_8p.pdf.

Promoting gender equality also requires that women be granted ownership and control of reproductive resources and property (Article 19, Maputo). Considering the important role that data now plays in precision agriculture, this verse could be read as requiring states to take measures to ensure that women are empowered with the appropriate credit finances, skills, training, and extension services to utilize data and data driven technologies related to agriculture, to advance their development. Women are to also participate in the procedure of data legislation. This requires states to take proactive action to ensure that the negative effects of free trade and IP policies are reduced to the minimum for women.

This emphasizes the interlinkedness of social, economic and environmental factors in advancing gender equality.[38] As both human rights and IPRs are widely recognized legal regimes, states should ensure appropriate balancing between both sets of rights. Though human rights are recognized as a goal of IP protection, they might be difficult to enforce as they are phrased in vague unenforceable language.

SDG 5

The goal of SDG 5, to which African countries are signatories, is to "Achieve gender equality and empower all women and girls."[39] This would require not just giving equal opportunities to men and women, but recognizing their special different needs and making provisions to close existing gaps between the sexes. Three methods for achieving the SDG 5 goal of parity between genders are: fostering equal rights to economic resources, property ownership and financial services for women; promoting empowerment of women through technology; and adopting, strengthening and enforcing laws and policies for gender equality.[40] Gender equality is not only a fundamental human right, but a necessary principle for expanding economic growth and inclusive sustainable development.[41] Thus, it should be mainstreamed in IP and trade regulations.

Though both men and women have been identified as equally active in agricultural innovation, women hold fewer IPRs and have less access to digital

37 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, July 11, 2003, available at: https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf (entered into force Nov. 25, 2005).

38 *See* UNESCO*, Science will play a key role in realizing Agenda 2030,* UNESCO Science Report: towards 2030, at 9-11 (2015), available at: https://unesdoc.unesco.org/ark:/48223/pf0000235406 (last visited Nov. 23, 2021) (opinion piece based on a policy brief prepared by the Scientific Advisory Board of the Secretary General of the United Nations).

39 *See Gender equality*, U.N. Sustainable Dev. Goals (last visited Nov. 23, 2021), https://www.un.org/sustainabledevelopment/gender-equality/.

40 *See Sustainable Development Goal 5: Achieve gender equality and empower all women and girls*, SDG Tracker (2018), https://sdg-tracker.org/gender-equality.

41 *See* East African Community, Gender Equality and Development Bill art. 3(1), Jan. 8, 2016, 1 E. Afr. Cmty. Gazette, Bill Supp. No. 3, available at: https://www.eala.org/uploads/the_eac_gender_equality_and_devolopment.pdf (last visited Nov. 23, 2021).

products than their male counterparts.[42] While women comprise almost half of the labour force in Africa's agriculture sector, yet they generally produce less per hectare than men.[43] Studies on small scale agriculture in Africa have linked the disadvantages in IP ownership and productivity faced by female smallholder farmers in Africa to the numerous disadvantages that women face including their lack of education, limited access to information, markets, capital, land tenure and even basic inputs like fertilizers and seeds in comparison to men.[44] This constitutes a form of inequity which goes against the principles of equality stated in SDG 5. Also, in Sub-Saharan Africa, women are 41% less likely than men to use mobile phones or the internet, and rural populations are 58% less likely to use mobile internet than urban populations.[45] Thus, for IP laws and policies to advance digitalization by Africa's women farmers, they should integrate the protection of IPR with advancing the socio-economic rights of women. This may occur by providing exceptions to IPR that support gender equity and clarifying the social and non-economic objectives of data and ICT regulations as was done in the WTO Doha Declaration

In contrast to the approach adopted in the WTO-TRIPS and WIPO agreements, that recognizes the right to data protection as an autonomous right, differentiating it from the human right to development, this article proposes IP and data protection rights as instruments for advancing SDGs. This requires the protection of both property rights and human rights. For example, where different groups (women farmers and ICT companies) have participated in the information creation process, the rights of both data generators and data collectors should be protected by data regulations to ensure that the resulting databases and benefits are shared equitably by these participating groups for mutual development.

4 How Data Protection Affects Sustainable and Equitable Agriculture

Sustainable agriculture is the efficient production of safe, high quality foodstuffs in a manner that protects and improves the natural environment; the social and economic conditions of farmers, their employees and local communities; and safeguards the health and welfare of all farmed species.[46] The importance of sustainable agriculture to food security was highlighted by the United Nations (UN) Economic and Social Council (ESC) when it opined that: "[e]nding hunger and malnutrition relies heavily on *sustainable food production systems* and resilient agricultural practices."[47] It was

42 *See Gender Equality, Diversity and Intellectual Property*, WIPO (last visited Nov. 23, 2021), https://www.wipo.int/women-and-ip/en/.

43 *See* FAO, The State of Food and Agriculture 2010-2011: Women in Agriculture: Closing the Gender Gap for Development 5 (2011), https://www.fao.org/3/i2050e/i2050e.pdf.

44 *See* Lewis Ndichu, *Africa's female farmers need better access to resources*, China Daily (Apr. 1, 2020), http://global.chinadaily.com.cn/a/202004/01/WS5e83e915a3101282172837cf.html.

45 *See Mobile Internet Connectivity 2019: Sub-Saharan Africa Factsheet*, at 1-2, GSMA (July 2019), https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/07/Mobile-Internet-Connectivity-SSA-Factsheet.pdf.

46 *See Who We Are*, SAI Platform (last visited Nov. 23, 2021), https://saiplatform.org/who-we-are/.

also affirmed by the United Nations Development Program (UNDP) comments in relation to goal two of the United Nations (UN) Sustainable Development Goals (SDGs),[48] (SDG 2) which aims at ending hunger, achieving food security, improving nutrition and promoting sustainable agriculture. UNDP noted that attaining SDG2 "involves promoting *sustainable agricultural practices*: supporting small scale farmers and allowing equal access to land, technology and markets.

Data is a necessity for adopting environmentally friendly farming procedures that are native to Africa (such as composting, mulching, crop rotation, irrigation and vegetation conservation); and for maintaining ecological practices like crop diversification, less use of agrochemicals, and the planting of resist resistant varieties of crops.[49] Data could also be used to add value to agricultural produce through innovation which would enable women to have a higher place in the value chain for agricultural production. For example, under the Women's Organic Cooperatives in Uganda, women have accessed agricultural data to produce improved crop varieties. They also learned about better markets where their produce could fetch a higher price as well as the most appropriate crops to grow. Essentially the data helped women farmers in choosing locally adapted crops for an existing market.[50] They have gone from buying seeds every year to producing their own sustainable varieties locally.

However, for such data to benefit female farmers, it would need to be resourced either through the data collection companies, or third parties that are licensed to such companies. There is also a loss in access and benefit sharing, as the current framework for data protection recognizes collectors as the owners of data, who monetize and profit from such data without returning the benefits to the original data generators. Lack of access to the conclusions drawn based on analysis of agricultural data inhibits women from innovating and improving their agricultural produce. For example, farmers have cried out against John Deere's tractors which contain sensors that obtain data on a farm, but do not allow the farmer access to the conclusions drawn for maintenance of farming machines, except by re-licensing.[51]

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47 *See* U.N. Secretary-General, *Progress Towards the Sustainable Development Goals*, Rep. to Econ. & Soc. Council, U.N. Doc. E/2016/75 (June 3, 2016), available at: https://unstats.un.org/sdgs/files/report/2016/secretary-general-sdg-report-2016--en.pdf (last visited Nov. 23, 2021).

48 *See* G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, ¶ 54 (Sep. 25, 2015), https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

49 *See* Eleni Mourdoukoutas, *Digital revolution holds bright promises for Africa*, U.N. Afr. Renewal Mag. (Dec. 2017 – Mar. 2018), https://www.un.org/africarenewal/magazine/december-2017-march-2018/digital-revolution-holds-bright-promises-africa (last visited Nov. 23, 2021).

50 *See* Cathy Farnworth & Jessica Hutchings, *Organic Agriculture and Womens' Empowerment* 64, IFOAM – Organics Int'l (2009), available at: http://static1.squarespace.com/static/551bb3ade4b0404100c31678/t/5628f31ce4b00d6d1577c4d0/1445524252516/Organic+Agriculture+Womens+Empowerment++Farnworth+and+Hutchings.pdf (last visited Nov. 23, 2021).

51 *See* Peter Waldman & Lydia Mulvany, *Farmers Fight John Deere Over Who Gets to Fix an $800,000 Tractor*, Bloomberg Businessweek (Mar. 5, 2020), https://www.bloomberg.com/news/features/2020-03-05/farmers-fight-john-deere-over-who-gets-to-fix-an-800-000-tractor.

Gender equity is an important concern for sustainable agricultural development in Africa, as women farmers have been traditionally known to conserve biodiversity through selection and preservation of local plant varieties. Because Africa's women farmers often rely on the free exchange of data relating to traditional plant varieties for agricultural production, data on traditional knowledge plays a prominent role in sustaining informal agricultural innovation among them.[52] Yet, data relating to traditional agriculture often does not qualify for protection under database regulations because as specified by the four landmark decisions of the EU Court of Justice in 2004, protection is granted where there is a considerable investment in the obtaining, presentation and verification of data, but not when the investment is the creation of data.[53] Legal protections are required to protect the misappropriation of women's traditional knowledge relating to forest conservation and sustainable agriculture by agro-technology and database companies.[54] The following section examines the question of how to ensure that Africa's female farmers can reap the full benefits of the agricultural data that they generate?

5 Recommendations for making data protection laws more beneficial to Africa's women farmers

Below are six ways in which current IP and data regulations and policies can be re-designed to be more inclusive of women. We also provide examples of best practices adopted by countries that reflect these principles. Against this backdrop, data protection laws shall:

5.1 Policy recommendation 1-Protect the ownership rights of data contributors along with users' rights: Women farmers are mostly generators and users of data. However, current data regimes grant ownership rights to the intermediaries that invest in databases (who are mainly constituted of men) and not to the farmers providing the data or the users.[55] Protecting the rights of generators and users of data would enable

52 *See* David J. Claudie et al., *Ancient but New: Developing Locally Driven Enterprises Based on Traditional Medicines in Kuuku I'yu Northern Kaanju Homelands, Cape York, Queensland, Australia*, *in* Indigenous People's Innovation: Intellectual Property Pathways to Development 29, 36-55 (Peter Drahos & Susy Frankel eds., 2012).

53 *See* Christiana Sappa, *How data protection fits with the algorithmic society via two intellectual property rights – a comparative analysis*, 14 J. Intell. Prop. L. & Prac. 407, 413 (2019).

54 *See* Cholthira Satyawadhana, *Appropriation of Women's Indigenous Knowledge: The Case of Matrilineal Lua in Northern Thailand,* 5 Gender, Tech. & Dev. 91-112 (2001).

55 Africa's contemporary regulations for data privacy and use include: African Union, Convention on Cyber Security and Personal Protection, May 11, 2020, available at: https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf; Economic Community of West African States, Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS, Feb. 16, 2010, available at: https://www.statewatch.org/media/documents/news/2013/mar/ecowas-dp-act.pdf; East African Community, Draft EAC Legal Framework for Cyberlaws, Nov. 2018, available at: http://repository.eac.int:8080/bitstream/handle/11671/1815/EAC%20Framework%20for%20Cyberlaws.pdf?seq.

women farmers to re-access data without paying for it a second time through licensing fees. In this regard, provisions should be made requiring

(a) prior informed consent and access of local farmers for use of their data by companies; and

(b) sharing of benefits between farmers (especially women who are most times left out) and companies from the use of agricultural data generated by them.

An example of how this can be implemented practically is Clause 2 of the *Code of Conduct for Agriculture* developed by Global Open Data for Agriculture and Innovation, which requires that farmers own information generated on their farming operations. Specifically, the clause mandates that whoever has produced or collected data, either by technical means or individually, or has created data providers for this purpose, dominates in controlling the access to and use of data from their business. As farmers generate data individually from their farms, this would make them players in determining how their data is accessed and used. Also, it will enable farmers to benefit from royalties for sharing the data with any partner that wishes to use their data. Laws and regulations should ensure that data providers preserve the ability of the farmer to determine who can access and use individual farm data.[56]

Another example can be found in New Zealand's *Farm Data Code of Practice*, which requires organisations to specify actions and policies that they adopt to safeguard farmer generated data. Signatory companies agree to implement practises that provide farmers with high assurance that their data is managed without misappropriation.[57]

5.2 Policy recommendation 2-Allow for open access to agricultural data. Current data protection regimes are based on exclusivity and closed data, which typically grant the owners of data the right to exclude others from accessing data. Protected data is not open or shared (ODI, 2015) while open data is data that anyone can access, use, or share (ODI, 2018) and is potentially the most impactful way that big data can make a difference in agriculture and nutrition, as it would allow women farmers the right to share data relating to sustainable agriculture without additional costs. For example, the International Institute of Tropical Agriculture (IITA), Ibadan-Nigeria, developed improved varieties of cassava and maize suitable for Cameroonian farmers, which were disseminated through development projects like the Agricultural Investment and Market Development Project. Women farmers provided data on local crops which was then utilized by the IITA to improve local crop priorities and women were allowed access to improved varieties at less cost.[58] To ensure that women continued to access data regarding improved varieties without extra cost, IITA and PIDMA signed

56 *See Rights of the Data Originator*, Glob. Open Data Agric. & Nutrition (last visited Nov. 23, 2021), https://www.godan.info/codes/list/rights-data-originator.

57 *See New Zealand Farm Data Code of Practice*, Farm Data Accreditation Ltd (June 2014), available at: http://www.farmdatacode.org.nz/wp-content/uploads/2014/06/farm-data-code-of-practice-final.pdf.

58 *See* Bob Koigi, [Cameroon] PIDMA delivers technologies to farmer organizations for sustainable cassava and maize production, IITA News (Nov. 2, 2020), available at: https://africabusinesscommunities.com/agribusiness/news/cameroon-pidma-delivers-technologies-to-farmer-organizations-for-sustainable-cassava-and-maize-production/.

an open access agreement, which allowed for collective open access databases, and crowdsourcing by members of female farm unions.[59]

Open access should be granted not just to the initial data contributed, but also to any resultant agricultural product that utilizes the data in its creation. For example, in Mali female smallholder farmers learnt that the reason why a large proportion of their sorghum seeds crops failed to mature was because the seed was susceptible to disease caused by lack of certain nutrients. Based on this information, local farmers in collaboration with local scientists produced an open-pollinated variety of sorghum seeds which was disease resistant, by combining it with another locally produced crop. Open-pollinated varieties require less inputs in fertiliser and pesticides, are less expensive and are more affordable for low-income farmers. The information used by the scientists to produce the improved seed variety was given by the farmers and in turn, the improved seeds were supplied freely to them.[60] The locally improved seed variety is being utilized by farmers for increased production consequently leading to poverty reduction, as it has reduced farmers reliance on hybrid seed imports. As a result of these positive developments, the International Crops Research Institute for the Semi-Arid Tropics (ICRISAT) has also partnered with the national and regional authorities in Mali to register thirteen open-pollinated varieties whose use by farmers expanded under the hybrid sorghum programme.[61] In contrast, under contemporary data protection regulations, access to such data improved products will have to be resourced either through the data collection companies, patent holders, or third parties that are licensed to such companies.

5.3 Policy recommendation 3: Require balancing of interests by data companies in relation to gender. This policy recommendation may be achieved by granting exceptions to data protection laws which prioritize access for women in their roles as farmers, entrepreneurs and generators of data, to relevant agricultural data, agrotechnology, market information, and rural agricultural finance.

For example, the OECD Toolkit for mainstreaming data[62] provides measures which governments can take to mainstream gender equality, one of which is to employ gender quotas which will require that a certain percentage of users of data technology be women. Countries can also give tax concessions to companies that make available greater data that is relevant to women. Five countries, including Kenya and Rwanda have adopted policies promoting women's leadership in producers' organizations

59 *Id.*

60 *See* Dana Freshley & Maria Mar Delgado-Serrano, *Learning fromt the Past in the Transition to Open-Pollinated Varieties*, 12 Sustainability 4716, 4717 (2020), available at: https://www.mdpi.com/2071-1050/12/11/4716.

61 *See* Atul Bhargava & Shilpi Srivastava, Participatory Plant Breeding: Concept and Applications 109-27 (2019).

62 *See Gender balance measures*, OECD (last visited Nov. 23, 2021), https://www.oecd.org/gender/governance/toolkit/parliament/representation-at-all-levels/measures/.

63 *See* Elaine Panter & Nisha Arekapudi, *Mapping the Legal Gender Gap in Agriculture* 5-6, World Bank Group (2018), https://thedocs.worldbank.org/en/doc/264381545233395816-0050022018/original/MappingtheLegalGenderGapinAgricultureEBAWBL.pdf.

through quotas that mandate a minimum number of women be included on managing committees or boards.[63]

In addition to promoting gender equity and equality, data protection policies should also provide special support for women, rural communities and small-scale companies by supporting small and medium-scale businesses and protecting access to data regarding local seeds and plants. An example is the development of ICT/e-commerce projects by Kudumbashree, a government organization in India. Kudumbashree founded the Kasargod computer facility, which provided extra training on markets and helped the women create suitable networks to procure business deals.[64] The businesses established under the Kudumbashree project are all owned, managed and operated by women from poorer households, who were given technical training to utilize data collection and exchange software. Studies of the project show that the training and informational support provided to the women was helpful in aiding women's micro enterprises to flourish in India.[65]

5.4 Policy recommendation 4: Require capacity building for women using agricultural data and technologies as a form of technology transfer. Continuous capacity development for women to enhance their knowledge of their data rights as well as their ability to effectively use technologies and information at individual, organizational and institutional levels is essential for enhancing the ability of female smallholder farmers to utilize data for agriculture. Capacity building should be primarily carried out by the government. Public-private partnerships with the private sector can also be utilized.

Talking Book is an example of a digital solution made available to farming communities in Ghana, Kenya, Rwanda and Uganda. Executed by the non-governmental organization (NGO), Literacy Bridge, Talking Book implements a technology to disseminate information to rural stakeholders. It is a low-cost and programmable audio computer which is simple and easy to use, as it responds to users' oral messages. Low-skilled and low-literate communities in the four countries can gain on-demand access to over 100 hours of content on farming practices. Notably, Talking Book contains local content and uses local languages tailored to the agricultural needs of the user. Talking book enables low skilled and low literate rural users to collaborate in the production of data and information, as they can record their own knowledge in the audio library. Also, when connected with other Talking Book devices, the locally generated knowledge can be exchanged.[66]

64 *See* Rashmi M. & Lekshmi V Nair, *ICT and Employment Among Women: A Case Study of Kudumbasree ICT Project,* 10 Eur. Sci. J. 224, 227-28 (2014).

65 *See id.* at 231.

66 *See* Ronda Zelezny-Green et al., *A Landscape Review: Digital Inclusion for Low-skilled and Low-literate People* 51-52, UNESCO (2018), https://unesdoc.unesco.org/ark:/48223/pf0000261791.

67 International Telecommunication Union, Declaration of Principles: Building the Information Society: a global challenge in the new Millennium, World Summit on the Information Society, Doc. No. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003) [hereinafter WSIS Declaration of Principles], https://www.itu.int/net/wsis/docs/geneva/official/dop.html.

5.5 Policy recommendation 5: Ensure that local women farmers actively participate in the deliberations and formulation of data protection and ICT regulations. This policy is reflected in the World Summit on the Information Society (WSIS) Declaration of Principles, which states that, "Development of ICTs provides enormous opportunities for women, who should be an integral part of, and key actors, in the Information Society. We are committed to ensuring that the Information Society enables women's empowerment and their full participation on the basis of equality in all spheres of society and in all decision-making processes. To this end, we should mainstream a gender equality perspective and use ICTs as a tool to that end."[67] This policy should address gender barriers to participation in law and policy making and how they can be overcome (e.g. when, where and in what languages consultations are held and having gender disaggregated discussion groups). An example of how this can be practically implemented is the practice of the Ethiopian Institute of Agricultural Research (EIAR), which following a gender audit of government agricultural policymaking, called for greater participation of women in government policy making and special funding for women participation.[68]

5.6 Policy recommendation 6: Require digital databases to contain substantive local content, utilizable by local women farmers. This would include data relating to local crops, informal African agriculture, traditional knowledge and related genetic resources.

This policy is reflected in the WSIS *Declaration of Principles*, para. B8-54, which states that:

"The preservation of cultural heritage is a crucial component of identity and self-understanding of individuals that links a community to its past. The Information Society should harness and preserve cultural heritage for the future by all appropriate methods, *including digitisation*."[69]

One tool necessary for aiding the accessibility of agricultural data is to ensure that it is produced in diverse languages and suited for various contexts. "The development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas."[70]

An example is the G8 Digital Opportunities Task Force's 2001 Genoa Plan of Action, which encouraged the development of local content through making software applications available, and the participation of local stakeholders by expanding the local

68 *See* Kristie Drucza et al., *Doing research and 'doing gender' in Ethiopia's agricultural research systems*, 23 Gender, Tech. & Dev. 55-75 (2019).

69 *See* WSIS Declaration of Principles, *supra* note 67.

70 *See also* SDG 5 Target 5.B, *in Gender equality*, *supra* note 39; Sofie Isenberg, *Investing in information and communication technologies to reach gender equality and empower rural women* 19, 35, FAO (2009), https://www.fao.org/3/ca4182en/ca4182en.pdf.

71 *See* G8 Genoa Summit, Digital Opportunities for All: Meeting the Challenge: Report of the Digital Opportunity Task Force (DOT Force), including a proposal for a Genoa Plan of Action, May 11, 2001, available at: http://www.g8.utoronto.ca/summit/2001genoa/dotforce1.html (last visited Nov. 23, 2021).

language content available on the internet.[71] Canada implemented the latter policy in Africa by establishing IDRC telecentres in Zimbabwe, Uganda and Swaziland, which creates databases on local agricultural products and practices and networks for local farmers.[72] Since women farmers are more involved in local crops and are generally less educated, databases on local content in local languages will be more useful for them. Because the loss of crop diversity reduces the capacity of poor farmers to adapt to climate change, the FAO has worked with local women farmers in Tanzania and Kenya to develop databases on local practices for conservation agriculture, which draws on women's production strategies and experience in crop selection.[73]

5.6 Policy recommendation 7: Place a disclosure of origin of agricultural data obligation in IPR and data regulations: One method to avoid such misappropriation of farmers data is to require a disclosure of origin obligation in IP applications.[74] A disclosure of origin would require applicants for patent protection to: disclose the origin of any genetic resources and/or traditional knowledge used in their invention; evidence that they received prior informed consent from the indigenous people or originating countries to use their data; and evidence provision for fair and equitable benefit sharing in agreements.[75] This would support the rights and interests of Africa's women farmers. If applied in the Oubli berry case, a disclosure requirement would give the Gabonese women the right to share in the benefits of the patent obtained based on their data contribution of traditional knowledge.

6. Conclusion

Policymakers have generally tended to consider data regulations as gender neutral, based on the assumption that data protection and free trade brings equal opportunity for all people, and typically design trade agreements and strategies without reference to gender equality or social inclusion considerations. However, analysis in this paper has demonstrated the existence of a digital divide in the use of data driven agricultural technologies by Africa's female smallholder farmers. Gender gaps exist at five levels, through differences in: welfare, access, awareness, decision making and control/ownership.[76] Analysis in section 3 of this paper recognizes that data protection laws

72 *See* Stephen Mutula, *Local content development projects in Africa*, 74 S. Afr. J. Libr. & Info. Sci. 105, 107 (2008).

73 *See* FAO, Bridging the gap: FAO's programme for gender equality in agriculture and rural development (2009), https://www.fao.org/3/i1243e/i1243e.pdf.

74 *See TRIPS: Reviews, Article 27.3(b) and Related Issues: Background and the current situation*, WTO (last updated Nov. 2008), https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm; WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth Session, Doc. No. WIPO/GRTKF/IC/8/11 (May 17, 2005), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_11.pdf (document title: "Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications").

75 *See* CBD, *supra* note 27, arts. 8(j) & 15.

76 *See* D.A. Patil et al., *ICT and Empowerment of Rural and Deprived Women in Asia*, 19 Asia-Pac. J. Rural Dev. 1, 8 (2009).

are not gender neutral, because they differentially impact African women working in agriculture. Therefore, special exceptions and limitations are needed in copyright and data protection regulations for women.

Despite the existence of vast amounts of data for precision agriculture, this information remains inaccessible to female smallholder farmers in Africa for several reasons, the principal ones being a lack of accessibility and affordability. Data is accumulated by a process that involves three categories of persons, the generators, collectors and users of data. However, current copyright and data protection laws grant exclusive private rights to those that collect data, including the right to determine access to and conditions (including costs) based on which such data can be accessed. Because Africa's women smallholder farmers are mostly generators and users of data, the current approach leaves them bereft of any enforceable legal right to access or control data, even that which is generated from activities on their own farms.

This paper proposes that because Africa's women farmers are active contributors to agricultural data, they should be considered as owners, with rights akin to authors under copyright, who should continue to be able to access conclusions drawn based on data generated from their farms. To implement this, the paper recommends the adoption of several policies on data regulation, as important tools for closing the gender gap and by which to make the utilization of digital and data driven agriculture more inclusive of female smallholder farmers in Africa. The recommendations address both the socio-economic and legal barriers that prevent women farmers from accessing agricultural data and precision farming. Without the adoption of such holistic policies by African economic communities (especially the African Union in AfCFTA), African and other developing countries as a proactive measure, there is little hope of bridging the digitalization gap, or of ensuring that the benefits of precision farming are more inclusive of women smallholder farmers.

Reforming the International Monetary Fund's Debt Sustainability Assessments towards Achieving the UN's Sustainable Development Goals (SDGs): A Crucial Post-Pandemic Recovery Agenda

Karina Patricio Ferreira Lima*

1. Introduction

The economic fallout of the Covid-19 pandemic has triggered sovereign debt crises in the global South.[1] While a substantial wave of sovereign defaults has failed to materialise so far, debt service has become increasingly burdensome for many Developing and Emerging Economies (DEEs).[2] In this scenario, their capacity to fund appropriate responses to the pandemic is endangered,[3] risking a 'two-track' recovery in which inequalities between cores and peripheries[4] in the global economy are reinforced and exacerbated.[5]

Since the outbreak of the pandemic, 85 countries have obtained lending arrangements with the International Monetary Fund (IMF).[6] Concomitantly, fiscal consolidation – also known as 'austerity' – is expected in 154 countries or about 75 percent of the global population in 2021, rising to as many as 159 countries or 85 percent of the world population in 2022. By 2025, 6.3 billion people or 78 percent of the world's population may still be living under austerity.[7]

1 U.N Conference on Trade and Development (UNCTAD), *Trade and Development Report 2020: From Global Pandemic to Prosperity for All: Avoiding Another Last Decade* (2020); Karina Patricio, Another Lost Decade?, Phenomenal World (Aug. 15 2020), https://bit.ly/3kljFLM.; UNCTAD, *Trade and Development Report Update: From the Great Lockdown to the Great Meltdown: Developing Country Debt in the Time of Covid-19* (April 2020) (Oct. 2 2020), https://bit.ly/3hDTIVK.; *The Global Economic Outlook During the COVID-19 Pandemic: A Changed World*, The World Bank (June 8, 2020), https://bit.ly/36DArxE.; Kristalyna Georgieva et al., *Reform of the International Debt Architecture is Urgently Needed*, IMFBlog (Oct. 1, 2020), https://bit.ly/3wFb5Kh.

2 Daniel Munevar, *A Debt Pandemic: Dynamics and Implications of the Debt Crisis of 2020*, Eurodad (Mar. 2021), https://bit.ly/3ifqqw1.

3 Albert G. Zeufack et al., *An Analysis of Issues Shaping Africa's Economic Future,* 21 Africa's Pulse, (April 2020) https://bit.ly/3rchiMo.

4 I use the concept of 'core' and 'periphery' in the sense attributed in the Latin American structuralist tradition to those terms, which are commonly employed to describe distinct patterns of productive, technological, and trade specialisation in the global economy. I also extend these concepts to describe the financial and monetary hierarchies that emerge from those asymmetries. On the concept of core and periphery in Latin American structuralism. *See* Raúl Prebisch, *El Desarrollo Económico de América Latina y sus Principales Problemas*, United Nations (1950); Raúl Prebisch, *A Critique of Peripheral Capitalism,* 1 CEPAL Rev. 9-76 (1976).

5 Kristalyna Georgieva, *Urgent Action Needed to Address a Worsening 'Two-Track' Recovery*, IMFBlog (July 7, 2021) https://bit.ly/3hGzx9M.

This article examines the role of the IMF's Debt Sustainability Assessments (DSAs) in achieving the UN's Sustainable Development Goals (SDGs), which is a crucial agenda towards a resilient, sustainable, and inclusive post-pandemic recovery.[8] Crucially, it advocates that the DSA should be reformed by de-emphasizing its commitment to austerity. Austerity measures are overwhelmingly associated with the need to guarantee debt service levels through a reallocation of budgetary resources otherwise allocated to public investment and services, typically by means of fiscal adjustment and regressive taxation.[9] This threatens the post-pandemic recovery capacity of vast segments of the global economy and jeopardises the ability of societies to innovate and build capacity towards achieving the SDGs,[10] as well as the state's ability to ensure the fulfilment of fundamental human rights to its population.[11]

The IMF has the legal mandate of financing its members facing temporary balance of payments problems.[12] It also has extensive surveillance authority to monitor the economic and financial policies of its members[13] as well as to provide them with technical assistance.[14] The DSA is one of the mechanisms through which the Fund exercises its surveillance powers. However, the Fund's debt sustainability assessments also have a crucial role in sovereign debt crises. This is because, even though the IMF does not have a legal mandate to conduct debt restructurings of its member countries, the DSA is pivotal in determining not only when restructuring is necessary, but also how much debt reduction is needed. In other words, the Fund is the global gatekeeper that determines what debt sustainability means and how to achieve it.[15] A debt sustainability framework that is unable to appropriately account for sovereign insolvency problems effectively legitimises unsustainable debt service by draining vital public resources from IMF member countries. Thus, the DSA has crucial distributive, economic, and ecological implications both within debtor states and across the globe.

6 *COVID-19 Financial Assistance and Debt Service Relief*, International Monetary Fund (June 30, 2021) https://bit.ly/2VxZiQX.

7 Isabel Ortiz & Matthew Cummins, *Global Austerity Alert: Looming Budget Cuts in 2021-25 and Alternative Pathway,* Initiative for Policy Dialogue (IPD) et al., 4 (April 2021), https://bit.ly/3ifrj7P.

8 *Working toward a Green, Resilient, and Inclusive Recovery*, World Bank (April 9, 2021), https://bit.ly/3eJN4M7.

9 As research shows, approximately 88.5 percent of IMF programmes in 2016-2017 had fiscal adjustment as an objective, policy or strategy. Gino Brunswijck, *Unhealthy Conditions: IMF Loan Conditionality and Its Impact on Health Financing*, Eurodad 12 (2018); *see* Bernhard Reinsberg, Thomas Stubbs, et al., *Taxing the People, Not Trade: The International Monetary Fund and the Structure of Taxation in Developing Countries*, 55 Stud. in Comp. Int'l Dev. 278, 304 (2020) (discussing regressive taxation in IMF policy conditions).

10 Daniel Munevar, *Arrested Development: International Monetary Fund Lending and Austerity Post COVID-19,* Eurodad (Oct. 6, 2020); see Sustainable Development Goals, United Nations, (accessed July 14, 2021), https://sdgs.un.org/goals (describing SDGs).

11 UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, *Integrating human rights into debt policies and debt sustainability analyses to counter new debt vulnerabilities*, United Nations General Assembly (August 5, 2016) https://bit.ly/3wHGpYJ.

12 Art. V(3) IMF Articles of Agreement.

13 Art. IV IMF Articles of Agreement.

14 Article V(2)(b) IMF Articles of Agreement.

15 Ngaire Woods, *The Globalizers: the IMF, the World Bank, and their Borrowers*, (Cornell Univ. Press 2006).

In considering the role of the DSA in the international financial architecture, this article argues that the DSA framework is both legally and macroeconomically biased towards conducting assessments that underestimate sovereign insolvency problems. Thus, rather than being the product of extraordinary circumstances or misjudgements, the underestimation of insolvency problems is a persistent pattern in the IMF's debt sustainability analyses that underpins the widespread trend of post-pandemic austerity in the global South. This renders the DSA a core legal infrastructure in the international financial architecture that needs to be reformed in the years ahead.

This article proceeds as follows. **Section 2** explains what the DSA is, as well as its uses and legal framework. **Section 3** discusses the importance of the DSA in sovereign debt crises. **Section 4** analyses the macroeconomic and legal assumptions of the DSA and critiques their adequacy to achieve the SDGs. **Section 5** discusses the legitimacy and accountability issues posed by the DSA. **Section 6** concludes this piece with some considerations on the need for reforming the DSA towards a sustainable and resilient post-pandemic recovery for all.

2. The DSA: definition, uses and legal framework

The DSA is a soft law framework created by the IMF to evaluate whether, as well as to which degree, the sovereign debt of its member states is sustainable or unsustainable.[16] It was created in 2002 after a period of deliberation following the capital account crises of the 1990s and early 2000s, when the IMF was subjected to persistent criticism over its exceptional access programmes.[17] In a nutshell, the DSA

16 *See Assessing Sustainability*, International Monetary Fund (May 28, 2002), https://bit.ly/3i8a0WH (describing the DSA's foundational instrument); *Staff Guidance Note for Public Debt Sustainability Analysis in Market-Access Countries*, International Monetary Fund (May 9, 2013) https://bit.ly/2XQRX0f; *Modernizing the Framework for Fiscal Policy and Public Debt Sustainability Analysis,* International Monetary Fund, (August 5, 2011), https://bit.ly/3CPHRf3.

17 The 1990s marked a turning point for the IMF as regards both the magnitude and frequency of large-scale liquidity provision under its exceptional access policy. During that decade, the Fund began to act as an international lender of last resort (ILOLR) that provided liquidity to countries experiencing not only current account imbalances, but especially large stock debt and outflows of private capital. *See* Marco Committeri & Francesco Spadafora, *You Never Give Me Your Money? Sovereign Debt Crises, Collective Action Problems, and IMF Lending*, 143 Banca D'Italia Questioni di Economia e Finanza (Occasional Papers) 20 (January 2013); Susan Schadler, *Unsustainable Debt and the Political Economy of Lending: Constraining the IMF's Role in Sovereign Debt Crises*, 19 CIGI Paper (October 2013). The peak of this process was Argentina's debt crisis in 2001, which marked a landmark in the scale of exceptional financing. The IMF bailout was followed shortly by the largest default in history at that time. Years later, the Fund itself would acknowledge the inappropriateness of its approach in managing the crisis by recognising that the large-scale financing only postponed the inevitable debt restructuring and, by raising the country's debt burden, also meant that 'the costs of the eventual collapse were all the greater'. *See* Christina Daseking et al., *Lessons from the Crisis in Argentina*, 236 IMF Occasional Paper 41 (Feb. 10, 2004); *see also* John V. Paddock, *IMF Policy and the Argentine Crisis* 34 Univ. of Mia Inter-Am. L. Rev. 155, 187 (2002); *Evaluation Report: The IMF and Argentina, 1991-2001* Independent Evaluation Office, 64-76 (2004); Pablo Nemiña, *Del Blindaje a la Intransigencia: Comportamiento del FMI Durante la Crisis Económica Argentina (2000-2001),* 20 Ciclos en la Historia, la Economía y la Sociedad 219, 243 (2011), https://bit.ly/3hMlvD1; Martin Guzmán, *An Analysis of Argentina's 2001 Default Resolution*, 110 CIGI Paper (Oct. 2016).

responded to the need of establishing a framework to determine when the IMF should provide financing for members facing a balance of payments crisis to service their debt in full or, alternatively, when it should require that its programme be accompanied by private sector participation (PSI) through debt restructuring.[18] In the DSA framework, 'debt sustainability' means the ability of the state to fully service its debts in a way that is economically and politically viable.[19]

The soft law character of the DSA means that it is an informal set of rules which are not explicitly governed by the IMF's Articles of Agreement, or formal secondary or internal law enacted by the IMF's organs. Instead, it is based on papers and guidance notes issued by the management in exercise of its general competence to conduct 'the ordinary business of the Fund'.[20] Furthermore, the DSA can be seen as a derivation of the IMF's mandate to oversee the international monetary system.[21] Although the DSA is not directly binding on member states, it must be observed internally by the staff.[22] Thus, despite its soft law character, the DSA plays a key role in the IMF's surveillance, technical, and lending activities.[23] In addition, it is utilised by third parties, such as other multilateral creditors[24] and private credit rating agencies,[25] in guiding their lending and risk assessment activities, respectively. The importance of the DSA in the decision-making processes of both the Fund and other relevant actors renders it a key technology of global governance.[26]

There are two different sets of instruments governing debt sustainability evaluations: (1) the Debt Sustainability Framework (DSF), which applies to the 68 low- and some lower- and upper-middle income countries eligible to borrow from the Poverty Reduction and Growth Trust (PRGT), whose main source of financing is concessional lending; and (2) the DSA for middle- and high-income Market Access

18 *See e.g.*, Independent Evaluation Office (n 17) 42-44, 67, 115-18; *Annual Report of the Executive Board for the Financial Year Ended April 30,* International Monetary Fund, (1999) available at https://www.imf.org/External/NP/ieo/2004/arg/eng/pdf/report.pdf; *Recovery from the Asian Crisis and the Role of the IMF*, International Monetary Fund, Issues Brief No 00/05 (June 2000); *Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund*, International Monetary Fund (September 24, 2000).

19 "[I]f no realistic adjustment in the primary balance – i.e., one that is both economically and politically feasible – can bring debt to below such a level, public debt would be considered unsustainable. […] This is because – other things equal – a higher debt requires a higher primary surplus to sustain it." Staff Guidance Note for Public Debt Sustainability Analysis in Market-Access Countries, International Monetary Fund at 4 (May 4, 2013) https://www.imf.org/external/np/pp/eng/2013/050913.pdf.

20 Art. 12(4)(b) IMF Articles of Agreement.

21 Art. 4(3) IMF Articles of Agreement.

22 Michael Riegner, *Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring,* 41 Yale J. of Int'l L., 141, 145-48 (2016).

23 Ibid. at 146.

24 These include, for instance, the World Bank, Inter-American Development Bank (BID), African Development Bank (AfDB), and Asian Development Bank (ADB).

25 André Broome & Joel Quirk, *Governing the World at a Distance: The Practice of Global Benchmarking*, 41 Rev. of Int'l Stud., 819, 837-38 (2015).

26 Kevin Davis, Angelina Fischer, et al., *Governance by Indicators: Global Power through Classification and Rankings* (OUP 2012); *see* Terence C. Halliday, *Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations*, 11-08 Center on L. and Glob. 2011) (discussing use of indicators in international finance).

Countries (MACs), mostly advanced and emerging economies, which borrow at higher interest rates from the IMF's General Resources Account (GRA).

The DSF for PRGT countries was jointly developed by the IMF and World Bank in 2005, with subsequent reviews in 2006, 2009, 2012, and 2013.[27] The current framework was approved by IMF and World Bank Executive Boards in 2017 and implemented in 2018.[28] It consists in a baseline scenario for the economy, government finances and external debt which compares the public sector and the external debt-to-GDP ratios and the servicing costs-to-GDP ratio against five thresholds, whose value depends on an assessment of the country's 'institutional quality'. Next, alterative scenarios are compared against the same thresholds. The assessment is concluded by producing a rating of external government debt default risk.[29]

The framework for sovereign debt sustainability analyses of MACs is exclusively run by the IMF. The Fund may, at its own discretion, conduct these assessments annually as part of its Article IV consultations.[30] These are known as 'Article IV consultations' because they are required by Article IV of the IMF Articles of Agreement, which relates to the Fund's surveillance roles. During those consultations, a team of IMF staff visits a country to assess economic and financial developments and discuss the country's economic and financial policies with government and central bank officials.[31] For countries with IMF arrangements, however, the assessment must be conducted at the time of programme approval and subsequently once a year – except for exceptional access cases, which require an updated DSA in every programme review.[32]

The DSA framework for MACs is anchored in the first debt sustainability framework introduced in 2002,[33] which was subsequently reviewed in 2003,[34] 2005,[35] and 2011-13.[36] The current framework was reformed in early 2021 and is expected to be operationalised in late 2021 or early 2022 through the completion of a staff guidance note and template.[37] It divides countries into two groups: emerging

27 *See Factsheet: Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries*, International Monetary Fund (March 12, 2020), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/39/Debt-Sustainability-Framework-for-Low-Income-Countries.

28 *Guidance Note on the Bank-Fund Debt Sustainability Framework for Low-Income Countries*, International Monetary Fund, (February 14, 2018), https://bit.ly/2TazPfE.

29 *See* Jasper Lukkezen and Hugo Rojas-Romagosa, *Early Warning Indicators in a Debt Restructuring Mechanism*, UNCTAD 5-7 (April 29, 2014).

30 *Review of The Debt Sustainability Framework for Market Access Countries*, International Monetary Fund, 40-41 (Feb. 3, 2021), https://bit.ly/3lFJMvJ.

31 *Surveillance*, International Monetary Fund https://www.imf.org/external/about/econsurv.htm (accessed 14 July 2021).

32 International Monetary Fund, *supra* note 30, at 40-41.

33 *Assessing Sustainability*, International Monetary Fund (28 May 2002).

34 *Sustainability Assessments – Review of Application and Methodological Refinements*, International Monetary Fund, (June 10, 2003).

35 *Information Note on Modifications to the Fund's Debt Sustainability Assessment Framework for Market Access Countries*, International Monetary Fund (July 1, 2005).

36 *Modernizing the Framework for Fiscal Policy and Public Debt Sustainability Analysis*, International Monetary Fund (August 5, 2011); *Staff Guidance Note for Public Debt Sustainability Analysis in Market-Access Countries*, International Monetary Fund (May 9, 2013).

37 International Monetary Fund, *supra* note 30

markets and advanced economies. The analysis comprises a baseline scenario for the economy and public debt, along with an adverse scenario. The assessment consists of three modules: a debt fanchart composite index that quantifies medium-term debt stabilization prospects, a Gross Financing Needs (GFN) module that assesses debt rollover risk, and a crisis prediction model calibrated on past episodes of unsustainable debt. Outputs from those three modules are subsequently aggregated in a composite index, where greater index values indicate higher risk. The index is divided into three sovereign debt sustainability risk zones – sustainable with high probability; sustainable, but not with high probability; or not sustainable. In this framework, the signal 'not sustainable' is associated with a probability of debt being unsustainable of more than 50 percent. In turn, 'sustainable, but not with high probability' indicates the risk zone between 50 and 20 percent, and 'sustainable with high probability' relates to risk values below 20 percent.[38] These mechanical signals are subsequently used as an input for a case-by-case assessment on the debt sustainability of the country concerned, whose judgement ultimately lies at the discretion of IMF staff.[39]

3. The DSA's role in IMF lending and debt restructurings

The DSA framework is a critical element of the Fund's lending policies because it forms the basis of the staff's judgment on whether, to what extent and under which conditions, a country can receive IMF financing. In this sense, the DSA assesses whether the combination of structural adjustment and exogenous developments is likely to produce sustainable debt.[40] The concept of 'structural adjustment' encompasses a wide range of policies directed at stabilisation, liberalisation, deregulation, and privatisation in the debtor country, all of which must be adopted as a condition for obtaining IMF financing.[41] Where the structural adjustment approach is not feasible because a state's debt is judged to be unsustainable no matter what measures are introduced in the medium term, a restructuring or relief that reduces the debt burden is required.[42] **Alongside its pivotal role in IMF financing, the DSA also informs the lending decisions of the World Bank, regional development banks and other lenders of last resort,[43] including the Chiang Mai Multilateralization Initiative (CMIM)[44] and the European Stability Mechanism (ESM).[45]**

38 International Monetary Fund *supra* note 30, at 38-40.

39 *Questions and Answers on the New Sovereign Risk and Debt Sustainability Framework for Market Access Countries*, International Monetary Fund (Feb. 19, 2021), https://bit.ly/2XJfLDb.

40 Susan Schadler, *Unsustainable Debt and the Political Economy of Lending: Constraining the IMF's Role in Sovereign Debt Crises*, 19 CIGI Paper 10 (Oct. 2013).

41 Lawrence H. Summers & Lant H. Pritchett, The Structural-Adjustment Debate 83 Am. Econ. Rev. 383-389 (1993).

42 *Sovereign Debt Restructuring – Recent Developments and Implications for the Fund's Legal and Policy Framework*, International Monetary Fund, 9-10 (April 26, 2013).

43 For instance, the World Bank's International Development Agency (IDA) reduces its allocation to countries with weak ratings by up to a fifth and makes the loans-grants mix conditional on debt sustainability. In addition, the World Bank uses debt sustainability ratings to design non-concessional borrowing limits for low-income countries (LICs). Similarly, regional development banks and bilateral aid agencies base their grant and lending decisions on such ratings. *See also* Valentin F. Lang & Andrea Presbitero, *Room for Discretion? Biased Decision-Making in International Financial Institutions*, 130 J. Dev. Econ. 1, 2-4 (2018).

The DSA also has a decisive influence on the timing of sovereign debt restructuring processes. When a state's debt is found to be unsustainable, the Fund is precluded from providing financing to it unless the programme includes specific measures to restore debt sustainability within the medium term, which will typically involve a debt restructuring.[46] The rationale for this requirement is that, otherwise, IMF financing would not be used to resolve a temporary balance of payments problem – as mandated in the IMF Articles of Agreement[47] – but rather to fuel an insolvency problem. Thus, while the IMF does not have an explicit legal mandate to conduct restructurings or to compel a member to initiate one, the DSA has the power to trigger or postpone the restructuring process. In addition, the assessment has a crucial role in determining the size of haircuts, although this function is not legally formalised and there are no established rules to allocate losses.[48]

Finally, the DSA is also a pivotal component in sovereign debt restructuring processes involving both the Paris Club and private creditors, including bondholders and commercial banks.[49] In a scenario of increasing creditor diversification in the sovereign debt market,[50] which makes consensus on debt restructuring processes particularly hard to achieve, the role of the DSA in determining the scope of debt sustainability – and therefore the need for, and magnitude of, debt restructurings – gains an unparalleled level of importance. This is especially so as regards the need

44 The CMIM is a multilateral currency swap arrangement among the ten members of the Association of Southeast Asian Nations (ASEAN) – Brunei Darussalam, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam –, China (including the Monetary Authority of Hong Kong), Japan, and South Korea. To access 40 percent or more of their maximum borrowing amount from the facility, CMIM members must be under an IMF programme, the approval of which depends upon completion of the DSA. *See The Amended Chiang Mai Initiative Multilateralisation (CMIM) Comes Into Effect on 31 March 2021*, ASEAN+3 Macroeconomic Research Office (March 31, 2021), https://bit.ly/39DtYnT.

45 Under Article 13(1)(b) of the ESM Treaty, the European Commission (EC), in liaison with the European Central Bank (ECB), is entrusted with the task of conducting debt sustainability assessments of its members. The analysis is meant to be conducted together with the IMF 'wherever appropriate and possible'. The ESM Treaty is available here https://www.esm.europa.eu/legal-documents/esm-treaty See IMF, Collaboration Between Regional Financing Arrangements and the IMF – IMF Policy Paper, July 2017 available here:https://www.imf.org/~/media/Files/Publications/PP/2017/pp073117-background-paper-collaboration-between-regional-financing-arrangements-and-the-imf.ashx (pages 18-22)

46 Sean Hagan, Maurice Obstfeld and Poul M. Thomsen, *Dealing with Sovereign Debt – The IMF Perspective*, IMFBlog (February 23, 2017). In particular, under the latest exceptional GRA access policy, sovereign debt 'should be sustainable with high probability, or if debt is sustainable but not with high probability, the IMF may lend if financing provided by sources other than the Fund improves debt sustainability and enhances safeguards to Fund resources'. *See The Fund's Lending Framework and Sovereign Debt – Further Considerations*, International Monetary Fund (April 9 2015).

47 Art. I(v) IMF Articles of Agreement.

48 Riegner, *supra* note 22, at 146.

49 *See Evian Approach*, Paris Club, https://bit.ly/2UYn353.

50 On creditor diversification in the private debt market, *see The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors – Recent Developments, Challenges, and Reform Options*, International Monetary Fund (Sept. 23, 2020); F Fastenrath, et al., *Where States and Markets Meet: The Financialisation of Sovereign Debt Management* 22 New Pol. Econ. 273 (2017). On official creditor diversification, *see* Sebastian Horn, et al., *China's Overseas Lending*, NBER Working Paper No. 26050 (2019); Kevin Gallagher & Margaret Myers, *China-Latin America Finance Database*, Inter-Am. Dialogue, (2019); Axel Dreher, et al., *Aid, China, and Growth: Evidence from a New Global Development Finance Dataset*, AidData Working Paper 46 (2017).

to ensure PSI in the restructuring process,[51] which has not been possible to achieve under recent debt treatment initiatives such as the G20's Debt Service Suspension Initiative (DSSI) and the Common Framework for Debt Treatments beyond the DSSI.[52] Despite the participation of official bilateral creditors in those agreements, including the confluence of both Paris Club and non-Paris Club creditors such as China, India, Turkey, and Saudi Arabia in the Common Framework, the voluntary character of those arrangements has kept private creditors unbound by its terms.[53] In this regard, it is worth noting that recent debt restructuring processes that involved significant levels of PSI had the direct support of the DSA by either incorporating PSI into the sustainability assessment, such as in the case of Ukraine in 2015,[54] or explicitly recognising the unsustainability of sovereign debt, such as in the case of Argentina in 2020. [55]

4. The DSA's macroeconomic and legal assumptions

In the previous section I argued that, although the Fund does not have a mandate to conduct restructurings, it has the role of facilitating them when the debt burden is unsustainable. The issue, however, is what sustainability means. Every definition of debt sustainability is embedded within a set of macroeconomic and legal assumptions. It is important, therefore, to understand what those assumptions are within the DSA and discuss their compatibility with key goals such as the SDGs, particularly within the context of the post-pandemic recovery.

From a macroeconomic perspective, two requirements are crucial to assess debt sustainability in a way that is conducive towards achieving the SDGs. First, indicators should include longer-term horizons along with shorter-term ones if they are to adequately measure the success of any development strategy.[56] This is because development strategies involve long-term processes of economic change, including through the expansion of the productive capabilities of a country (also known as 'economic complexity') and institution-building.[57] Second, achieving the SDGs requires a high level of public sector ambition and investment in innovation, infrastructure, and services.[58] This is particularly so in the context of the current environmental

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51 International Monetary Fund, *supra* note 50.

52 *See* Questions and Answers on Sovereign Debt Issues, International Monetary Fund (April 8, 2021) https://bit.ly/3utnjX3.

53 Stephen Connelly, et al., *The G20 Debt Service Suspension Initiative: What of Commercial Creditors?,* 35 Butterworths J. of Int'l Banking & Fin. L. 741, 743 (2020).

55 In March 2015, the IMF assessed Ukraine's debt to be sustainable with a high probability only if bondholders agreed to a restructuring that would reduce the debt-to-GDP ratio to 71 percent in 2020. *See Ukraine: Request for Extended Arrangement Under the Extended Fund Facility and Cancellation of Stand-By Arrangement*, International Monetary Fund, (Mar. 12, 2015) https://bit.ly/2XPz2D5; *see also* Susan Schadler, *Ukraine and the IMF's Evolving Crisis Narrative*, CIGI Policy Brief No. 68 (Nov. 2015) https://bit.ly/3nW703z.

56 Jan Kregel, *Rethinking Debt Sustainability in the Context of the Millennium Development Goals*, 59 BNL Q. Rev. 225, 248 (2006).

crisis, which prompts societies to adopt bold strategies towards achieving crucial goals such as ensuring the availability and sustainable management of clean water and sanitation (SDG6); building resilient infrastructure, promoting inclusive and sustainable industrialisation and fostering innovation (SDG9); building sustainable cities and communities (SDG11); ensuring responsible consumption and production (SDG12); combating climate change (SDG13); conserving and sustainably using the oceans, seas and marine resources (SDG14); and promoting the sustainable use of terrestrial ecosystems (SDG15). The public sector is therefore a key player in not only providing those public goods, but also shaping the market towards achieving the societal missions embedded within the SDGs.[59] This view presupposes an idea of debt sustainability that is anchored not only in economic growth, but in development as well. In other words, countries that reach higher levels of development are more equipped to achieve sustainable levels of debt, as opposed to being vulnerable to the booms-bursts in the commodity cycle that often lead to debt crises.[60] Yet moving up in the development ladder often requires expansionary fiscal policies, that is, high levels of public sector investment towards achieving the SDGs.

However, those requirements are currently incompatible with the DSA. First, in relation to the time horizon of the assessment, the current framework only makes projections for public debt over 10 years embedded in a model that projects key macroeconomic variables.[61] These projections typically consist of a baseline scenario for public finance based on existing information, measured against predetermined thresholds and alternative scenarios.[62] Those indicators do not adequately reflect development goals, focusing only on shorter-term debt service capacity instead. A longer-term span in the DSA is therefore required to bring into view a perspective of debt sustainability that captures the time needed to adequately plan, achieve, and measure development goals.

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57 Ricardo Hausmann & César Hidalgo, *The Network Structure of Economic Output*, 16 J. of Econ. Growth, 309, 342 (Oct. 1, 2011); Ricardo Hausmann et al., *The Atlas of Economics Complexity: Mapping Paths to Prosperity* (Puritan Press 2011); César Hidalgo & Ricardo Hausmann, *The Building Blocks of Economic Complexity* 106 Proceedings of the Nat'l Acad. of Sci. of the U.S., 10570, 10575 (2009); Ha-Joon Chang, *The East Asian Development Experience: The Miracle, the Crisis and the Future* (Third World Network 2006); Celso Furtado, *Development and Underdevelopment* (Univ. of California Press, 1964); R Prebisch, *The Economic Development of Latin America and its Principal Problems,* 7 Econ. Bull. for Latin Am. 1, 22 (1962); Albert O. Hirschman, *The Strategy of Economic Development* (Yale Univ. Press 1958).

58 As the United Nations Conference on Trade and Development (UNCTAD) estimated in 2014, developing countries face an annual gap of USD 2.5 trillion in investment in SDG-relevant sectors. *See World Investment Report 2014,* UNCTAD, xxvi (2014) https://unctad.org/system/files/official-document/wir2014_en.pdf.

59 Mariana Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Allen Lane, 2021).

60 *See* R Prebisch, *The Economic Development of Latin America and its Principal Problems* (ECLAC 1950) https://bit.ly/3ufhxIa; Harry Bloch & David Sapsford, *Whither the Terms of Trade? An Elaboration of the Prebisch-Singer Hypothesis*, 24 Cambridge Journal of Economics 461-81 (2000).

61 *See* Jasper Lukkezen & Hugo Rojas-Romagosa, *Early Warning Indicators in a Debt Restructuring Mechanism*, UNCTAD, 6 (April 29, 2014).

62 On the different approaches that exist to assess debt sustainability and their complexities, including the IMF's DSA, *see* Xavier Debrun et al., *Debt Sustainability* in SA Abbas, A Pienkowski, and K Rogoff (eds), *Sovereign Debt: A Guide for Economists and Practitioners* (OUP 2019).

Second, as it currently stands, the DSA focuses on fiscal adjustment and the evolution of the primary balance as the main elements underpinning debt sustainability. As Guzmán stresses, this prevents the DSA framework from adopting a more workable view based on *consistent macroeconomic policies*, rather than focusing on the short- and medium-term impacts of adjustment shocks.[63] In contrast, a definition that focuses on the consistency and political feasibility of macroeconomic policies conducive to debt stabilisation under non-extreme shock scenarios would result in a more structural approach to debt sustainability. Most importantly, as Marsh highlights, **a coherent framework on debt sustainability should be centred in the balance of payments and macroeconomic challenges facing IMF members** – after all, it is the balance of payments, or the ability to generate foreign exchange through an export surplus (as opposed to primary fiscal balance) what really matters for foreign currency-denominated debt.[64] Such framework should include a comprehensive analysis of how external developments such as export volumes and prices, capital flows, and transfers impact the economy, with a structural view towards creating a sustainable flow of foreign currency into the country by escalating on the economic complexity ladder. This would allow the Fund to contemplate a wider range of policies conducive to the restoration of debt sustainability that would be more workable in terms of achieving development goals and would not necessarily have fiscal adjustment at their core.[65] Instead, these could also include the possibility of running counter-cyclical policies, foreign exchange controls, and industrial policy strategies for dealing with debt sustainability issues as well as achieving the SDGs.

The most remarkable consequence of the current DSA framework's flawed macroeconomic assumptions is its poor performance in terms of assessing debt sustainability in practice. Admittedly, making projections about the future is a genuinely challenging activity in light of fundamental uncertainty,[66] which makes debt sustainability indicators more adequate to ascertain vulnerability in the present than in future scenarios.[67] However, the evaluations conducted under the DSA often reflect various types of assumptions underlying projected debt trajectories which are manifestly unrealistic from the outset. These include impracticable policy efforts and overoptimistic projections for growth, real interest rates, inflation, or exchange rates within the context of IMF-imposed austerity that create the illusion of a sustainable debt outlook.[68] This pattern has been recognised by IMF staff, who suggested that the DSA's assumptions are 'heroic' rather than 'realistic'.[69] As a result, projections have generally underestimated the insolvency problem of states in debt distress not only at

63 Martin Guzmán, *Definitional Issues in the IMF Debt Sustainability Analysis Framework: A Proposal*, 77 CIGI Policy Brief 4-5 (May 2016).

64 C Marsh, *Remarks on the IMF's New Debt Sustainability Framework*, General Theorist, (Feb. 16, 2020), https://bit.ly/2W1ZxEG.

65 Alan Auerbach & Y Gorodnichenko, *Fiscal Multipliers in Recession and Expansion* in A Alesina and F Giavazzi (eds), *Fiscal Policy After the Financial Crisis* (Univ. of Chi. Press 2012); Anja Baum et al., *Fiscal Multipliers and the State of the Economy*, 12 IMF (2012).

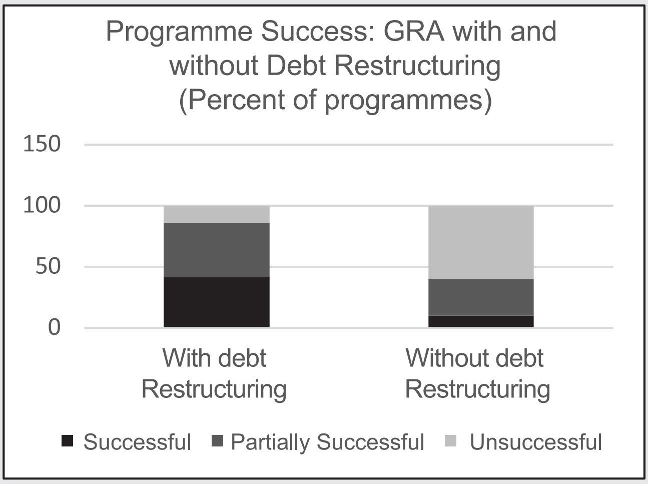
66 On modelling uncertainty in debt sustainability assessments, *see* Xavier Debrun et al., *supra* note 61, at 171-77.

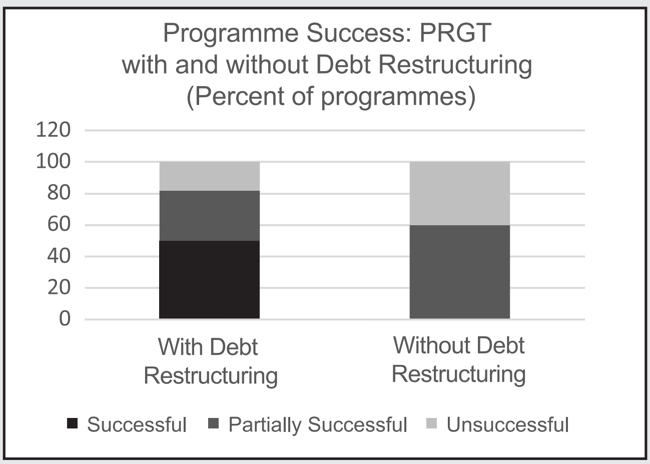
67 Riegner, *supra* note 22, at 147.

the beginning of the crisis but also throughout its entire period; that is, large forecast errors typically persist even after information on the economic performance of the country has been revealed.[70]

As research conducted shortly before the outbreak of the pandemic shows, from 2015 to 2019 the Fund has approved programmes that did not involve any debt restructuring with 18 countries that, despite being highly overindebted, had their risk of default reduced to moderate or the equivalent.[71] These were effectively identified as cases where IMF financing was used to de-risk debt with the private sector in a scenario of actual or highly probable sovereign insolvency. Across those 18 members, the amount of IMF financing committed was US$93bn. As evidenced by the Fund's *2018 Review of Program Design and Conditionality*, the result of this pattern of insufficient level reduction was a significant level of failures in IMF programmes which did not involve early debt restructuring (Figure 1).[72]

Figure 1: IMF Programmes' Success Rates with and without Debt Restructuring





Source: International Monetary Fund, '2018 Review of Program Design and Conditionality', Policy Paper No 19/012 (20 May 2019) 32 (based on VE indicators, WEO, and IMF staff calculations).

Closely associated with the DSA's macroeconomic assumptions are its legal assumptions. A framework that is built upon the core premises of short-term debt service capacity and fiscal adjustment is one that is centrally focused on ensuring the performability of debt contracts between the state and its creditors, including private creditors and the IMF as preferred creditor of the debtor state.[73] However, in underestimating sovereign insolvency problems and prioritising shorter-term debt service over longer-term debt sustainability, the framework creates *de facto* priority rights in the allocation of insolvency losses to other stakeholders with equally valid legal claims on the public budget. These include, for instance, longer-term creditors of the debtor state and its population, whose claims over public services and investment, salaries, pensions, and welfare are supported by both domestic and international legal orderings.[74] Domestic legal orderings may include constitutional or other types of legislative provisions recognising the right to food safety, sanitation, healthcare, education, social protection, and other types of provisions that must be adequately reflected in a nation's budget to be operationalised. International legal orderings include obligations such as those established in the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose 171 ratifying states commit to ensure a minimum floor protection for the progressive realisation of economic, social, and cultural rights.[75] Those claims, however, are neglected in the DSA's legal assumptions, which recognise the priority of legal claims over debt assets as senior to any other types of legal claims, including those associated with the human rights obligations of states.[76] A reform in the DSA framework is therefore necessary to take those claims into consideration in debt sustainability evaluations.

68 *2018 Review of Program Design and Conditionality*, International Monetary Fund, 19 Policy Paper 26 (May 20, 2019). On the gap between debt sustainability assessments and the realism of hypothetical policies, see X Debrun, *supra* note 61, at 159.

69 Susan Hagan, *Debt Restructuring and Economic Recovery*, *in* Sovereign Debt Management, 379 (RM Lastra and L Buchheit, 2014); Susan Hagan, M Obstfeld and PM Thomsen, *Dealing with Sovereign Debt – The IMF Perspective,* IMFBlog (Feb. 23 2017).

70 Guzmán, *supra* note 62, at 2.

71 Among this group of states, eight were part of the PRGT – Afghanistan, Cameroon, Central African Republic, Chad, Ghana, Mauritania, São Tomé and Príncipe, and Sierra Leone – and ten drew on the IMF General Resources Account – Angola, Argentina, Ecuador, Egypt, Jordan, Mongolia, Pakistan, Sri Lanka, Tunisia, and Ukraine. *See* Jubilee Debt Campaign et al., *Preventing and Resolving Sovereign Debt Crises: Stop Bailing Out Reckless Lenders* (Oct. 2019).

72 *2018 Review of Program Design and Conditionality*, International Monetary Fund Policy Paper No 19/012, 31 (May 20, 2019). Under GRA programmes, the IMF's definition of success is the ending of any balance-of-payments liquidity support and medium-term external viability after programme completion. In turn, success in PGRT programmes is measured on the basis of a set of indicators tailored to the specific objectives of the LIC facilities, including the evolution of external debt vulnerabilities, social spending, capital expenditure, revenue mobilisation, real GDP growth, and inflation.

73 Rutsel Silvestre Martha, *Preferred Creditor Status under International Law: The Case of the International Monetary Fund* 39 The Int'l & Comp. L. Q. 801, 826 (1990).

74 *See e.g.*, Jackie Dugard et al., *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Elgar 2020); Ilias Bantekas and Cephas Lumina, *Sovereign Debt and Human Rights* (OUP 2018).

75 *Status of Ratification Interactive Dashboard: International Covenant on Economic, Social and Cultural Rights* UN Office of the High Commissioner for Hum. Rights, https://bit.ly/3znrq7P.

76 *Integrating human rights into debt policies and debt sustainability analyses to counter new debt vulnerabilities*, UN Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights (August 5, 2016), https://bit.ly/3wHGpYJ.

In sum, the macroeconomic and legal assumptions embedded within the DSA have done little (if anything) to promote debt sustainability through economic recovery from the insolvency crisis, and have mostly been counterproductive to the socioeconomic development of the borrowing state.[77] Their effectiveness relies on their capacity to reallocate risk away from the IMF's general resources, regardless of whether the Fund's purpose of correcting balance of payments imbalances 'without resorting to measures destructive of national or international prosperity' – as per Article I of the IMF's Articles of Agreement – are achieved. Moreover, their general effect is to upset the main wealth and income distribution chains in society – wages[78] and public services.[79] In doing so, they contribute towards increasing inequality in the borrowing state,[80] thereby placing the highest burden of insolvency costs on the most vulnerable sectors in society.

5. Towards higher legitimacy and accountability standards for the DSA

Another crucial set of elements for reform in the DSA pertains to the domain of transparency, accountability, and participation in the design and application of the framework.[81] The high levels of discretion enabled by the DSA framework to IMF staff in the assessments,[82] as well as the lack of institutional voice for DEEs in the design of, and decision-making process on, such processes, often result in suboptimal levels of legitimacy, transparency, and accountability.[83] In fact, due to the soft law status of the DSA, the processes involved in its application are not subject to any formalised accountability mechanisms. The soft legal characterisation of the assessment contrasts

77 *Trade and Development Report, 2015: Making the International Financial Architecture Work for Development* United Nations Conference on Trade and Development, 138 (2015); James Vreeland, *The IMF and Economic Development* (CUP 2010) ch 5; William Easterly, *What Did Structural Adjustment Adjust? The Association of Policies and Growth with Repeated IMF and World Bank Adjustment Loans* 76 J. of Dev. Econ. 1, 22 (2005); A Przeworski and James Vreeland, *The Effect of IMF Programs on Economic Growth* 62 J. of Dev. Econ. 385-421 (2000).

78 *Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes*, ILO, IMF, et al., (2015) https://www.oecd.org/g20/topics/employment-and-social-policy/Income-inequality-labour-income-share.pdf.

79 Emma Seery, *Working for the Many: Public Services Fight Inequality*, 182 Oxfam Briefing Paper (April 3, 2014), https://bit.ly/3CoEA6m; Gerlinde Verbist et al., *The Impact of Publicly Provided Services on the Distribution of Resources: Review of New Results and Methods*, 130 OECD Soc., Emp. and Migration Working Papers, 35 (2012).

80 Nona Tamale, *Adding Fuel to Fire: How IMF Demands for Austerity will Drive Up Inequality Worldwide*, Oxfam (Aug. 11, 2021), https://bit.ly/2Z9sqQh; V Lang, *The Economics of the Democratic Deficit: The Effect of IMF Programs on Inequality,* The Rev. of Int'l Org. (2020), https://bit.ly/3lHlCBi; Timon Forster et al., *How Structural Adjustment Programs Affect Inequality: A Disaggregated Analysis of IMF Conditionality 1980-2014*, 80 Soc. Sci. Rsch. 83-113, (2019); Doris A. Oberdabernig, *Revisiting the Effects of IMF Programs on Poverty and Inequality*, 46 World Dev. 113, 142, (2013); James Vreeland, *The Effect of IMF Programs on Labor*, 30 World Dev. 121, 139 (2002); Gopal Garuda, *The Distributional Effects of IMF Programs: A Cross-Country Analysis,* 26 World Dev. 1031, 1051 (2000).

81 Kern Alexander et al., *Global Governance of Financial Systems: The International Regulation of Systemic Risk,* 153 (OUP 2005).

82 Valentin Lang & Andrea Presbitero, *Room for Discretion? Biased Decision-Making in International Financial Institutions*, 130 J. of Dev. Econ. 1, 16 (2017).

83 Ngaire Woods, *Making the IMF and the World Bank More Accountable* 77 Int'l Aff. 83-100 (2001); Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 Reg. & Gov. 137, 164 (2008).

with the importance of its implications for the economic development and wellbeing of the borrowing state's population. This makes those legal decisions, despite their soft law characterisation, an exercise of international public authority.[84]

This issue is exacerbated within the IMF because the institution currently has a highly asymmetric governance profile, with an almost complete mismatch between the Fund's controlling members and those who actually use its lending facilities. IMF voting rights are allocated according to each member's quota holdings – that is, the subscription paid by each member to join the Fund.[85] IMF quotas are predominantly owed by the most monetarily powerful states in the international monetary system, which typically do not rely on IMF financing to solve balance of payments problems – most prominently, the United States, China, Japan, Germany, France, and the United Kingdom.[86] As the largest shareholder, the United States has unique veto power over major policy decisions [87] and, in practice, is able to critically influence individual country lending decisions. Consequently, a few core states hold much of the voting power over policies that are predominantly targeted at a non-controlling majority of states in the global South.[88]

As it relates to participation mechanisms in the DSA, the IMF has been historically resistant to adopt recommendations on the normative and procedural elaboration of debt sustainability analyses by both governments and various civil society actors.[89] Although since the 2000s the Fund has opened up a bit more in order to seek a higher level of legitimacy in its actions – perhaps in response to what has been called the IMF's 'legitimacy crisis' since the Asian financial crisis of 1997-98[90] –, the normative framework and decision-making procedures of the DSA establish insufficient mechanisms for the participation of debtor states and other civil society actors in its design and application. In general terms, the participation mechanisms currently in place (such as those carried out under the Article IV report framework) are not formal in nature and, consequently, have not generated any substantial changes in the DSA criteria. Indeed, the concept of debt sustainability that underlies those assessments has always been based around the idea of shorter-term debt service capacity. At the same time, particularly in the cases of low-income countries (LICs),

84 A Bogdandy and Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, *in* Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing (C. Espósito, Y Li & JP Bohoslavsky eds. 2013).

85 Rutsel Silvestre Martha, *The Financial Obligation in International Law*, 53 (OUP 2015); JK Horsefield, *The International Monetary Fund 1945-1965*, IMF 94, (1969).

86 *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, International Monetary Fund https://www.imf.org/external/np/sec/memdir/members.aspx.

87 *The International Monetary Fund*, US Cong. Res. Serv. (January 13, 2021), https://bit.ly/2XDwura.

88 Daniel K. Tarullo, *The Role of the IMF in Sovereign Debt Restructuring* (2005) 6 Chi. J. of Int'l L. 287, 292-93 (2005).

89 A Caliari, *The New World Bank/IMF Debt Sustainability Framework: Does it Live Up to the Human Development Promise?* (2005) https://bit.ly/3ivuB6P.

90 Leonard Seabrooke, *Legitimacy Gaps in the World Economy: Explaining the Sources of the IMF's Legitimacy Crisis* 44 Int'l Pol. 250 (2007).

91 Caliari, *supra* note 88.

the participation of states in determining and managing the sustainability of their own debt is limited. Indeed, these countries have not had any participation in the determination of the indicative thresholds that serve as a parameter for their debt sustainability analysis.[91]

The lack of participation of many of LICs in the DSA is reflected on the fact that the debt sustainability assessments of poor and highly indebted countries apply indicators such as those of the Country Policy and Institutional Assessment (CPIA, prepared by the World Bank), without any voice mechanisms for governments regarding the applicable criteria.[92] Indeed, most of the 16 criteria used in the CPIA are irrelevant for the purpose of determining the good use of the debt that is contracted and, in some cases, are aimed at promoting specific policies, such as trade liberalisation, so-called 'deregulation' and a regressive tax structure.[93]

Finally, the ineffectiveness of the participation mechanisms for both states and civil society organisations produces negative impacts on the transparency of the framework. The IMF adopts a 'transparency policy' through which it provides the public with 'access to Fund views and deliberations' aimed at 'informing public debate and building traction for the Fund's advice, supporting the quality of surveillance and of programs, by subjecting the Fund to outside scrutiny, and enhancing the Fund's legitimacy by making the institution more accountable'.[94] Despite this policy, the substantive and procedural elements of the DSA remain at a considerably lower stage of development regarding transparency.[95] Crucially, the analysis leaves many elements to the discretion of the staff, which makes it difficult for actors external to the institution – including the governments of the countries upon which the evaluation is carried out – to demand accountability for the content of the assessments.[96]

This is where procedural and substantive elements overlap in the governance problems of the DSA: the substantive consequence of those procedural issues is the proscription of a development-oriented approach in the analysis, which would be more likely if the framework had the crucial input of those affected by the policies prescribed to deal with sovereign indebtedness problems. In this sense, a quota reform in the IMF that more adequately reflects the relative economic weights of the global South[97] could potentially lead to better transparency, accountability, and participation

92 Ibid.

93 African Forum and Network on Debt and Development, et al., *Civil Society position on the IMF and World Bank Debt Sustainability Framework Review* (2016), https://bit.ly/3xPKZpc.

94 *Updated Guidance Note on the Fund's Transparency Policy*, International Monetary Fund at 4 (April 7, 2014) https://www.imf.org/external/np/pp/eng/2014/040714.pdf.

95 On the limits of transparency and the importance of ambiguity in the governance of the Bretton Woods institutions, *see* Jacqueline Best, *The Limits of Transparency: Ambiguity and the History of International Finance* (Cornell University Press, 2007).

96 Daniel Bradlow, *An IMF that Works for Africa*, The Global Governance Project, (August 12, 2019), https://bit.ly/3lWsjiU.

97 Rakesh Mohan, *IMF Quota Reforms and Global Economic Governance: What Does the Future Hold?*, 2 Center for Soc. and Econ. Progress Working Paper (2020) https://bit.ly/3CVX7Y5 ; José De Gregorio et al., *IMF Reform: The Unfinished Agenda*, 20 Geneva Reports on the World Econ. (2018) https://bit.ly/3zNYxBP; Barry Eichengreen and Ngaire Woods, *The IMF's Unmet Challenges,* 30 J. of Econ. Perspectives 29-52 (2015).

mechanisms in the DSA and help redesigning the framework towards making its debt sustainability analyses and policy advice compatible with the SDGs.

6. Concluding Remarks

The post-pandemic recovery agenda requires a global response focused on achieving resilience and sustainability through the pursuit of the SDGs, enabling an adequate response to the crisis in DEEs. Urgent measures and policies are needed that stimulate broad-based economic growth and complexity, employment creation and socioeconomic development for all. The public sector has a crucial role in this agenda. Most countries in the global South are in desperate need to widen their fiscal and monetary space to build and shape markets through investment, innovation, and financial support to businesses and workers in the post-pandemic stage. This requires a view of debt sustainability that is conducive to long-term development strategies and is based on consistent macroeconomic policies and the sustainability of the balance of payments in the longer term, rather than short-term debt service goals. Equally, this requires a view that recognises the multiplicity of legal claims involved in sovereign debt crises, rather than creating unjustifiable legal hierarchies between claims over debt assets and other types of valid claims founded in various legal orderings.

Within a context in which most DEEs have approached the IMF for balance of payments support amid the crisis, reforming the DSA framework away from its austerity-biased legal and macroeconomic assumptions is urgently needed. This process of legal reform should ensure higher levels of transparency, accountability, and voice mechanisms to those mostly impacted by the adverse effects of sovereign debt crises, including debtor states. Embracing a debt sustainability framework that is compatible with the SDGs agenda is a crucial precondition to achieve a sustainable and resilient post-pandemic recovery in the years ahead, particularly in the global South.

Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development

Katrin Kuhlmann*

Abstract

There is a growing consensus that we are at a turning point in international trade law and international economic law (IEL) more generally, signaling the possibility for a more inclusive and sustainable approach to law and development. The multilateral system of trade rules has reached an impasse, and the COVID-19 pandemic, resulting economic crisis, and mounting issue of climate change highlight vulnerabilities that the current rules-based system is ill-equipped to address. These include systemic vulnerability at the State level and vulnerabilities at a more disaggregated, stakeholder-specific level that impact individuals and communities. Given that more vulnerable and less diverse economies, racial and ethnic minorities, indigenous and rural populations, and smaller enterprises tend to be disproportionately underrepresented in the global economic system, it is time to issue a strengthened call for new normative frameworks and a concrete plan of action for inclusive trade and development. The vulnerabilities of "State" and "subject" also argue for fresh approaches that incorporate more diverse legal innovations and go beyond narrow "best practices" in IEL.

This paper contributes to the literature in two ways. First, it compares legal approaches for addressing vulnerability at both the State and stakeholder levels, framing legal and regulatory design and implementation in light of inclusive and sustainable development. In the context of State vulnerabilities, the paper incorporates traditional approaches to trade and development, namely use of special and differential treatment and the assertion of "policy space", as well as growing trends to incorporate flexibility and sustainable development into legal mechanisms. The article goes beyond this foundation, however, to present a lens through which to assess rules and their impact at the more individual or stakeholder level, linking a "bottom-up" approach to law

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and development with the more traditional State-to-State model. This aspect of the paper draws upon a decade of empirical work conducted in sub-Saharan Africa and Asia and illustrative case studies to highlight an approach that could inform future IEL.

The paper's second contribution is the presentation of an analytical framework, or topology, and preliminary set of options that allow for comparison of the design and implementation of economic law across seven dimensions: (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) engagement, inclusiveness, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact. Across all seven dimensions, the paper highlights innovative legal and regulatory approaches present in both trade agreements and domestic law. The seven dimensions, and the methodology presented in the paper, establish the basis for a broader research agenda that maps and eventually measures inclusive design and implementation of international and national economic law, collectively referred to as "inclusive regulation". Ultimately, the paper proposes a new model for using economic law to better address both systemic and individual vulnerabilities as we usher in a new chapter in international trade law and IEL.

I. Introduction

The system of rules surrounding international economic law (IEL), and international trade law more specifically, has reached a turning point. Movements in law and development correspond with movements in legal and economic history,[1] and the COVID-19 pandemic and climate change, coupled with the impasse within the World Trade Organization (WTO), signal that yet another shift is underway. The current turning point is leading to the need for a systemic retooling of international law and development focused more on equity and inclusiveness,[2] economic dignity,[3] shared voice in the global trading system among the Global North and South,[4] sustainable development and environmental sustainability,[5] and distributive justice.[6]

1 Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* The New Law and Economic Development: A Critical Appraisal (D. Trubek & A. Santos eds., 2006).

2 *See* Robert Howse & Kalypso Nicolaïdas, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large,* 79 L. & Contemp. Probs. 259, 282 (2016), available at https://scholarship.law.duke.edu/lcp/vol79/iss2/12. *See also* Gillian Moon, *Trade and Equality: A Relationship to Discover,* 12 J. Int'l Econ. L. 617 (2009); Chantal Thomas, *Income Inequality and International Economic Law: From Flint Michigan to the Doha Round, and Back* (Cornell Legal Stud., Rsch. Paper No. 19-08, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341523; Jennifer Harris, *Making Trade Address Inequality,* 48 Democracy J. (Spring 2018), available at https://democracyjournal.org/magazine/48/making-trade-address-inequality/; Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion* 2019 U. Ill. L. Rev. 1, 29 (2019), available at https://www.illinoislawreview.org/wp-content/uploads/2019/03/Shaffer.pdf; Timothy Meyer, *The Law and Politics of Socially Inclusive Trade,* 2019 U. Ill. L. Rev. 32 (2019); Katrin Kuhlmann, *Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19*, Afronomicslaw, (Aug. 27, 2020) [hereinafter *Flexibility and Innovation*], https://www.afronomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19.

3 *See* Abhijit Banerjee & Esther Duflo, Good Economics for Hard Times (2019).

4 *See* James Thuo Gathii, *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 97 Proc.

This not only presents an opportunity to reimagine the design and application of economic rules across and within borders, it also provides an opening to think beyond the usual limitations of geography and bias that can be inherent (explicitly or implicitly) in economic law. Despite the challenges that have led to the current turning point, it ushers in the chance to consider legal innovations from a much broader pool of countries, including those in the Global South,[7] and also creates the space to incorporate the needs of a much wider range of legal stakeholders into IEL. In doing so, the current moment presents an opportunity to craft and implement more diverse legal and regulatory approaches that could better address vulnerabilities and achieve a new "globalization" that is truly global.[8]

While existing trade rules have worked well in some situations, such as providing the ground rules for reducing discrimination in trade and strengthening supply chains, they have been ill equipped to address a number of the vulnerabilities exposed by the pandemic. [9] In addition, the current system has long struggled with achieving a more equitable distribution of economic benefits.[10] Confronting these challenges

Am. Soc'y Int'l L. Ann. Meeting 157, 157 (2003) [hereinafter *Fairness as Fidelity*]; Dani Rodrik, The Globalization Paradox (2011); Sonia E. Rolland & David M. Trubek, Emerging Powers in the International Economic Order: Cooperation, Competition, and Transformation (2021).

5 *See* Gabrielle Marceau & Fabio Morosini, *The Status of Sustainable Development in the Law of the World Trade Organization, in* Arbitragem e Comercío Internacional (Umberto Celli Junior et al. eds., 2013). *See also* Thabo Fiona Khumalo, *Sustainable Development and International Economic Law in Africa*, 24 L. Democ. & Dev. 133 (2020); Kuhlmann et al., Trade Policy for a Resilient, Inclusive, and Sustainable Development in A New International Economic Order (June 2020), available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_4460da2de0e746dd81ad32e003cd0bce.pdf; Kuhlmann et al., *Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens*, NML (July 27, 2020) [hereinafter *Reconceptualizing FTAs*], available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_8b66c44bd19b4683b974eaa267fd4070.pdf.

6 *See* Abdul Hasib Suenu, *Distributive Justice, SDT Provisions, and the African Continental Free Trade Agreement*, Afronomicslaw (Mar. 18, 2019), available at https://www.afronomicslaw.org/index.php/2019/03/18/distributive-justice-sdt-provisions-and-the-african-continental-free-trade-agreement; David Trubek et al., *World Trade and Investment Law in a Time of Crisis: Distribution, Development, and Social Protection*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization (A. Santos et al. eds., 2010). *See also* Harlan Grant Cohen, Comment, *What is International Trade Law For?*, 113 Am. J. Int'l L. 326-46 (2019); Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 Eur. J. Int'l L. 1359 (2019), to be expanded upon in Anthea Roberts & Nicolas Lamp, Six Faces of Globalization: Who Wins, Who Loses, and Why it Matters (forthcoming 2021).

7 *See* Obiora Chinedu Okafor & Maxwel Miyawa, *Africa as a "Theatre" of International Law and Development: Knowledge, Practice, and Resistance*, *in* Oxford Handbook of Law and Development (forthcoming).

8 In his Grotius Lecture, Gathii concludes by emphasizing "we can all agree that issues of race and identity have so far been underemphasized, understudied, and undertheorized in international law," and "a full accounting of our discipline would be incomplete without critical approaches such as Third World Approaches to International Law or Critical Race Theory." Gathii, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law: The Promise of International Law: A Third World View, at 27 (June 25, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509. *See also* Makau Mutua, *What is TWAIL?,* 94 Am. Soc'y Int'l L. Proc. 31 (2000); Olabisi Akinkugbe, *Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa,* 22 Chi. J. Int'l. L. 1 (2021); Olabisi D. Akinkugbe, *Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)*, 1 Af. J. Int'l. Econ. L. 297 (2020).

9 *See* Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic,* U.N. Econ. & Soc. Comm'n Asia & Pac. (Sep. 24, 2021) [hereinafter *Handbook*], https://www.unescap.org/sites/default/d8files/knowledge-products/Handbook%20FINAL%2029Sept2021%28edited%29.pdf.

will require both maintaining the foundation of law that has served important goals, particularly a number of aspects of the multilateral rules established under the WTO that now also underpin many regional trade agreements (RTAs), while revisiting the "legal ground rules"[11] of trade and IEL in areas that require attention. In doing so, it will be important to critically assess what Gathii calls a "façade of neutrality regarding how the rules of the international trading regime are crafted, applied, and adjudicated."[12] It will also necessitate looking at what drives and informs these rules in the first instance, evaluating both what individuals need and what lawyers and policymakers take into account when designing economic laws and treaties. Overall, this exploration will have implications for how international trade agreements and national law are drafted, discussed, and applied.

This paper presents a comparative, socio-legal approach for mapping trade and economic rules, both international and domestic, in the context of inclusive and sustainable development across seven dimensions:[13] (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) inclusiveness, engagement, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact, including distributive effects.[14] While some of these are already present in international legal approaches to varying degrees others, particularly the more "stakeholder-driven" dimensions,[15] are largely absent in a meaningful way. Through empirical research and real-world examples, this paper provides entry points for all seven of these dimensions, setting the stage for a broader comparative law mapping and research agenda to address current gaps in the system, systemic capacity challenges, and responsiveness to existing vulnerabilities and inequalities.

A number of vulnerabilities surface at the systemic level that provide context for this approach. These include unequal voice in setting global rules, uneven influence in

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10 *See* Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019).

11 *See* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Stud. F. 327 (1991).

12 *See* Gathii, *Fairness as Fidelity*, *supra* note 4, at 157.

13 These factors are based on research and a socio-legal and empirical approach developed by the author and practiced through the law and development organization, NML. While just a starting point, this approach will form the basis for a broader research agenda and a digital comparative law database under development by NML and its partner Verdentum that will house legal and regulatory options across the seven dimensions of inclusive and sustainable development presented in this paper and establish a comparative law library that can be built out over time, ideally in partnership with academic institutions and local partners.

14 Implementation is used throughout this discussion in several interrelated contexts. One involves the institutional changes, resources, and set of government interventions, including development of new laws and regulations, needed to implement the obligations in a trade agreement. *See* Jean-Pierre Chauffour & David Kleimann, Presentation at the Society for International Economic Law's Third Biennial Global Conference: The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design (July 12, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104183#. Implementation will also be used to refer to the ongoing process of applying laws and regulations in practice, particularly through national law, as well as the interplay between these different contexts.

15 The term "stakeholders" is used to represent a broad range of individuals, communities, and voices from the field. Stakeholder vulnerabilities are diffuse and interconnected, exhibiting "capillarity" in terms of the impact of legal dimensions and decisions on different populations, vulnerable groups, and individuals. *See, e.g.,* Jeffrey Alwang et al., *Vulnerability: A View from Different Disciplines* (Soc. Prot. Discussion Paper Series, Paper No. 115, 23304, 2001), available at https://documents1.worldbank.org/curated/en/636921468765021121/pdf/multi0page.pdf.

determining the flow of global resources (such as medicines, vaccines, and food during a health crisis), susceptibility to trade shocks and crisis, and uncertainty in the efficacy of policies and laws. They also include longstanding vulnerabilities such as disparities in economic diversity and export earnings, unequal capacity to benefit from trade, and geographic and product-based market considerations.[16] Alongside these systemic vulnerabilities, the paper addresses vulnerabilities at the stakeholder and community levels, or "subject" vulnerabilities,[17] that impact marginalized races and ethnic groups, vulnerable communities, women, and individuals facing varying circumstances that contribute to economic dignity and the ability to benefit from trade. These include explicit or inherent bias in rules and regulations, unequal voice in the rulemaking process, information asymmetries, and other considerations. As this paper will discuss, while the approaches to address these different types of vulnerabilities intersect, they are not the same, and greater attention is needed on how IEL plays a role at both the systemic and stakeholder/field levels.

While the paper will focus on qualitative dimensions of inclusive law and regulation, relevant measures are worth noting. As the rules of the international trading system increasingly extend beyond the WTO to encompass RTAs, which are generating law in new areas,[17] understanding differences in context, design, application, and adjudication across these instruments will become increasingly important. National law, which flows from these international legal instruments and often informs them as well, is also important. In addition, the UN Sustainable Development Goals (SDGs) are relevant, as is human rights law, which provides the basis for a number of the SDGs. The target for SDG 17.10, for example, is directly related to trade law, recognizing the need to "promote a universal, rules-based, open, non-discriminatory and *equitable* multilateral trading system" (emphasis added).[19] However, although the SDGs offer some guidance on how trade rules could address vulnerability, they do not provide a more precise roadmap on how to more comprehensively incorporate equitable and inclusive approaches into trade law and its implementation, necessitating complementary tools and approaches. Such as roadmap could include more inclusive options for trade rules, enhanced capacity, multilateral and regional cooperation, and methods for incorporating broader development considerations and the needs of individuals into the trade rulebook.

16 *See* U.N. Conf. Trade & Dev., Trade and Development Report 2014: Global Governance and Policy Space for Development [hereinafter T&D Rep.], U.N. Doc. UNCTAD/TDR/2014, U.N. Sales No. E.14. ILD.4 (2014), https://unctad.org/system/files/official-document/tdr2014_en.pdf. *See also* Jürgen Habermas, The Theory of Communicative Action (1984).

17 *See* Martha Feinman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J. L. & Feminism (2008).

18 RTAs are increasingly creating law in additional areas, including digital regulation, gender, traditional knowledge, competition, and other areas. As Howse & Nicolaïdas highlight, RTAs introduce the possibility of innovation in economic law, however, it remains important that "regional deals must not exploit asymmetries of power vis-à-vis the rest of the world." *See* Howse & Nicolaïdas, *supra* note 2, at 282. *See also* Chris Brummer, Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering are Redefining Statecraft (2014).

19 Rep. of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators, Annex IV, U.N. Doc. E/CN.3/2016/2/Rev.1 (2016) [hereinafter UN SDGs].

This paper is particularly focused on the different dimensions of inclusive law and development that a redesign of trade's "legal ground rules" will need to take into account in light of systemic and stakeholder-driven vulnerabilities. It does this in several phases. First, the paper will examine how international trade law currently incorporates development considerations, including through special and differential treatment and use of "policy space", flexibility in rules, and sustainable development. Building upon this foundation, the discussion will then shift to an additional set of characteristics that are central to inclusive trade and development but not fully captured under current approaches. These include equity; inclusiveness, engagement, and transparency; legal and regulatory gateways that present opportunities to tailor rules to stakeholder needs and development priorities (and create the space for stakeholders to voice their own needs in legal and regulatory design); and impact and implementation. The paper concludes with a number of "options" for inclusive trade rules that appear in international and domestic law across the seven dimensions and which could be expanded upon to address future vulnerabilities. These options also highlight the importance of moving beyond narrow conceptions of "best practices" to encompass more diverse legal innovations, highlighting how different regions and States have designed and applied rules to put the needs of vulnerable individuals and communities first, while creating spaces for effective communication and engagement in the rulemaking process.

II. The Building Blocks of Inclusive Trade Law: Special and Differential Treatment, Flexibility, and Sustainable Development

Development is certainly not a new concept in the field of international trade law. The link between trade and development dates back to the start of the multilateral trading system and the General Agreement on Tariffs and Trade (GATT).[20] Since then, global trade rules have become more expansive, and the initial foundation for trade and development has been further developed through multilateral rules and RTAs. Throughout this history, development-led trade approaches at the institutional level have largely focused on enhanced market access, safeguarding of developing countries' economic interests, and flexibility and capacity building. These approaches, however, have not focused systemically on an affirmative use of law to drive development and have overlooked some key challenges.[21]

20 General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194, 258, *as incorporated and modified by* General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 154 [hereinafter GATT]. The 1958 Haberler Report marked a significant "landmark" in the evolution of trade and development, highlighting the importance of addressing vulnerabilities such as insufficient export earnings, fluctuating commodity prices, and agricultural protectionism, which led to calls for addressing developed country trade barriers in particular. *See* Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How?*, at 3-4 (World Trade Org. Econ. Rsch. & Stat. Div., Working Paper No. ERSD-2004-03, 2004).

21 Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Model for Trade and Development Law*, 51 Geo. J. Int'l L. 4 (2020); *see also* Kuhlmann, *Reframing Trade and Development: Building Markets Through Legal and Regulatory Reform*, E15 Initiative (Nov. 2015) [hereinafter E15], available athttp://e15initiative.org/publications/reframing-trade-and-development-building-markets-through-legal-and-regulatory-reform/.

A. Special and Differential Treatment and Policy Space as Tools for Development-Led Trade

Trade and development have traditionally been viewed through two interrelated approaches, special and differential treatment (S&DT, also referred to as S&D or SDT) and "policy space," both of which provide necessary but not sufficient entry points for inclusive trade rules. S&DT can be broadly defined as "special rights" for developing countries,[21] while policy space generally refers to the flexibility governments have within trade rules to put in place policies that will best achieve equitable and sustainable development and other policy objectives.[22] S&DT and policy space were designed to address certain vulnerabilities, namely differences in economic diversity and export earnings, infant industry and balance of payments considerations, trade protectionism (particularly in sectors such as agriculture), and lack of capacity to engage in trade.[23] While both tend to be focused at the State-to-State level, exercise of policy space also necessarily involves domestic law.[24] The link between S&DT and broader development considerations is apparent in the SDG targets, which explicitly reference S&DT in Target 10.a "Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements."[25] As elaborated below, both S&DT and policy space can be effective if used well but problematic if not well tailored.

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22 WTO Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018) [hereinafter WTO S&DT], available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm. *See also* James Bacchus & Inu Manak, *The Development Dimension: What to do About Differential Treatment in Trade*, Cato Institute (Apr. 13, 2020), https://doi.org/10.36009/PA.887; Keck & Low, *supra* note 20; D.B. Magraw, *Existing Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms*, 60 Colo. J. Int'l Envtl. L. & Pol'y 69 (1989).

23 UNCTAD, established in 1964 as part of the push to integrate trade and development, defines policy space as "the freedom and ability of a government to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development that is best suited to its particular national context". *See* T&D Rep., *supra* note 16, at 34. *See also* Jagdish Bhagwati, In Defense of Globalization (2004); Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. Int'l Econ. L. 405 (2005); Alisa DiCaprio & Kevin P. Gallagher, *The WTO and the Shrinking of Development Space: How Big is the Bite?,* 7 J. World Inv. & Trade 781 (2006); Sheila Page, *Policy Space: Are WTO Rules Preventing Development?,* Overseas Dev. Inst. 1 (Jan. 22, 2007), https://cdn.odi.org/media/documents/106.pdf. Economist Dani Rodrik has been a longstanding proponent of policy space within the framework of IEL, especially for developing economies that could benefit from the adoption of measures to advance industrial development and economic diversification. *See, e.g.,* Dani Rodrik, Straight Talk on Trade: Ideas for a Sane World Economy (2018); Dani Rodrik, The Globalization Paradox (2011).

24 *See* Keck & Low, *supra* note 20, at 3-4.

25 After all, "the greatest buffer in cushioning the effects of globalization is at the state level". *See* Howse & Nicolaïdas, *supra* note 2, at 278. *See also* Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico,* 52 Va. J. Int'l. L. 551 (2012); James J. Nedumpara, *Imagining Space in India's Trade and Investment Agreements* (São Paulo L. Sch. Fundação Getulio Vargas – Fgv Direito SP Rsch Paper Series, Legal Stud. Paper No. 113, 2014); Manoj Mate, *The WTO and Development Policy Space in India*, 45 Yale J. Int'l. L. 285 (2020).

Legally, the integration of S&DT and policy space into the broader system of trade rules has evolved over time, beginning with Article XVIII of GATT 1947 that allows for policy space in the context of infant industry protection and balance of payments challenges.[27] Several key legal provisions incorporate S&DT into the rules, including Part IV of the GATT (1965) which established the principle of non-reciprocity (Article XXXVI:8 of Part IV)[28] and the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) which codifies aspects of S&DT, noting that S&DT should "be designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries."[29] In addition to GATT Article XVIII, GATT Part IV, and the Enabling Clause, S&DT appears throughout the WTO Covered Agreements in 183 instances.[30] S&DT provisions also appear in RTAs, including the African Continental Free Trade Area (AfCFTA) that includes fifty-four African States[31] and the Regional Comprehensive Economic Partnership (RCEP) agreement among China, Japan, Australia, New Zealand, South Korea, and the Association of Southeast Asian Nations (ASEAN) members.[32]

The WTO has developed a typology for S&DT that includes the range of measures and related programs: (1) Longer Time Periods for Implementing Agreements and Commitments; (2) Measures to Increase Trading Opportunities for Developing Country Members; (3) Flexibility of Commitments, of Action, and Use of Policy Instruments; (4) Provisions Requiring WTO Members to Safeguard the Interests of Developing Country Members, including S&DT provisions across disciplines and WTO agreements; (5) Support to Help Developing Countries Build Capacity; and (6) Provisions Relating to Least Developed Country (LDC) Members.[33] In assessing measures that fall within these categories, the legal language of S&DT is particularly relevant. Hege and Wouters catalogue a number of duties for developed and developing country members, as well as for the WTO as an institution, and privileges stemming from S&DT, along with five types of rights for developing countries: (a) right of delayed application, (b) right to exemptions, (c) right to reduced commitments, (d) right to presumption, and (e) right to temporary derogation.[34] Accordingly, the

26 *See* UN SDGs, *supra* note 19.

27 GATT, *supra* note 20, Article XVIII.

28 Aside from non-reciprocity, Part IV of the GATT contains largely "best endeavor" language that lacks legal force. *See* Keck & Low, *supra* note 20, at 4. *See also* Kuhlmann & Agutu, *supra* note 21; Pallavi Kishore, *Special and Differential Treatment in the Multilateral Trading System*, 13 Chi. J. Int'l L. 363 (2020).

29 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, ¶ 5, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 203–05 (1980).

30 WTO S&DT, *supra* note 22.

31 Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA]. *See also* Lily Sommer & Jamie MacLeod, *How Important is Special and Differential Treatment for an Inclusive AfCFTA?*, *in* Inclusive Trade in Africa: The African Continental Free Trade Agreement in Comparative Perspective 71 (David Luke & Jamie MacLeod eds., 2019); Kuhlmann & Agutu, *supra* note 21.

32 Regional Comprehensive Economic Partnership Agreement, Preamble, Nov. 15, 2020, https://rcepsec.org/legal-text/ [hereinafter RCEP].

33 WTO S&DT, *supra* note 22.

language used to represent S&DT, flexibility, and the other inclusive trade dimensions is important to consider in the context of the design and implementation of trade rules.

Much of the debate around policy space and S&DT has focused on how much room international trade rules, including WTO rules and regional trade agreements, leave for domestic regulatory discretion,[35] as well as where this discretion is particularly important in the context of development. Within the literature, there is disagreement over whether international trade rules provide sufficient space for States' ability to design rules tailored to development.[36] A number of critiques of the global trading system have focused on the extent to which international law reduces policy space to respond to domestic concerns, particularly for developing countries. Some have argued that international trade law limits policy space too much in areas that are particularly important for sustainable development, such as agriculture, intellectual property rules, investment, and subsidies.[37] On the other hand, proponents emphasize that the system of global trade rules provides ample room for States to regulate in the interest of development.[38] In reality, however, international trade law both restricts and preserves policy space, albeit to differing degrees in different contexts and sometimes within different legal areas.[39]

The efficacy of these approaches, as usual, rests in the details and depends upon both the particular priorities and vulnerabilities that need to be addressed and how law is designed and implemented. S&DT has had a mixed record, due to issues with enforceability, complex procedural requirements, weak institutional capacity, and lack of strategy and evidence backing its application.[40] S&DT has been a useful tool in some regards, particular with respect to the flexibility it provides as discussed below.

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34 Vineet Hedge & Jan Wouters, *Special and Differential Treatment under the World Trade Organization: A Legal Typology* (KU Leuven Ctr. Glob. Governance Stud., Working Paper No. 227, 2020). The authors find that 86 percent of S&DT provisions (195 out of 227) create legally binding obligations, although many are not enforceable. *Id.* at 51. Of these, 115 duties are duties (57 of which apply to developed country members and 16 of which apply to developing country member, including duties to inform or notify), 39 privileges, and 41 rights. *Id.* Duties extend from language such as "shall consider", "shall take account of", or "shall consult" (which is qualified language that does present a duty but may not be fully enforceable), *id.* at 22-23; privileges derive from language such as "may" or "should," *id.* at 32; while the different types of rights flow from language such as "developing Members shall have the flexibility," *id.* at 28.

35 *See* Dominique Bruhn, *Global Value Chains and Preferential Trade Agreements: Promoting Trade at the Cost of Domestic Policy Autonomy?* (Aug. 8, 2014), available at https://ssrn.com/abstract=2464136.

36 For a helpful summary of the different positions on policy space reflected in legal and economic scholarship, see Mate, *supra* note 25. Mate also notes that there has not been sufficient precision in conceptualizing policy space at the legal, institutional, and compliance levels. *Id.* at 287.

37 *See* Thomas Bernhardt, *North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could*, 12 Consilience: J. Sustainable Dev. 123 (2014).

38 *See* Shaffer, *supra* note 2. *See also* Alice Amsden & Takashi Hikino, *The Bark is Worse than the Bite: New WTO Law and Late Industrialization*, 570 Annals Am. Acad. Pol. & Soc. Sci. 104 (2002); Alice Amsden, *Promoting Industry Under WTO Law*, *in* Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions (Kevin P. Gallagher ed., 2005).

39 *See* Page, *supra* note 23, at 4.

40 Hedge & Wouters estimate that only 21 percent (47 S&DT provisions) "actually result in differential treatment." *See* Hedge & Wouters, *supra* note 34, at 51. *See also* Hesham Youssef, *Special and Differential*

It is typically more reactive than proactive, however, and largely overlooks legal design and implementation, particularly at the national level.[41] Further, because policymakers are often not aware of the full range of needs and vulnerabilities that must be taken into account when designing trade agreements and domestic law, there is a persistent gap in effective application of policy space and S&DT. As a result of these different factors, S&DT is often more State-focused than stakeholder-focused and better suited to addressing institutional capacity challenges than actual stakeholder needs.

S&DT is an important dimension to map in terms of inclusive trade, however. While this is well documented across WTO Agreements,[42] it is not nearly as well documented in the context of RTAs, calling for greater focus on RTA options.[43]

It is also important to take stock of the current debate surrounding S&DT and its relationship to vulnerability. As currently designed, S&DT applies to developing countries and LDCs only, with special focus on LDCs. Although LDCs are clearly defined and designated based on UN criteria, "developing country" has not been defined in the context of WTO rules, and countries currently self-designate. Because roughly two-thirds of WTO members have self-designated as developing countries, a number of more advanced economies have pressed for further differentiation and clearer limits on what constitutes a developing country.[44] RTAs have also addressed this issue of differentiation to a degree, sometimes noting different categories within S&DT, such as small and vulnerable economies, small island developing nations, and other categories. Still, how to differentiate among countries remains an open issue. The most comprehensive proposal in the context of vulnerability is the Trade Vulnerability Index (TVI), which is based on a number of vulnerability categories (or proxies, with preliminary mapping against S&DT provisions): "export concentration; export destination; trade shock; trade openness; dependence on strategic imports; reliance on external finance; market share of global trade, remoteness; instability of agricultural

Treatment for Developing Countries in the WTO (South Ctr., Trade-Related Agenda, Development, and Equity (T.R.A.D.E) Working Paper, 1999), available at https://www.iatp.org/sites/default/files/Special_and_Differential_Treatment_for_Deve_2.htm; Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* 20 (World Bank Pol'y Rsch., Working Paper No. 2388, 2000); Keck & Low, *supra* note 20; Hoekman, *supra* note 23; Kuhlmann, E15, *supra* note 21.

41 *See* Kuhlmann & Agutu, *supra* note 21, at 751; *see also* Kuhlmann, E15, *supra* note 21.

42 With respect to S&DT in the WTO context, see WTO S&DT, *supra* note 22; *see also* J. Jason Cotton et al., *Using a Trade Vulnerability Index to Determine Eligibility for Developing-Country Status at the WTO: A Conceptual Response to the Ongoing Debate*, at 2 (Shridath Tamphal Ctr. for Int'l Trade L., Rsch. Working Paper, 2019), available at https://shridathramphalcentre.com/wp-content/uploads/2019/10/Using-Trade-Vulnerability-Index-for-Determining-WTO-Developing-Country-States_WorkingPaper_Sept_2019-3.pdf; Hedge & Wouters, *supra* note 34.

43 With respect to S&DT in the RTA context, see Paul Baker, *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, U.N. Econ. & Soc. Comm'n Asia & Pac. (2018); Kuhlmann, *Handbook*, *supra* note 9.

44 Leading the debate are the United States, Europe, Canada, and Norway, with some developing economies (albeit to a lesser extent) pushing for more differentiation based on other criteria. *See* Cotton et al., *supra* note 42, at 2.

production; economic diversification; small size; susceptibility to natural disasters and climate change (with health pandemics more recently added); market flexibility; and political, social and environmental governance".[45] The TVI can be a helpful prism through which to view current design and application of S&DT in the context of WTO disciplines and RTAs, particularly in the context of sustainable development.

B. Flexibility and Sustainable Development in WTO Rules and Regional Trade Agreements

Along with S&DT (and policy space), two additional qualitative dimensions related to inclusive trade are becoming more prevalent in international agreements. These are flexibility, which is a hallmark of S&DT, and sustainable development, which is referenced in the WTO Preamble[46] and increasingly incorporated into international trade rules.

Flexibility is central to the concept of S&DT, and the provisions that provide flexibility in "commitments, action, and use of policy instruments" are among the most numerous of the S&DT provisions.[47] Flexibility is also apparent in provisions under RTAs, both in the context of S&DT and more broadly. Because of this broader context, flexibility is treated as a separate category for purposes of the approach presented in this paper.[48] Flexibility in rules includes the exemption in GATT Art. XI on quantitative restrictions that gives all States the space to address shortages of food or other essential products.[49] In addition, GATT Art. XIX, GATT Art. XX (General Exceptions), the WTO Agreement on Safeguards, the WTO Agreement on Subsidies and Countervailing Measures, and Art. XIV of the General Agreement on Trade in Services (GATS) all encompass some degree of flexibility. Although use of flexibilities tends to arise in legal approaches established under the rules,[50] flexibility can sometimes imply a "suspension" of or departure from the rules, which can present

45 *Id.* at 16-19.

46 The Preamble to the WTO reflects the priority of sustainable development: "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources *in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." Marrakesh Agreement Establishing the World Trade Organization, pmbl., April 15, 1994, 1867 U.N.T.S. 154 (emphasis added).

47 There are forty-four such provisions among the 183 S&DT provisions in the WTO covered agreements; only provisions to safeguard the interests of developing country members counts a greater number of provisions (forty-seven). Hedge & Wouters, *supra* note 34, at 12.

48 The AfCFTA references both S&DT and flexibility in its principles, signaling a distinction between these dimensions. AfCFTA, *supra* note 31, Art. 5 (d).

49 *See* Kuhlmann, *Handbook*, *supra* note 9.

50 *See* Mate, *supra* note 25.

51 *See, e.g.*, Simon J. Evenett & Richard Baldwin, *Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?*, *in* Revitalising Multilateralism: Pragmatic Ideas for the New WTO Director-General 9 (Simon J. Evenett & Richard Baldwin eds., 2020), available at https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general.

its own set of challenges.[51] Interestingly, the pandemic has reinforced the need both for greater certainty in rules overall and greater flexibility and innovation in how particular rules are developed and applied in the context of particular circumstances.[52] Flexibility has taken on new significance during the pandemic, as States and international institutions have been confronted with both localized and shared vulnerabilities in the face of the global health crisis.[53] As the pandemic has highlighted, flexibility with respect to certain essential goods, including medicines and food, is especially important. In addition to the flexibilities noted above under GATT Article XI, which also references but does not define "essential" products, [54] relevant flexibilities exist under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[55] which is discussed in Section IV, and the WTO Agreement on Agriculture and WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

Flexibility in RTAs can sometimes be seen in the agreement structures themselves. African trade agreements, for example, tend to be more flexible treaty instruments, incorporating variable geometry and differing geographic and economic circumstances.[56] These aspects can be particularly important for addressing vulnerability.[57] African RTAs provide a compelling model for flexibility due to their multidimensional nature, blending "economic and non-economic objectives [… and] formal and informal regimes."[58] African trade agreements also exhibit flexible cooperation "instead of rules requiring scrupulous and rigorous adherence."[59] The WTO Trade Facilitation Agreement, which contains a unique approach to S&DT tailored to countries' needs and capabilities, has characteristics in common with African RTAs; trade facilitation in both the WTO and African RTA context is linked with other dimensions important to inclusive trade, such as transparency.[60]

Given the importance of agriculture to development, as well as in the S&DT and policy space debate,[61] several aspects of S&DT and flexibility related to agriculture are

52 *See* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

53 *Id. See also* Trubek et al., *supra* note 6.

54 GATT, *supra* note 20, Article XI.2(a).

55 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

56 *See* Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. Int'l L. & Com. Reg. 571 (2010) [hereinafter *AFTAs*]. *See also* Arinze Bryan Okiche, *Reconsidering the Flexibility Paradigm of African Regional Trade Agreements and Informal Trade Arrangements,* Afronomicslaw (July 8, 2020), available at https://www.afronomicslaw.org/2020/07/08/reconsidering-the-flexibility-paradigm-of-african-regional-trade-agreements-and-informal-trade-engagements.

57 *See* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

58 Akinkugbe, *supra* note 8, at 293.

59 *See* Gathii, *AFTAs*, *supra* note 56, at 573; *see also* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

60 *See* Tsotang Tsietsi, *In Pursuit of Transparency for Trade Facilitation in Southern Africa,* Afronomicslaw (Mar. 16, 2021), available at https://www.afronomicslaw.org/index.php/category/analysis/pursuit-transparency-trade-facilitation-southern-africa; *see also* Tsotang Tsietsi, *Trade Facilitation in the Southern African Development Community: The Potential Contribution of the World Trade Organization's Trade Facilitation Agreement,* Thesis presented in Department of Commercial Law, Faculty of Law University of Cape Town (2020) (on file with author).

61 For a discussion on the WTO's agricultural rules and policy space, see Ahmad Mukhtar, *Policy Space for Sustainable Agriculture in the World Trade Organization Agreement on Agriculture*, U.N. Food & Agric. Org. (2020), https://www.fao.org/3/ca9544en/CA9544EN.pdf. *See also* Hoekman, *supra* note 23, at 6.

worth noting.[62] These include flexibilities under the WTO Agreement on Agriculture and relevant aspects under other WTO agreements, such as the Agreement on Technical Barriers to Trade (TBT Agreement).[63] In particular, the WTO Agreement on Agriculture offers flexibility in the form of policy instruments (subsidies/domestic support programs),[64] including higher de minimis thresholds for trade-distorting subsidies, use of certain subsidies for investment and agricultural inputs,[65] and availability of certain export subsidies for net food importing countries.[66] S&DT is also part of the SPS Agreement, particularly under Articles 9 and 10,[67] although other aspects of the SPS Agreement are relevant in this context as well.[68] S&DT in the SPS context mainly includes time-limited exceptions and phased implementation along with capacity building support to develop national legislation, establish institutions and laboratories, and information dissemination.[69] S&DT has also included focus on developed country SPS measures and their impact on developing economies,[70] which remains an important area of concern. Despite these mechanisms, however, numerous challenges still exist in the agricultural sector, calling for greater focus on effectiveness.[71]

Another key dimension of inclusive trade is sustainable development, which encompasses environmental sustainability as well as the broader vision articulated by the SDGs. Sustainable development is central to addressing vulnerability, [72] as, by its definition, it involves balancing the needs of individuals and communities in the present against the needs of future generations. For the purposes of this paper,

62 *See* Neha Mishra, *Ensuring Food Security Through WTO Rules: Should the 'Policy Space' be Expanded?,* Pub. Sphere (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848685.

63 WTO S&DT, *supra* note 22. According to the WTO, there are 13 S&DT provisions in the WTO Agreement on Agriculture, 9 of which are flexibility options. *Id.* at 21.

64 *See also* Cotton et al., *supra* note 42, at 22

65 *See* Youssef, *supra* note 40, at 17-20; *see also* Keck & Low, *supra* note 20, at 22..

66 *See, e.g.,* Hoekman, *supra* note 23, at 9.

67 Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). According to the WTO, there are 6 S&DT provisions in the WTO SPS Agreement, of which an equal number focus on safeguarding the interests of developing country members, transitional time periods, and technical assistance. A number of additional guidelines and decisions of the SPS Committee apply as well. WTO S&DT, *supra* note 22, at 26.

68 These include Article 14 (delayed application) and Paragraph 9 of Annex B (WTO Secretariat should inform developing countries of notifications that may affect them). *See* Youssef, *supra* note 40, at 21-22.

69 Constantine Michalopoulos, *Trade Policy and Market Access Issues for Developing Countries: Implications for the Millennium Round* 42 (World Bank Pol'y Rsch., Working Paper No. 2214, October 1999) [hereinafter *Trade Policy*].

70 *See* World Trade Org., Draft G90 Ministerial Declaration, WTO Doc. JOB/GC/160; JOB/TNC/65 (Nov. 28, 2017); *see also* Michalopoulos, *Trade Policy*, *supra* note 69, at 65.

71 *See* Manuela Tortora, UNCTAD, *Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet*, U.N. Doc. WEB/CDP/BKGD/16 (Jan. 2003), available at https://moam.info/special-and-differential-treatment-and-development-issues-in-unctad_5a0032d71723dd5ab2ef8de5.html.

72 Sustainable development can be defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Rep. of the World Comm'n on Env't and Dev., G.A. Res. 42/187, U.N. Doc. A/Res/42/87, at 46 (Dec. 11, 1987).

"sustainable development" and "sustainability" will be discussed in both a narrower sense focused on environmental rules and in the broader sense as envisioned in the UN SDGs, which cover multiple, interconnected areas of law (including labor rules as well).

Sustainable development is becoming more prevalent in international trade law, building upon the language in the preamble to the WTO.[73] Sustainable development is central to the use of GATT Article XX exceptions, which is one of the main avenues for exercising policy space.[74] The "balancing act" inherent in sustainable development is perhaps most clearly illustrated in the use of GATT Article XX exceptions, which are also incorporated into most RTAs.[75] In particular, Article XX establishes exceptions for measures taken to protect human or animal life or health (GATT Article XX (b)) and conservation of exhaustible natural resources (Article XX (g)).[76] Notably, however, these exceptions are designed to be applied by individual States in response to particular circumstances, not by multiple States due to shared vulnerabilities.

Newer RTAs also reflect a broader dimension of flexibility that allows legal instruments to be adapted to changing circumstances and multi-factor priorities. This can take different forms. The AfCFTA, for example, includes "review and revise" provisions that allow the legal instruments to adapt as circumstances evolve, including provisions calling for periodic review or incorporation of additional instruments as needed.[77] The U.S.-Canada-Mexico Agreement (USMCA) meanwhile contains a "sunset clause" calling for review and termination after a period of time if the parties do not affirm an interest in extending.[78]

Sustainable development is also increasingly appearing in RTAs in a more expansive sense, including the Comprehensive Economic and Trade Agreement (CETA) between Europe and Canada (CETA),[79] which contains a sustainable development chapter along with provisions focused on environment (and labor). U.S. trade agreements also focus on aspects of sustainable development, in particular environment, labor, and workers, which may expand under the current administration.[80] Other RTAs, such as

73 Sustainable development also appears in a very limited context in WTO case law. Marceau & Morosini, *supra* note 5, at 60.

74 *See* Santos, *supra* note 25.

75 For example, the Comprehensive Economic and Trade Agreement, Article 22.5, Oct. 30, 2016, O.J. L 11/23 (Jan. 14, 2017) [hereinafter CETA], http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, incorporates GATT Art. XX (CETA, Article 28.3), as does the Agreement between the United States of America, the United Mexican States, and Canada, Can.–Mex.–U.S., Dec. 13, 2019. [hereinafter USMCA], *mutatis mutandis,* in Art. 32.1.

76 GATT, *supra* note 20, Art. XX (b) & (g).

77 AfCFTA, *supra* note 31, Art. 8.

78 USMCA, *supra* note 75, Art. 34.7.

79 CETA, *supra* note 75, Art. 22.4. *See also* Winfried Huck & Claudia Kurkin, *The UN Sustainable Development Goals (SDGs) in the Transnational Multi-Level System*, 78 Heidelberg J. Int'l L. 375 (2018).

80 *See* Terrence P. Stewart, *U.S. Trade Policy Under a Biden Administration and a Democratically-Controlled Congress – How Will a Search for Social Justice and More Equitable Distribution of Benefits Affect Trade Laws and Negotiations?*, Current Thoughts on Trade (Jan. 13, 2021), available at https://currentthoughtsontrade.com/2021/01/13/u-s-trade-policy-under-a-biden-administration-and-a-democratically-controlled-congress-how-will-a-search-for-social-justice-and-more-equitable-distribution-of-benefits-affect-trade-laws-and-negoti/.

the AfCFTA, reference sustainable development, even though African RTAs do not fully encompass sustainable development as yet.[81] Perhaps the most expansive of all RTA models with a sustainability focus is the Agreement on Climate Change, Trade, and Sustainability (ACCTS) currently under negotiation between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland, which will establish a foundation of rules on combatting climate change and eliminating fossil fuel subsidies.[82]

While this increasing focus on flexibility and sustainable development signals an important move towards more inclusive trade, these dimensions, along with S&DT and policy space, have largely left inequality and vulnerability unaddressed, particularly at the community and individual levels. Recognizing this continued gap, the next section presents additional, stakeholder-focused dimensions of inclusive trade. When combined with the approaches discussed in this section, these "bottom-up" dimensions could better inform legal design and implementation, tailoring the rules to address vulnerability and systemic flaws in economic law as States negotiate multilateral and regional trade instruments and domesticate them through national law.[83]

III. The Missing Dimensions of Inclusive Trade: Equity, Inclusiveness, Legal and Regulatory Gateways, and Impact Tailored to the Needs of Individual Stakeholders

Although there is currently a trend towards inclusive trade and sustainable development, as the preceding section illustrates, the current approaches are too narrowly construed, particularly with respect to stakeholder-focused vulnerabilities. Thus, one of the purposes of this paper is to highlight dimensions of inclusive trade that are often overlooked, in particularly dimensions that focus on the experience of those living under the law.[84] After all, it is generally those living under the laws, not those making them, who are the most vulnerable. The challenge, however, is that understanding stakeholder needs or voices from the field often requires a different analysis than assessing legal flexibilities available to States. This section will begin with two interconnected "case studies" involving different dimensions of stakeholder-based vulnerabilities and "inclusive regulation", drawing out broader lessons learned

81 Khumalo, *supra* note 5. The AfCFTA does include the objective to promote and attain *sustainable and inclusive socio-economic development*, gender equality and structural transformation of the State Parties (emphasis added; AfCFTA, *supra* note 31, Art. 3 (e)). For a discussion of the development dimensions of the AfCFTA, see Kuhlmann & Agutu, *supra* note 21.

82 *See* Ronald P. Steenbilk & Susanne Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, Int'l Inst. Sustainable Dev. (Sep. 25, 2019), https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change.

83 There are notable differences between common law and civil law jurisdictions in this regard, although, even in civil law jurisdictions where treaties have direct application, domestic law and regulation are often needed to incorporate additional, more detailed measures.

84 *See* Tamar Megiddo, *The Missing Persons of International Law Scholarship: A Roadmap for Future Research, in* International Law as Behavior 230-64 (Harlan Grant Cohen & Timothy Meyer eds., 2021); Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine,* 29 Case W. Res. J. Int'l L. 167 (1997).

that point to an expanded view of the legal and regulatory choices that States should consider in the context of inclusive and sustainable trade and development.

To a degree, the dimensions discussed in this section require shifting some focus away from the institutions that govern trade and into the realm where trade rules are applied in practice. If indeed "the life of the law has not been logic: it has been experience",[85] how should experience factor into inclusive law and regulation? Accordingly, the approach in this section is based on over ten years of empirical work[86] and socio-legal methods.[87] Overall, this includes over a hundred field-based missions that relied upon comparative legal research, hundreds of stakeholder interviews, tailored questionnaires and surveys, deep analysis of national rules and regulations, and process mapping and tracing, all designed to assess how law was working in practice, where gaps existed, and how local partners could be more directly engaged in addressing legal and regulatory challenges relevant to economic and social development.[88]
Empirical analysis of how international trade and economic law are designed and applied in practice provides useful insight into how to understand the "context, object, and purpose" of law.[89] It can also question aspects of international law, which "call[s] for empirical study to test and build theory regarding the conditions under which international law is formed and those under which it has effects", employing a mix of "empirical findings, abstract theorizing, real-world testing, and back again."[90] The approach presented in this section involves just such a mix of findings and testing, focusing on the conditions under which international (and national) law take effect through a combination of empirical methods and real-world application to present new channels for addressing individual vulnerabilities into economic and trade law.

The case studies below are illustrative of a methodology and broader body of work that spans sub-Saharan Africa, Asia, and, to a lesser (but growing) extent, Latin America and points to larger patterns in inclusive legal and regulatory design and implementation. The substantive focus of the empirical work described in this section is also illustrative, and, although agricultural rules are primarily discussed below,

85 Oliver Wendell Holmes, The Common Law 1 (1881).

86 *See* Shaffer & Tom Ginsburg, *Empirical Work in International Law: A Bibliographical Essay* (Minn. Legal Stud., Rsch. Paper No. 09-32, 2009). *See also* Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1991).

87 *See* Reza Banakar & Max Travers, *Law, Sociology, and Method*, *in* Theory and Method in Socio-Legal Research 1-25 (Reza Banakar & Max Travers eds., 2005); Adam Chilton et al., *The Social Science Approach to International Law,* 22 Chi. J. Int'l. L. 1 (2021); Akinkugbe, *supra* note 8.

88 This section is based upon a series of projects and programs designed by the author and colleagues as part of the ongoing work of the NML, which was established to provide insight into how international trade rules and domestic law could be better designed and applied from the perspective of economic and social development. This work has benefitted from funding from the William and Flora Hewlett Foundation, Bill and Melinda Gates Foundation, Syngenta Foundation for Sustainable Agriculture, Alliance for a Green Revolution in Africa, U.S. Agency for International Development, and other partners, some of which are specifically noted, although the analysis contained herein is that of the author alone.

89 *See* Gathii, *Fairness as Fidelity*, *supra* note 4, at 157.

90 *See* Shaffer & Ginsburg, *supra* note 82, at 1 (emphasis removed). Shaffer and Ginsburg also note that "while generalizing from any specific domain can be risky, in the aggregate, a series of particular analyses help to provide a picture of how international law as a whole works, and why it works differently in discrete areas." *Id.* at 21.

the approach applies much more widely and has been used to assess regional trade agreements, focus on trade and gender, and conduct comparative assessments of the regulation of investment, services, intellectual property rights (IPRs), and the digital economy.

So what does this approach illustrate that differs from the work summarized in the preceding section? First, it emphasizes that broad flexibilities still need to be tailored to individual stakeholders, whose needs will be different than the needs of States, while simultaneously emphasizing the importance of national law alongside international and regional law. To the extent that international economic law has focused on domestic or national law, it has primarily done so based on the practices of the most powerful economies.[91] However, individual and community needs, as highlighted in the case studies, include can often be better addressed through local or regional good practices rather than the wholesale incorporation of legal structures from countries with more advanced systems and more diverse economies. African law, for example, is replete with inclusive and innovative aspects that may be more suited (but lesser known) than Western law, which often serves as a benchmark.

The approach also shines light on the importance of both comparative legal approaches and legal and regulatory diversity. Understanding how trading partners have implemented international rules differently, including different ways in which S&DT or the exercise of policy space have been applied, is as important as (or perhaps even more important than) understanding the history behind these provisions. Relatedly, the empirical work and socio-legal context explored in this section shine some light on what Akinkugbe has referred to as "pluraliz[ing] the false universal narratives of conventional IEL."[92] Comparative law is an important aspect of this paper's focus on inclusive trade and development and will require that a more diverse set of legal approaches be better documented, understood, and encompassed in legal and regulatory design, even in the context of trade rules that strive for harmonization.

Finally, the approach highlights that engagement in the legal system is essential and cannot be achieved through legal provisions or high-level capacity building alone, even though both remain important. Engagement is a continuous process, which ideally should be stakeholder-driven, and deeper work in this area could inform future trade agreements and the design of national law. Engagement at the national and sub-national level provides particular insight into the S&DT and policy space debate, as it is where policy space is ultimately exercised. National law also holds the potential to shape future international law, particular in the current multi-polar system with proliferating RTAs. Ultimately, even if S&DT provides the opening for more inclusive trade, a deeper process of ensuring inclusivity and equity must operate in parallel at the national legal level. These lessons will be illustrated through the discussion below and integrated into the dimensions summarized in Section IV.

91 *See* Anthea Roberts, Is International Law International?, at 43-46 (2017).

92 *See* Akinkugbe, *supra* note 8, at 4.

A. Understanding Economic Law Through a Stakeholder Lens

The analysis in this section starts not with an international agreement but with the experience of a particular stakeholder, in this case a farm in the Southern Highlands of Tanzania, that sought to create greater diversity in Tanzania's local economy and exports (one of the goals of S&DT efforts as noted in the preceding section). This may seem relatively small in the context of international trade law, but the lessons that resulted from this case study provide important insight into the design and implementation of trade law more broadly. The experiences of one farm, scaled to the level of a trade corridor, and eventually expanded to regional trade bodies, highlight the importance of inclusive legal interventions and illustrate how legal flexibility can be applied in practice. They also underscore the dichotomy between "law in books" and "law in action"[93] in a trade law context, providing critical insight given the normative shift currently underway.

i. Tanzanian Legal Reform in the Context of Food Security as an Illustrative Case

The broader policy context in which the first phase of the case study began illustrates a connection between the development landscape and the legal and regulatory environment. Notably, the initial phase of the case study began in around 2010, not long after the 2007-8 global food crisis, which also exposed systemic and stakeholder-level vulnerabilities (in all their capillarity), with important lessons for the pandemic crisis the world faces today. As context for the early stage of the case study, then Tanzanian President Jakaya Kikwete prioritized agriculture and food security through a number of initiatives, including the Kilimo Kwanza (Agriculture First) policy approved in 2009 and participation and leadership in international efforts, including the World Economic Forum's New Vision for Africa, the Grow Africa initiative, and the G8 Global Alliance for Food Security and Nutrition. A key component of these efforts was the Southern Agricultural Growth Corridor of Tanzania (SAGCOT),[94] which launched in 2010 as an agricultural development corridor with both a food security and sustainability focus. Although this paper does not seek to assess these broader policy efforts, the issues discussed in the context of the case study were directly linked with Tanzania's commitments under these initiatives, including the Global Alliance for Food Security and Nutrition. Tanzania was also a party to a regional agreement that covered the regulation of agricultural inputs, including seed, and allowed for mutual recognition of rules and procedures among Kenya, Tanzania, and Uganda.[95] Tanzania

93 Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

94 *See* Beth Jenkins, *Mobilizing the Southern Agricultural Growth Corridor of Tanzania: A Case Study,* Harv. Kennedy Sch. Corp. Soc. Resp. Initiative (2012), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_48_SAGCOT.pdf.

95 Association for Strengthening Agricultural Research in Eastern and Central Africa (ASARECA) & Eastern and Central Africa Programme for Agricultural Policy (ECAPAPA) Agreement, 4 ECAPAPA Monograph Series (2002).

was also a party to the WTO and a number of regional trade bodies, including the East African Community (EAC) and the Southern African Development Community (SADC), the latter of which had also developed regionally integrated rules for seed.

The interconnected phases of the case studies take place in Tanzania against this backdrop. Economic, social, and legal interventions were designed in the wake of the food security crisis to address vulnerability through increased yields, improved market connections for smallholder farmers, and more diversified crop production. The first phase of the case study involved a local farming enterprise seeking to diversity the economy through a socially-focused business model that would develop high-quality, high-yielding certified seed potato, commercializing the sector and ultimately impacting around 150,000 small holder farmers, mainly women, who had been using low-yielding seed potatoes for a number of years.[96] This was exactly the type of investment the larger policy context was designed to encourage.

The farm immediately confronted a range of legal and regulatory issues when it tried to introduce a new product to the local market (certified seed potato) and scale its operations. Substantively, there were issues related to the application of SPS rules and a host of other non-tariff measures, such as licensing and registration measures.[97] While these were challenging for development of the domestic agricultural sector, they were also precisely the type of issues that could have been taken into account with more tailored use of legal flexibilities.

Ultimately the legal and regulatory issues that arose presented a challenge not because Tanzania's laws or the regional rules were inconsistent with international law, but because of gaps in implementation, inclusiveness, and engagement. For example, finding the relevant rules and understanding how they would be applied was a gap, as was the significant regulatory discretion in the process. The regional trade agreement referenced above ultimately reduced this regulatory discretion, allowing the enterprise to successfully import seed potato germplasm that had been tested and approved in Kenya and then undergo a much shorter period of testing and regulatory approval in Tanzania. However, the enterprise was the first "test case" for the agreement's implementation, as the agreement had pre-dated the investment but had never been applied in practice before.

With private and public support, including an unusually intensive legal capacity building effort, the enterprise's legal and regulatory hurdles were addressed one at a time.[98] While this was a slow process, it provided an opportunity to document their

96 *See Improving Livelihoods, Removing Barriers: Investing for Impact in Mtanga Farms,* Glob. Impact Inv. Network (Nov. 28, 2011), https://thegiin.org/research/publication/improving-livelihoods-removing-barriers-investing-for-impact-in-mtanga-farms.

97 Some of the issues encountered related to application of the WTO SPS Agreement, but Tanzania did have "policy space" within which to implement the agreement, and these issues did not constitute actionable "non-tariff barriers". In any event, a challenge of uneven application of SPS rules would have had to come from a trading partner and would not have been available to a domestic non-state actor.

98 The first phase of the case study was done under the TransFarm Africa pilot project undertaken with the support of the William and Flora Hewlett Foundation. The author coordinated work to identify and address legal and regulatory challenges that impacted these opportunities, first out of the German Marshall Fund and Aspen Institute and later out of a non-profit organization established in 2010, which is now NML.

experience in detail, seeing through their eyes the challenges that arose as the rules were applied in practice.[99] Ultimately, the enterprise was able to resister and certify the new, high-yielding seed potato varieties, introducing them into the local market and creating precedent under the new regional agreement.

ii. Practical Applications Generalized from Phase I of the Case Study

Although a complete discussion of the legal and regulatory details that underpinned the case study is beyond the scope of this paper, several key lessons learned are worth noting. First, the enterprise's ability to invest in a new sub-sector (potatoes) was very closely linked with the application of domestic SPS regulations and implementation of a regional trade agreement, even though the enterprise was not trading across borders. Interestingly, an international agreement proved to be a significant factor in the enterprise's success; however, when the case study began, the enterprise had no knowledge that such an agreement existed. It took an insightful Tanzanian official to point out the regional agreement, which had yet to be operationalized (NB: this agreement, and in a number of ways the type of experiences detailed in the case studies, provided the basis for broader, more integrated regional rules.)

Second, it is worth emphasizing that the challenges faced by the enterprise were not due to gaps in the law on the books. In fact, the Government of Tanzania had put in place a quite comprehensive legal system for seed due to the broader development and food security priorities noted above. Tanzania, an LDC, had been able to take advantage of the full range of S&DT options in implementing its WTO obligations, and this flexibility was likely one reason that Tanzania's system had been developed to the extent highlighted in the case study. However, there was a significant challenge related to "law in action", and the case study uncovered uneven implementation of the rules, particularly for a newer market entrant and a relatively unfamiliar crop like potato. Had the process of engagement been more inclusive as the rules were developed, it is possible that the enterprise would have been more aware of national law and the relatively new trade agreement. Further, had the new trade agreement been better publicized, perhaps under transparency obligations, it is possible that its existence would have been more widely known, although it is likely that this did not happen because it was narrow in scope and not a more traditional trade agreement.

99 For a more detailed discussion of Phases I and II of the case study, see Kuhlmann, *Streamlining Seed Regulatory Systems: Lessons Learned from Registering New Seed Potato Varieties in Tanzania*, teaching case study on file with the author. Comparative lessons are also drawn from NML's use of "Regulatory Systems Maps" and a program on regional seed regulation co-designed with the Syngenta Foundation for Sustainable Agriculture that began in 2015. The Regulatory Systems Maps (see Figure 1) break laws and regulations down into step-by-step components, allowing for more focused study of how domestic law reflects stakeholder and legal diversity and highlighting where development-focused intervention could be applied to better respond to the needs of different stakeholders. The Regulatory Systems Maps also provide a basis for comparisons between countries' laws and changes in law or regulation within an individual State.

Viewed in light of the issues discussed in Section II of this paper, the legal and regulatory issues that arose during the different phases of the case study highlighted other aspects that needed to operate in parallel. S&DT had been applied, and the agreement in question provided for staged implementation consistent with the flexible model set by other African trade agreements. Taken alone, these factors may have suggested that flexible application of the rules could lead to desired development outcomes and a pathway for addressing vulnerabilities caused by the global food crisis. Yet, the case studies reinforces that these more State-focused dimensions of inclusive trade are necessary but not sufficient without also incorporating a stakeholder-focused approach, as expanded upon below. It also highlights an important dimension of flexibility in economic law tied to economic context that is so little explored in literature.

iii Scaling the Law and Food Security Case Study Throughout Tanzania

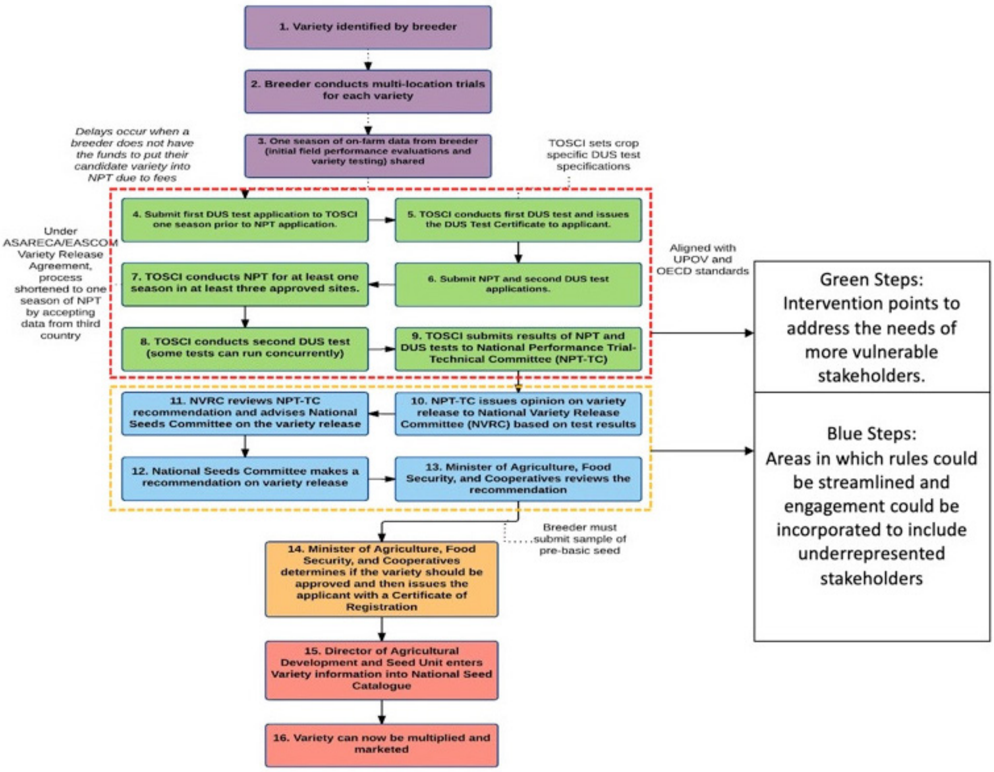
A successful result in the enterprise-focused phase of the case study led to better implementation of rules for registering and certifying seed and the introduction of high-quality seed potatoes into the market that produced yields ten times the national average, ultimately contributing to food security and agricultural development. In the wake of that success, what is described for purposes of this paper as the second phase of the case study began along the SAGCOT corridor in partnership with the New Markets Lab (NML),[100] with support from the Alliance for a Green Revolution in Africa (AGRA) and the U.S. Agency for International Development. This phase focused on scaling up the knowledge and experience gained at the enterprise throughout the SAGCOT agricultural trade corridor stretching from Dar es Salaam to Tanzania's border with Zambia. This phase also tracked with the Government of Tanzania's commitments under the New Alliance for Food Security and Nutrition, and the project helped assess how relevant legal commitments were being implemented in practice.

The corridor-wide phase involved consultations with over ninety stakeholders from the public and private sectors to understand whether the experience of the single agricultural enterprise was becoming more common as the new rules were implemented. It also involved an extensive legal review that included nearly seventy laws, regulations, guidelines, international agreements, and other measures. Working closely with SAGCOT and local representatives from the private sector, government,

100 The author and colleagues traveled the SAGCOT corridor to interview stakeholders on their experiences navigating Tanzania's seed rules and regulations and developed a series of legal tools to build knowledge and improve implementation. For additional detail, see NML & Southern Agricultural Growth Corridor of Tanzania Centre Ltd., *A Legal Guide to Strengthen Tanzania's Seed and Input Markets*, Alliance for a Green Revolution (April 2016) [hereinafter, *Tanzania Legal Guide*] (made possible through support provided by the U.S. Agency for International Development, under the terms of Cooperative Agreement No. AID-OAA-A-13-00040, and managed by The Alliance for a Green Revolution in Africa (AGRA); the opinions expressed therein are those of the author(s) and do not necessarily reflect the views of the U.S. Agency for International Development), available at https://docs.wixstatic.com/ugd/0959633a4f751a4c83488982341082f530aa32.pdf.

and NGOs, NML mapped Tanzania's entire regulatory system related to seed (including registration and certification of seed, IPR, and trade) across a range of legal instruments and developed and validated a Legal Guide for the seed sector and a series of Regulatory Systems Maps (See Figure 1) that depicted key regulatory processes step by step. The mapping process involved a combination of legal analysis, in-country consultation, crowd-sourced input, dialogue, and tailored updates.

Figure 1: NML Regulatory Systems Map Highlighting Legal and Regulatory Gateways and Opportunities for Inclusive Regulation[101]



This more detailed approach proved to be important, since most enterprises were neither aware of the updated agricultural rules, nor had their experiences paralleled those of the enterprise in the first phase. The maps allowed stakeholders to pinpoint more precise gaps, implementation challenges, and intervention points for Inclusive Regulation (these Legal and Regulatory Gateways are shown by the dotted sections above that correspond with the green and blue portions of the map).[102] The maps and other legal tools developed in the second phase which were used to build capacity among local stakeholders and generate concrete interventions to improve implementation of the regulatory system for seed and other inputs in practice.

101 Adapted from *Tanzania Legal Guide*. *See id.*
102 *Id.*

iv. Practical Applications Generalized from Phase II of the Case Study

The maps shown in Figure 1 provided a visual representation of the intersection between rules on paper and rules in action. The "Legal and Regulatory Gateways" depicted in the maps correspond with practical steps that enterprises and other stakeholders encounter in navigating a particular aspect of the legal and regulatory system and also signify intervention points to make the rules more equitable, inclusive, and efficient. The process for developing the maps was modeled largely on experience developed mapping non-tariff measures as a trade negotiator.

The maps have proven to be an important tool for information sharing and engagement to discuss regulatory options and their impact on diverse stakeholders.[103] In addition, delving deeply into the details of laws and regulations highlights important issues with respect to equity inclusiveness. Were the laws designed with certain stakeholders or certain crops in mind? If not intentionally so, were they operating this way in practice? How was their design related to Tanzania's overall development goals and the vulnerabilities the government wished to address? Was there a disconnect between the design of the laws and their implementation in practice? Were the needs of small farmers, women, and other stakeholders adequately reflected?

Each colored cluster represents a distinct part of the regulatory process, with relevant international agreements and standards referenced that inform law in these areas. The highlighted areas in Figure 1 illustrate how Legal and Regulatory Gateways could be used to consider important factors like equity, inclusiveness, and regulatory diversity. The green shaded steps all involve testing and evaluation. While these steps are largely aligned with SPS disciplines and international standards, some of the requirements and procedures could be tailored to address the needs of more vulnerable stakeholders. Ideally this phase of the process could also incorporate direct input through a space for communicative action that would allow stakeholders to directly voice their needs and interests. The blue shaded steps all involve government discretion in the registration process, highlighting not only ways in which the rules could be streamlined but also areas in which engagement of underrepresented stakeholders could be improved. Again, while these steps may not be per se inconsistent with international law, States can choose how to design these processes with local stakeholders and development considerations in mind. For each of the gateways,

103 One important change that occurred as a result of the case study was that the number of testing seasons required before a new seed variety could be formally released into the market was reduced significantly. When the first phase of the case study began, the sixteen-step process depicted in Figure 1 could potentially repeat six times, and the risk of repeated testing was higher for new crops like potatoes that were less commercially recognized and more linked with the livelihoods of small farmers and food security. By the conclusion of the second phase of the case study, as tested during the first phase, this had been reduced to two seasons (or one if a relevant regional agreement applied), in alignment with RTA requirements and Tanzania' commitments under the New Alliance for Food Security and Nutrition. Tanzania also made requirements for vegetable crops more flexible, eliminating one type of testing that is not as suitable to vegetable crops (the national performance trials (NPT) testing depicted in the green Regulatory Gateways), as vegetables have characteristics and risks that differ substantially from field crops.

both individually and as a group (denoted by the highlighting), different options are available to policymakers, providing a lens through which to identify and discuss possible interventions that could make legal and regulatory processes more efficient, less expensive, and, most importantly, more equitable. For example, the procedures shown in the green block of steps could be tailored to address the needs of indigenous communities, which may not be able to navigate this complex process. In terms of options, other African countries' laws (and the laws of countries in Asia and Latin America) contain relevant innovations,[104] discussed below, that could be considered.[105]

A number of lessons that arose from the second phase of the case study extended well beyond Tanzania's borders. Tanzania is a party to several regional economic communities (RECs), namely SADC and the EAC. At the time that both phases of the case study were unfolding, Tanzania was also participating in regional discussions on harmonized seed regulations, and Tanzania's experiences implementing the more limited regional agreement under the first phase of the case study helped to inform more extensive regional rules within the RECs, including during the second phase of the case study and extending well beyond the case study as well.

Further, while not the focus of the case study, the maps highlighted other important dimensions as well. As noted, when the case study began, Tanzania's laws had recently been amended to follow international standards. They were, however, largely modeled on European seed law, which turned out to present a great deal of complexity in terms of implementation. In Tanzania's case, both the enterprises using the rules and the regulators applying them could have benefitted from a design better suited to Tanzania's system. This, in turn, would have led to more equitable implementation as well. In other words, studying Tanzania's laws at this more granular level, in the context of international standards and "good practices" but also with local needs in mind, highlighted ways in which Tanzania could not only exercise policy space but could also innovate within the bounds of international law.

The Legal and Regulatory Gateways shown in the maps also present a window for identifying entry points for addressing the equity and sustainability dimensions presented in this paper, while also linking trade and human rights law. While many countries may have broad constitutional provisions that incorporate human rights relevant to food security and stakeholders' rights, the provisions in more specific laws can sometimes limit exercise of these rights. Understanding the structure of economic rules at the national level can, therefore, be imperative. Many stakeholders share an interest in making sure that laws are designed and applied in a way that is more sustainable and equitable, taking into account, in particular, the needs of small farmers, vulnerable stakeholders, SMEs, and women working in the agricultural sector.[106] However, as both phases of the case study highlight, this does not always happen in practice even with good intentions. Neither public nor private sector

104 *See* Okafor & Miyawa, *supra* note 7.
105 Kuhlmann & Bhramar Dey, *Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study*, 11 Agronomy 1, 16 (2021), https://www.mdpi.com/2073-4395/11/2/377.

stakeholders have a reliable way to access information on the regulatory options and innovations that exist in other parts of the world (or even within their own legal systems, since approaches in one sector or sub-sector could learn from and inform approaches in other sectors), reinforcing the need for more systemic approaches to legal design. Addressing these gaps in legal design and, most importantly, creating opportunities for those affected by laws and regulations to voice their needs will be a pivotal point in changing the narrative of trade.

B. Additional Lessons Learned and Their Implications for "Best Practices" and Legal and Regulatory Options

The research and illustrative case studies described above have revealed notable patterns in how countries regulate within and across borders, as well as highlighted "options" and good practices in regulation that have emerged from within sub-Saharan Africa and other developing markets, including those that benefit marginalized stakeholders. This has significant implications for regional and international law and highlights the need for both deeper comparative law initiatives and more detailed study of how law operates in practice.

At the comparative law level, while national rules are often catalogued benchmarked against "best practices", this does not reflect the full range of options possible under international law. Indeed, this approach may reinforce the false assumption that there is just one way of designing and implementing the rules.[107] Although benchmarking tools can be helpful for comparing systems, they can also overlook the legal diversity and unique features that can make national law and trade agreements, including African trade agreements, a powerful contribution to the international legal system.

The methodology described above highlights this diversity, however, and since the case studies were concluded, it has been applied in multiple countries in sub-Saharan Africa, including Kenya, Uganda, Rwanda, Tanzania, Malawi, Zambia, Zimbabwe, Mozambique, South Africa, Ghana, Nigeria, Senegal, and Mali.[108] This comparative legal and regulatory work in over a dozen countries has been benchmarked

106 These goals underpin many capacity building programs For example, the author led a 2013 workshop with approximately forty women-led agricultural enterprises in Tanzania and SAGCOT, with support from the German Marshall Fund, that highlighted ways in which the legal and regulatory system for agricultural trade impacted women. These findings were incorporated into the case study, and several of the stakeholders were included the consultations and validation meetings. NML and Aspen Network of Development Entrepreneurs also developed a *Legal Guide for Women Entrepreneurs in East Africa* in 2016 that included legal considerations particular to women in trade, agriculture, and land tenure (on file with author).

107 *See* Akinkugbe, *supra* note 8, at 4.

108 *See, e.g., Tanzania Legal Guide*, *supra* note 100; Kuhlmann & Yuan Zhou, *Seed Policy Harmonization in the EAC and COMESA: The Case of Kenya* (2015); Zhou & Kuhlmann, *Seed Policy Harmonization in SADC and COMESA: The Case of Zimbabwe* (2015); Kuhlmann & Zhou, *Seed Policy Harmonization in ECOWAS: The Case of Ghana* (2016); Kuhlmann et al., *Seed Policy Harmonization in ECOWAS: The Case of Nigeria* (2018); Kuhlmann et al., *Seed Policy Harmonization in COMESA and SADC: The Case of Zambia* (2019); Kuhlmann et al., *Seed Policy Harmonization in COMESA and SADC: The Case of Zambia* (2019), all available from NML at https://www.newmarketslab.org/casestudies. The model is also currently being extended to Ethiopia.

against WTO and other international measures, including the rules of four of the main RECs on the continent, the EAC, SADC, the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of West African States (ECOWAS).[109] This empirical work has produced nearly a hundred maps similar to Figure 1, and, as the maps have evolved, they have expanded to include additional details, such as (a) areas in which what is written into law or regulation differs from stakeholder experience in practice; (b) areas in which law and regulation are changing; (c) areas of law and regulation that have changed but are not yet implemented; (d) aspects that require more detailed measures (e.g., regulations, guidelines, etc.) to become operational; (e) cost and average time of regulatory procedures; (f) gender considerations, and other factors.

Comparison of these maps has allowed for a deeper dive into the different ways in which national and regional rules are designed, implemented, and shaped by development factors, even when underpinned by the same international rules. At the national level, it has highlighted options along the seven dimensions discussed in this paper that can address vulnerabilities like lack of economic diversification, poor productivity, and limited opportunities for diversity, both in terms of products and market stakeholders. At the regional and global levels, these findings have contributed to balancing market access with food security; implementing and building upon existing international, regional, and national good practices; and establishing more inclusive markets over time.[110]

The mapping has also been extended to other issues, including digital regulation, IPRs, and other trade issues. As the section below highlights, a number of examples of "options" for inclusive trade exist. These include "different rules for different types of business, rules designed to address the needs of a certain group (for example, in response to discrimination or economic vulnerability), or some other differentiation".[111]

In the context of the case study, stakeholders and the government might have considered additional options tailored to the needs of Tanzania's small farmers, and some such options did factor into the second phase in particular. These could include options for reducing testing requirements for certain seed varieties or ensuring that farmers' varieties are eligible for variety registration, as countries like Benin, Brazil, and Peru have done.[112] It could also include more flexible systems for plant breeders' rights (PBR),[113] and countries such as India and Malaysia have established such systems to

109 NML has partnered with the Syngenta Foundation for Sustainable Agriculture and its Seeds2B program on regional seed regulation since 2015, which has resulted in a series of case studies (*Id.*) and other publications. *See also* Kuhlmann, *Regional Seed Harmonization in Sub-Saharan Africa: A Comparative Assessment*, Syngenta Found. (2015), https://www.syngentafoundation.org/sites/g/files/zhg576/f/seedpolicy_new_africa_regulation_comparative_analysis_september_2015.pdf. NML has also partnered with Emerge Centre for Innovations-Africa and the East African Community (EAC), through AGRA, on the EAC's new seed and fertilizer laws and policies, and in 2020, NML began a program as part of a consortium led by the Alliance for a Green Revolution in Africa and Common Market for Eastern and Southern Africa (COMESA), with support from USAID, focused on implementation of regional seed regulations in Eastern and Southern Africa.

111 Kuhlmann & Dey, *supra* note 105, at 3 (citing Kuhlmann, *Flexibility and Innovation*, *supra* note 2).

112 *Id.* at 16.

allow for expanded farmers' privilege and, in Malaysia's case, establish a less stringent standard for seed variety registration and PBR.[114] Options for signaling product quality also exist beyond the complicated process for certifying seed that the enterprise in the case study pursued, such as more flexible quality control measures like truth-in-labeling (India, South Africa, and Nepal maintain this option, for example), quality declared seed schemes that can be administered in local regions, and community-focused seed clubs and associations that focus in particular on the needs of smaller farmers, such as those in Vietnam, Myanmar, and Zimbabwe.[115] Similar options exist outside of agricultural regulation, of course. For every legal issue or sector, a diverse range of inclusive legal options exist that correspond with the needs of vulnerable communities and stakeholders, as briefly illustrated in the section below.

IV. Mapping the Seven Dimensions of Inclusive Law and Regulation to Address Systemic and Stakeholder Vulnerabilities

Ultimately, building an inclusive approach to trade law, or other areas of IEL, will come down to options for applying and sometimes reshaping international and domestic law and regulation. These will include possibilities for exercising law in a way that is compliant with the WTO and other trade instruments,[116] while also addressing development and human rights considerations,[117] as well as options for designing and applying the rules to address vulnerability at different levels. Identifying these options, however, can be a difficult task that requires extensive comparative legal research.[118]

113 States have different approaches to implementing the provisions of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised on November 10, 1972, on October 23, 1978, and on March 19, 1991 (UPOV Convention), available from the International Union for the Protection of New Varieties of Plants (UPOV) at https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf. Some countries have adopted national legislation on plant breeder's rights, one of the ways in which the sui generis requirement of TRIPS Art. 27(3)(b) can be met, that still allow farmers to use saved seed from previous crops for future use and for exchange with other farmers. This practice, also known as "farmer's privilege," is considered an important practice for inclusive seed systems and is allowed under the UPOV 1978 Convention, but, while the UPOV 1991 Convention limits this practice further, which is often stressed as the "best practice", it does allow members to limit the scope of plant breeders' rights within certain parameters. This exercise of "policy space" by States could be important to addressing farmers' needs and vulnerabilities. *See, e.g.,* Bram De Jonge & Peter Munyi, *A Differentiated Approach to Plant Variety Protection in Africa*, 19 J. World Intell. Prop. 28 (2016). While the WTO TRIPS Agreement contains a provision on *sui generis* protection for plant varieties, traditional varieties and landraces are often not eligible for plant variety protection, and local communities cannot hold rights in most countries. *See also* New Mkts. Lab, Local Seed Collection and Protection of Farmer-Developed Seed Varieties: Regional and International Frameworks (2018); Loretta Feris, *Protecting Traditional Knowledge in Africa: Considering African Approaches*, 4 Afr. Hum. Rts. L.J. 242, 243 (2004).

114 Kuhlmann & Dey, *supra* note 105, at 15.

115 *Id.* at 19.

116 Mate writes of the "availability and viability of alternate WTO-compliant policy choices." *See* Mate, *supra* note 25, at 288.

117 *See, e.g.,* Moon, *supra* note 2; Howse & Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization* (Friedrich-Ebert-Stiftung Dialogue on Globalization Occasional Paper Series, Paper No. 30, Apr. 2007), http://library.fes.de/pdf-files/iez/global/04572.pdf.

While this section advocates for a collaborative approach to expanding this research base, most stakeholders will have neither the time nor the resources to undertake this type of analysis every time a question of legal design or implementation arises. Many will also continue to contend with the lack of an inclusive process in rulemaking at all levels. For States, the pressures to follow established legal models from powerful economies, whether the United States, Europe, or China, are also considerable, adding a layer of vulnerability in terms of legal autonomy and diversity. As a result, even where options exist, it may not be possible to exercise them, particularly in a way that can serve the needs of a more diverse group of stakeholders. With a broader set of open-access data on legal and regulatory options, however, some of these vulnerabilities could be addressed in a more context-specific way and, over time, perhaps be reduced. This section summarizes examples of options and innovations across the seven dimensions for inclusive law and regulation that address the vulnerabilities that frame this discussion. These seven dimensions provide the foundation for a research agenda on how to incorporate inclusive and sustainable development into trade rules and economic law. Before providing examples of options that fall within each of the seven dimensions, however, it is important to note several assumptions that underpin this research. First, these options will often correspond with WTO, international treaty, RTA, and national legal provisions, but they will not focus on international or national case law, at least not initially. While case law is extremely valuable and provides a very useful frame of reference, the day-to-day application of laws and regulations also deserves greater attention, and, as the case studies above highlight, the day-to-day application of rules and regulations impacts a diverse group of stakeholders most directly. Many important issues will never rise to the level of litigation or even regulatory challenge and will instead be worked out through more discrete procedures and practices. Questions of how to apply the law will be continuous, even as new precedent is created.

Second, the research described in this section will complement but not replicate the important work done under other initiatives, including categorization of S&DT done by the WTO and other initiatives, including the TVI, and databases on RTAs (for example, the World Bank project and database on Deep Trade Agreements (DTAs), the Design of Trade Agreements (DESTA) Database, the WTO RTA Exchange, and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Trade Intelligence and Negotiation Adviser (TINA)), to name but a few.

Finally, the methodology will not simply focus on the design of rules and regulations, it will also begin to assemble information on how law is applied or implemented in practice. Initially, this will focus on data gathered through the Regulatory Systems Maps, with new ways of comparing the maps added in as the research is expanded. Over time, it will also involve other methods for assessing

118 For example, Kuhlmann & Dey's comparative study was conducted over a year-long period; however, the author and NML had been researching many of the comparative legal and regulatory options, such as more flexible approaches to seed variety registration, IP, and seed certification, for over a decade. *See* Kuhlmann & Dey, *supra* note 105.

implementation of laws and regulations, particularly in the context of the distributive effects of trade and economic law.

Following is a brief summary of the seven dimensions discussed in this paper, with examples of the types of legal and regulatory options that exist within these categories: (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) inclusiveness, engagement, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact.

(1) Special and Differential Treatment

As discussed in Part II, S&DT is a central component of inclusive trade law. S&DT options have been well documented at the WTO level and appear throughout the WTO covered agreements. As the most recent example of S&DT, the WTO TFA and its provisions provide particularly interesting options, as the TFA allows States to prioritize and schedule implementation of commitments based on particular capacities and needs.[119] This is a notable example of S&DT and flexibility, and the WTO TFA's approach to phasing in implementation of commitments over time based on needs and resources, and intentionally integrating capacity building,[120] could serve as a model for future obligations.[121]

S&DT is also incorporated into a number of RTAs. The AfCFTA, for example, incorporates S&DT in a number of provisions, including in the agreement's objectives, Protocol on Trade in Goods, and Protocol on Trade in Services.[122] Notably,

119 Agreement on Trade Facilitation arts. 14-16, Feb. 22, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401. *See also* Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C. (Jan. 28, 2016); NML & Harvard Law & Int'l Dev. Soc'y, Harvard Law School Trade Innovation Initiative: Summary of Findings on Trade and Development in Free Trade Agreements (2015), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf; Kuhlmann, *Handbook*, *supra* note 9; Howse & Nicolaïdas, *supra* note 2, at 271.

120 Howse & Nicolaïdas emphasize that capacity building assistance was integral to the WTO TFA and not an "afterthought", in contrast the TRIPs Agreement, for example. *Id.* at 277 (citing Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization,* 14 World Trade Rev. 643, 659-62, 669-70 (2015)).

121 *See* Wanjiku Waweru, *Trade Facilitation Measures: Avoiding a 'One Size Fits All' Approach*, Afronomicslaw (Apr. 26, 2019), https://www.afronomicslaw.org/index.php/2019/04/26/trade-facilitation-measures-avoiding-a-one-size-fits-all-approach; Tsietsi, *supra* note 60.

122 AfCFTA, *supra* note 31, Art. 5 (d). Relevant S&DT provisions include: AfCFTA Art. 5 (c) and (d) and Art. 15; The Protocol on Trade in Goods, Preamble, Article 6 (provision of flexibilities that shall include special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis), Article 11 (modification of tariff concessions), Article 17 (trade remedies), Article 24 (infant industries), Articles 26 (general exceptions), Article 27 (security exceptions), and Article 28 (balance of payments difficulties), with Article 29 covering technical assistance and capacity building. AfCFTA, Protocol on Trade in Goods, Mar. 21, 2018, 58 I.L.M. 1028, 1043 [hereinafter AfCFTA Protocol on Trade in Goods]; Protocol on Trade in Services Preamble, Article 7 (flexibilities such as transitional periods, on a case by case basis, to accommodate special economic situations and development, trade and financial needs of the state parties*)*, Article 14 (balance of payment difficulties), Article 15 (general exceptions), Article 16 (security exceptions), Article 23 (modification of schedules and concessions), and Article 27 (technical assistance and capacity building) AfCFTA, Protocol on Trade in Services, Mar. 21, 2018, 58 I.L.M. 1028, 1053 [hereinafter AfCFTA Protocol on Trade in Services]. *See also* Sommer & MacLeod, *supra* note 31; Kuhlmann & Agutu, *supra* note 21.

the AfCFTA's Protocol on Trade in Goods and Protocol on Trade in Services recognize States' different levels of development and particular needs, which are notable in terms of addressing vulnerabilities. The AfCFTA's Protocol on Trade in Services specifically refers to "least developed, land locked, island states, and vulnerable economies in view of their special economic situation and their development, trade, and financial needs,"[123] moving beyond the usual distinctions based largely on economic measurements, and taking into account "other factors, such as level of industrialization, size of the agricultural sector, resource endowments, proximity to ports, and conflict status."[124]

As an additional example of S&DT in an RTA, the RCEP Agreement references S&DT, as well as the need for "flexibility", for some of the parties, namely Cambodia, Laos, Myanmar, and Vietnam.[125] The RCEP also incorporates S&DT for LDCs into dispute settlement (Chapter 19), noting that other parties should exercise due restraint in pursuing disputes against LDCs, which tracks with the WTO's Dispute Settlement Understanding, and otherwise take into account S&DT. It is too soon to assess the impact of these provisions, but their implementation should be tracked going forward.[126]

(2) Flexibility

Flexibility is an important aspect of inclusive law and development, particularly during periods of uncertainty or crisis, although it does need to be carefully crafted and exercised. Flexibility in international agreements, regional rules, and domestic laws and regulations can be important both for policymakers and the stakeholders who are using these systems. Flexibility here relates to legal provisions and structural aspects that allow States to respond to changing circumstances and the needs of stakeholders. As a result, this dimension is particularly focused on how rules can be better adapted to address vulnerabilities in practice and should not be viewed as a replacement for predictable rules themselves.

Flexibility can appear in many forms in international trade law and IEL more broadly, ranging from use of soft law instruments[127] to building block approaches that apply variable geometry. Both are reflected in the AfCFTA,[128] for example, as well as in other African trade agreements. The AfCFTA also specifically refers to "flexibility" alongside other dimensions such as S&DT and sustainable development, including language in the AfCFTA Protocol on Trade in Goods that calls for the need to provide flexibilities, special and differential treatment, and technical assistance to State parties

123 AfCFTA Protocol on Trade in Services, *supra* note 122.
124 Kuhlmann & Agutu, *supra* note 21 (referencing Sommer & MacLeod, *supra* note 31).
125 RCEP, *supra* note 32, pmbl.
126 Farhaan Uddin Ahmed, *Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguard?*, Afronomicslaw (Feb. 17, 2021), https://www.afronomicslaw.org/index.php/category/analysis/special-and-differential-treatment-ldc-parties-rceps-dispute-settlement-mechanism.
127 *See* Rolland & Trubek, *supra* note 4.
128 AfCFTA, *supra* note 31, Art. 5(c).

with special needs.[129] Flexibility can also be incorporated into RTA design through "living agreement mechanisms" that allow for monitoring, adjustments, and assessment of implementation needs over time.[130] These can include the flexibility to "review and revise", which is gaining attention, particularly in a crisis context, although this type of flexibility should be balanced with the need for transparency and predictability in rules.[131] As noted, a number of agreements incorporate some aspect of this principle, ranging from the AfCFTA, which provides for periodic review and addition of instruments as needed (Art. 28 and Art. 8, respectively),[132] to the USMCA with its sunset clause. International agreements exhibit flexibility as well. In international trade law, this is most often noted in the context of plurilateral agreements, such as the Information Technology Agreement,[133] which may become a more viable model with WTO negotiation and adjudication functions at an impasse. Several new plurilateral agreement, including those on environmental goods, investment facilitation, services, and digital trade, are currently underway.[134]

The pandemic has highlighted the importance of legal flexibility in a number of respects, ranging from classification of essential goods, agreements between States to facilitate trading during an emergency, and States' ability to waive standards and requirements that might prevent vulnerable stakeholders from accessing essential goods and services.[135] One example of such an option is the Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic signed between New Zealand and Singapore that waives import tariffs on essential goods, including medical goods and food, and establishes an agreement to avoid export restrictions on essential goods, all in order to address vulnerabilities posed by the COVID-19 pandemic.[136]

At the multilateral level, flexibilities in IP rules remain important in the context of vulnerability.[137] One example is the flexibilities on access to medicines incorporated

129 The Preamble to the Protocol on Trade in Goods states: "In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis." AfCFTA Protocol on Trade in Goods, *supra* note 122, art. 6.

130 Chauffour & Kleimann, *supra* note 14, at 7.

131 *See* Diane Desierto, *The Human Costs of Exiting Trade Agreements: The Right to Development in an Era of Policy Uncertainty*, EJIL:Talk! (Oct. 27, 2017), https://www.ejiltalk.org/the-human-costs-of-exiting-trade-agreements-the-right-to-development-in-an-era-of-policy-uncertainty/.

132 AfCFTA, *supra* note 31, arts. 28 & 8.

133 Howse & Nicolaïdas, *supra* note 2, at 271.

134 *See* Gary Clyde Hufbauer, *Focused Trade Agreements Can Sustain the WTO in Time of Economic Nationalism*, Peterson Inst. Int'l Econ. (Apr. 12, 2021), https://www.piie.com/blogs/realtime-economic-issues-watch/focused-trade-agreements-can-sustain-wto-time-economic.

135 For a more comprehensive presentation of flexibilities in RTAs during time of crisis, see Kuhlmann, *Handbook*, *supra* note 9.

136 Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic para. 2, N.Z.-Sing., Apr. 15, 2020, available at https://perma.cc/WWG4-JRAC.

137 *See, e.g.*, Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. Int'l L. & Pol. 1 (2018). *See also* Kasim Musa Waziri & Awomolo O Folasade, *Protection of Traditional Knowledge in Nigeria: Breaking the Barriers*, 29 J.L. Pol'y & Globalization 176 (2014).

into the TRIPS Agreement, which are particularly relevant to addressing systemic vulnerabilities in light of the pandemic and have a strong connection with the SDGs as well.[138] TRIPS flexibilities on access to medicines include TRIPS Articles 31 and TRIPS 31*bis* (which is notably the only amendment to the WTO agreements), allowing countries to use compulsory licenses to override intellectual property rights in order to compel production or export of generic medicines to address public health concerns.[139] While these flexibilities, particular under TRIPS 31*bis,* have not been used in practice frequently, they have been successfully leveraged to drive down drug prices. Currently, a number of States are supporting expanded flexibilities through a TRIPS waiver.[140] This, however, should also be evaluated in terms of its projected impact, drawing from the lessons of the flexibilities in using compulsory licensing to spur production.

Flexibilities also appear throughout domestic laws as well. In addition to the agricultural examples noted above,[141] India's patent law incorporates flexibility on patentable subject matter and compulsory licensing to create domestic procedural and legal flexibilities.[142] Based on comparative work to date, numerous examples of domestic legal flexibility exist, although they are not yet well documented, and assessing flexibilities across substantive rules could present helpful options for States and stakeholders alike.

(3) Sustainable Development

Sustainable development is also receiving increased focus, both in the context of environmental sustainability and climate change, as well as more broadly in line with the SDGs.[143] Like flexibility, sustainable development appears in a number of forms throughout a variety of legal instruments. These range from language in the WTO preamble and preambles and objectives of RTAs, including the AfCFTA,[144] to incorporation of exceptions that provide the space to address environmental and health considerations.

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138 *See* Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Plank Inst. Intell. Prop., Competition & Tax L. Rsch. Paper Series, Paper No. 08-02, 2008). *See also* Antony Taubman, *TRIPS Jurisprudence in the Balance: Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic*, *in* Ethics and Law of Intellectual Property: Current Problems in Politics, Science, and Technology (Lenk et al. eds., 2007).

139 Decision of the General Council on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (2003).

140 *See* Colm Quinn, *Rich vs. Poor (Again) at WTO*, Foreign Pol'y (Mar. 10, 2021), https://foreignpolicy.com/2021/03/10/wto-intellectual-propert-waiver-india-south-africa/. In early May, the United States and EU announced their support of the proposal for an IP waiver for the COVID-19 vaccine. *See Statement from Ambassador Katherine Tai on the COVID-19 TRIPS Waiver*, Off. U.S. Trade Representative (May 5, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver.

141 *See* Kuhlmann & Dey, *supra* note 105.

142 Nedumpara, *supra* note 25, at 6. *See also* Amy Kapczynski, *Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 Cal. L. Rev. 1571 (2009).

Options also include sustainable development chapters in RTAs, including the CETA[145] and UK-EU Agreement. The latter contain provisions focused on sustainable development as well as environment and labor, drawing a link with the SDGs.[146] A number of other RTAs incorporate aspects of sustainable development, including the CPTPP,[147] which includes chapters on development, labor, and environment, and the USMCA.[148] The ACCTS agreement under negotiation will likely move the needle further in terms of RTA options for sustainability and development, with provisions on climate change and elimination of fossil fuel subsidies that may act as precedent for other agreements. In addition, it will be interesting to watch how incremental agreements, like the AfCFTA, incorporate provisions on sustainable development as they evolve, particularly in ways that are tailored to development needs.[149] While linked to the SDGs, sustainable development rules in trade agreements have been met with some skepticism as well, raising concerns that they as not well aligned with development needs.[150] Overall, it is important to ensure that sustainable development provisions intersect with other dimensions of inclusive trade and do not act as a form of disguised protectionism.

Sustainable development appears throughout domestic law as well. Sustainability provisions are common in agricultural regulations, including regulations on agricultural inputs as discussed above, trade rules, and investment provisions. These could also be combined with other areas of law, such as in investment rules that balance States' policy space.[151] SDG Target 17.15 explicitly links policy space with sustainable development, noting the importance of "respect[ing] each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development".[152] This is an important reminder that policy space in the area of sustainable development needs to be tailored to particular needs and approached in a way that respects both different legal traditions and the rights and needs of different stakeholders. The emphasis on sustainability, in both a broad and narrow sense, is only increasing, and cataloguing options in this area, both in RTAs

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143 While SDGs 12, 13, 14, and 15 refer to environmental sustainability in particular, all of the SDGs are relevant in the context of this dimension. UN SDGs, *supra* note 19.

144 For a discussion of the development dimensions of the AfCFTA, *see* Kuhlmann & Agutu, *supra* note 21.

145 *See* Huck & Kurkin, *supra* note 79. The Agreement in Principle of the EU-Mercosur Trade Agreement, which is yet to be ratified, also contains a chapter on trade and sustainable development. *See EU–Mercosur Trade Agreement: The Agreement in Principle and its Texts*, Eur. Comm'n (Jul. 12, 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048.

146 *Id.* at 375.

147 *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 19 (Labor), Chapter 20 (Environment), Chapter 23 (Development), Mar. 8, 2018, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents [hereinafter CPTPP].

148 *See* Alvaro Santos, *The New Frontier for Labor in Trade Agreements*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization 6 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

149 *See* Khumalo, *supra* note 5; *see also* Kuhlmann & Agutu, *supra* note 21.

150 *Id.* at 1.

151 *See, e.g.,* Talkmore Chidede, *The Right to Regulate in Africa's International Investment Regime*, 20 Or. Rev. Int'l L. 437, 461 (2019). *See also* Kuhlmann & Agutu, *supra* note 21.

152 UN SDGs, *supra* note 19.

and domestic law, will help identify options for more inclusive and sustainable trade in the future.

(4) Equity

Building equity considerations into international and national economic law and regulation is perhaps one of the most important ways in which to address vulnerability and build inclusive and sustainable legal frameworks. As noted above, equity issues factor into every aspect of national and international economic law, and priority must be placed on identifying a range of options to tailor the design and implementation of economic law to the needs of economically marginalized communities, racial and ethnic minorities, small farmers, SMEs, women, and indigenous groups and to applying these options whenever possible.[153]

In RTAs, equity considerations are beginning to get incorporated into agreement provisions, including language on inclusion of vulnerable groups, provisions and chapters on gender and indigenous communities, special rules for SMEs, and other approaches. The range of options in this area, however, has only just begun to unfold, and current options sometimes lack detail and implementation. Equity tracks with the SDGs in many respects, including Target10.3 of "ensur[ing] equal opportunity and reduc[ing] inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard." [154]

As the preceding section discusses, socio-legal approaches, focused on stakeholder needs, are critical in order to identify how equity considerations could be incorporated into international economic law and related domestic law.

Some of the examples above regarding agricultural regulation illustrate how the needs of rural communities and farmers could be better aligned with legal and regulatory design and implementation, including the implementation of international agreements. The rights of indigenous communities and protection of traditional knowledge and biodiversity are also central to this approach. National rules and procedures for recording and protecting rights in countries like Ethiopia, Kenya, Tanzania, South Africa, Zambia, India, Peru, Thailand, Malaysia, and Vietnam provide important examples of legal and regulatory models and options.[155] International obligations, such as access and benefit sharing established under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits and International Treaty for Plant Genetic Resources for Food and Agriculture, provide a framework upon which to build and could open the door for more affirmative

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153 *See, e.g.*, Alex T. Johnson et al., *A Transatlantic Plan for Racial Equity and Justice,* Just Sec. (Feb. 8, 2021), https://www.justsecurity.org/72968/a-transatlantic-plan-for-racial-equity-and-justice/ (calling for integrating economic empowerment of "communities marginalized by systemic racism" in negotiations for a U.S.-U.K. Free Trade Agreement).

154 UN SDGs, *supra* note 19.

155 *See* Kuhlmann & Dey, *supra* note 105.

rights for local communities once domesticated into national law and implemented in practice.[156] Labor laws and provisions in trade agreements could also be viewed through an equity framing, particularly if coupled with bottom-up approaches to focus on the needs of workers.

One area in which trade measures could be made more equitable is through tailored approaches to address the particular circumstances facing women.[157] While a number of WTO Members have affirmed a commitment to gender through the 2017 Joint Declaration on Trade and Women's Empowerment,[158] some recent RTAs contain more tangible options in terms of gender-focused provisions and chapters.[159] Overall, the World Bank and WTO report that 80 RTAs (including 69 notified to the WTO) contain provisions on gender and women's issues.[160] To date, five RTAs incorporate a separate gender chapter, namely, the Chile-Uruguay, Canada-Chile, Argentina-Chile, Chile-Brazil, and Canada-Israel FTAs[161] Of these, only the Canada-Israel FTA subjects the gender provisions to dispute settlement mechanisms if amicable avenues for resolving disputes fail.[162] While RTAs often focus on softer requirements, such as establishment of committees and agreement to coordinate on gender issues, a combination of soft and hard commitments could be beneficial.[163] Gender chapters may also take a page from commitments in labor and environment and link to relevant international treaties,[164] or they could incorporate minimum legal standards on important legal issues.[165]

Although RTA provisions and chapters on gender are an important step towards building one aspect of equity into trade agreements, they are often not designed to address tangible challenges facing women or facilitate development in the sectors in which women work. This pervasive challenge can be seen in the African RECs as well, which do address gender to an extent but do not fully recognize the diverse roles that women occupy in an economy.[166] However, innovations such as the EAC's Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating

156 For a more extensive discussion of the intersections between indigenous rights and IEL, including international trade law, see Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. 1243 (2019); Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements (John Burrows & Risa Schwartz eds., 2020).

157 *See, e.g.,* Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

158 *See* José-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreements* (World Trade Org. Econ. Rsch. & Stat. Div., Staff Working Paper No. ERSD-2018-15, 2018), https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

159 *See, e.g.*, Sama Al Mutair et al., *Trade & Gender: Exploring International Practices That Promote Women's Economic Empowerment*, TradeLab (May 17, 2018), https://www.tradelab.org/single-post/2018/05/17/Trade-and-Gender-1.

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

161 *Id.*; Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

162 Kuhlmann et al., *supra* note 5.

163 *Id*.

164 *See* Mia Mikic & Vanika Sharma, *Feminising WTO 2.0*, *in* Revitalising Multilateralism: Pragmatic Ideas For The New WTO Director-General 250 (Simon J. Evenett & Richard Baldwin eds., 2020), https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general.

165 *Mainstreaming Gender in Free Trade Agreements*, Int'l Trade Ctr. (Jul. 2020), https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf.

Mechanism, which is incorporated into several RECs and now the AfCFTA as well, show some promise.[167]

These provisions have application for other vulnerable stakeholders, including small enterprises, and other dimensions of inclusive trade as well. Comprehensive gender strategies are needed, and, on the African continent, gender should also be mainstreamed into the operationalization of the AfCFTA through the national implementation strategies that are currently under development,[168] particularly if done in a way that integrates the needs of local stakeholders in the process.

Another example, among the many that need to be included within this dimension, is digital trade rules that building inclusion and address the digital divide. Although digital access to goods and services has been a lifeline to many during the pandemic, the digital divide has only deepened.[169] While innovations in national law will be particularly important in this regard, digital inclusion could be incorporated into RTAs as well, as the Digital Economy Partnership Agreement (DEPA) highlights.[170] The DEPA includes specific language that emphasizes digital inclusion for indigenous communities, women, rural populations, and low socio-economic groups.[171] The ECOWAS data protection rules, which include a specific reference to human rights and "fundamental liberties" of the data holder, are also a notable option.[172]

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166 These agreements fail to recognize "the diverse roles of women as traders, workers, and consumers in African economies [which] has sustained inequalities through the guise of the development discourse". Clair Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies,* 1 Af. J. Int'l. Econ. L. 1, 1 (2020).

167 *Id.* at 1, 3.

168 Nadira Bayat, *A 'Business Unusual' Approach for Gender Equality under the AfCFTA*, 9 ECDPM Great Insights Mag. (2020), available at https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/business-unusual-gender-afcfta/#:~:text=A%20'business%20unusual'%20approach%20for%20gender%20equality%20within%20the%20AfCFTA&text=In%20this%20way%2C%20AfCFTA%20implementation,a%20key%20role%20to%20play.

169 Franziska Sucker, *COVID-19 Pushes Digital Solutions and Deepens Digital Divide: What Role for African Digital Trade Law,* Afronomicslaw (May 9, 2020). *See also* World Econ. F., Accelerating Digital Inclusion in the New Normal 5 (2020), available at http://www3.weforum.org/docs/WEF_Accelerating_Digital_Inclusion_in_the_New_Normal_Report_2020.pdf.

170 Digital Economy Partnership Agreement, June 12, 2020, Sing. Min. Trade & Indus., https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Digital-Economy-Partnership-Agreement.pdf [hereinafter DEPA]. The draft negotiated agreement text for the Partnership Agreement between the EU and Members of the Organisation of African, Caribbean, and Pacific States also includes provisions on the digital divide. *See* Negotiated Agreement Text for the Partnership Agreement between the European Union/The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part, Apr. 15, 2021, Eur. Union, https://ec.europa.eu/international-,partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf.

171 DEPA art. 11.1.

172 Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS, Feb. 16, 2015, ECOWAS, available at http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf

(5) Legal and Regulatory Gateways

As the discussion above highlights, mapping and tracking legal and regulatory gateways provide a glimpse into how law actually affects different stakeholders in practice rather than assuming that all will be impacted equally and where inclusive legal and regulatory approaches could be integrated. In the trade context, while a number of gateways tend to track with common non-tariff regulatory measures (registration, licensing, and certification requirements, for example), this method for mapping rules and regulations has broader application and can be used for IEL provisions, regional rules, and national laws, including those on finance, digital trade, and land tenure. Gateways can also be very useful in assessing laws and regulations from the perspective of vulnerabilities, development priorities, and legitimate legal and policy goals. They highlight important intervention points for incorporating inclusive and equitable legal approaches, addressing common hurdles and reducing discretionary practices that compound vulnerability for many stakeholders, and improving compliance with legal requirements. Too many gateways may also reflect the adoption or importation of law not ideally suited to particular circumstances, and a more detailed examination could lead to better design and implementation, incorporating legal innovation from the Global South.[173]

Mapping legal and regulatory gateways can be very useful in several regards. It allows for comparisons across countries (for example, the regulatory process depicted in Figure 1 in Section III, for example, involves fewer steps in some countries that are part of the same RTAs). At an international level, mapping can also pinpoint areas in which mutual recognition of standards and procedures might be an option or could present challenges, due to differences in how rules are designed to function. Finally, maps are particular useful as an entry point for other dimensions in this methodology, since they highlight concrete intervention points for incorporating equity, sustainability, inclusiveness, and flexibility, in particular, into fit-for-purpose, inclusive legal and regulatory design.

(6) Inclusiveness, Engagement, and Transparency

Inclusiveness and engagement ultimately indicate the degree to which, and process through which, affected communities and individuals can participate in the rulemaking process. Its importance can be seen in the case study discussed in Section III, where SMEs, NGOs, and local organizations representing the interests of farmers and women were engaged in a process for legal and regulatory change in the agricultural sector that would not have occurred absent a more hands-on, inclusive approach. As the case studies illustrated, many stakeholders are not aware of the range of economic rules that affect them day-to-day or the international agreements that could change these realities.

173 *See* Okafor & Miyawa, *supra* note 7.

While many are not aware of all of the economic rules affecting them, even fewer have the opportunity to participate in the process of shaping economic and trade rules. Trade agreements, including the newer RTAs, are notoriously concluded "behind closed doors" with limited public participation,[174] which has implications for the degree to which the needs of developing economy parties and more vulnerable stakeholders are integrated.

Trade agreements and national law can only have an impact if they are implemented in an inclusive way, which necessarily hinges on knowledge of the rules and a process for engagement. However, it is important to note that, while improving inclusiveness and engagement can be done through capacity building efforts, these aspects also need to be integrated into the rules themselves and sustained through a comprehensive and locally-supported process – created in tandem with local initiatives and processes that are already in place – in order to be effective.

Engagement and inclusiveness do appear in global and national trade rules in different forms and relate to both States and stakeholders. The SDGs reflect a priority on engagement and inclusiveness, and Target 10.6 highlights the importance of "ensur[ing] enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions."[175] SDG Target 16.8 further notes the importance of "broaden[ing] and strengthen[ing] the participation of developing countries in the institutions of global governance.[176]
RTAs can also include provisions on engagement, including in areas like labor and environment,[177] which are linked with sustainable development more broadly as discussed above. Newer RTAs increasingly include provisions designed to increase participation of a broader range of stakeholders, which is particularly relevant in terms of addressing systemic and even individual vulnerabilities.[178] In addition to provisions that call for engagement and consultation, procedural rules allowing for amicus briefs are another example of an option to enhance engagement and inclusiveness.[179]

Transparency is another dimension of inclusive trade and development that has proven to be particularly important in times of crisis and vulnerability when rules tend to change quickly, and it is closely linked with inclusiveness and flexibility.[180] In terms of international trade rules, WTO members are bound by the requirements established under Article X of the WTO, as well as a range of other provisions, and

174 *See, e.g.,* Farhaan Uddin Ahmed, *Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguard?*, Afronomicslaw (Feb. 17, 2021), available at https://www.afronomicslaw.org/index.php/category/analysis/special-and-differential-treatment-ldc-parties-rceps-dispute-settlement-mechanism.

175 UN SDGs, *supra* note 19.

176 *Id.*

177 Free Trade Agreement art. 18.7, U.S.-Peru, Apr. 12, 2006, available from Off. U.S. Trade Representative at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

178 *See* Howse & Nicolaïdas, *supra* note 2, at 271 (emphasizing the importance of inclusiveness to antifactionalism).

179 *Id.*; *see also* Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

180 *See id.* at 277 (indicating that transparency can bridge inevitable conflicts between flexibility and inclusiveness).

transparency provisions appear throughout RTAs as well. Transparency tends to arise in RTAs in four common forms: (1) provisions designed to increase participation in the rulemaking process, (2) notification of new rules or changes to existing rules, (3) disciplines on accountability, and (4) mechanisms for cooperation and information pooling.[181] Notification requirements in RTAs usually complement the multilateral notification obligations contained in the WTO covered agreements, and in some cases deepen commitments. For instance, the 2020 Korea-New Zealand FTA imposes a general obligation on parties to notify one another of not only actual measures but also proposed measures deemed to be of material effect.[182] RTAs also include provisions that aim to ensure the general availability of information on trade measures. Notably, the RCEP (as do other RTAs) highlights certain categories of information as especially relevant, a practice that might be useful in addressing vulnerability.[183] It is important, however, that these provisions are not drafted too narrowly.[184]

Transparency is particularly important to all who are affected by economic rules, and, as the pandemic has highlighted, it is central to addressing vulnerability at the global, State, and individual levels. Transparency is also particularly important during a crisis, given the propensity of governments to change laws and regulations and the challenge many stakeholders have in accessing information on existing and new rules.

(7) Implementation, Impact, and Distributive Effects

The final dimension of inclusive trade relates to implementation of economic rules and their impact, including more equitable distribution, in practice. This dimension can help assess how well laws and regulations measure up to stated or shared goals (these could come from policies, customs, or other expressed values) or a causal relationship between the rules and their affect in practice. Assessing the impact, and in particular the distributive effects, of law is, however, a formidable task. As a starting point, implementation of RTAs could be better assessed, including through institutional reform and capacity building.[185] This should also be coupled with application of the lessons outlined in Section III, including the mapping described under Legal and Regulatory Gateways, to better understand how international agreements are being implemented through national law at a more granular level, tracking with other dimensions discussed in this section.

181 *See* Kuhlmann, *Handbook*, *supra* note 9.

182 Free Trade Agreement art. 17.5(l), N.Z.-S. Kor., Mar. 23, 2020, available from N.Z. Ministry Foreign Affs. & Trade at https://www.mfat.govt.nz/assets/Trade-agreements/Korea-NZ-FTA/NZ-Korea-FTA-consolidated-text.pdf.

183 RCEP, *supra* note 32, art. 4.5(l).

184 *See* Kuhlmann, *Handbook*, *supra* note 9, at 154.

185 For a discussion of implementation of preferential trade agreements, see Chauffour & Kleimann, *supra* note 14, at 4-5 (highlighting aspects of implementation drawn from World Bank case studies, namely translation of trade agreement commitments into national law, establishment or reform of relevant institutions, inter-agency coordination and management, institutional capacity building, creation of enforcement mechanisms (e.g., conformity assessment agencies), private sector capacity building to enhance compliance, and sustained budgetary resources).

Substantively, research on impact and distributive effects could begin with what Trubek, Santos, and Thomas refer to as the "background norms" of economic law, which include property and contracts; when combined with "foreground norms" like labor and possibly health rules and regulations (in addition to environmental laws), these could be assessed to more extensively address vulnerabilities.[186] Better understanding legal options across substantive areas, particularly in the context of the other dimensions noted above, would also related to impact and distributive elements and enhance economic dignity, and this dimension in particular will be expanded upon in future work.

Over time, this dimension could also include approaches to more fully evaluate the impact and equitable distribution of laws by employing some of the tools used in economic assessments, tailored, of course, to the realities of designing, enforcing, and living under, economic rules and regulations.

V. Conclusion and Way Forward

International law provides a solid foundation for inclusive trade and sustainable development, setting the stage for a new, more equitable era in international trade rules and IEL more generally. By combining the more traditional tools available to States (such as S&DT and policy space, particularly if applied strategically) with bottom-up approaches that can incorporate the needs of different stakeholders, both systemic and more specific vulnerabilities could be better addressed. As this paper illustrates, the experiences of those living within the law tend to be overlooked as rules are designed and agreements negotiated, with more well-resourced stakeholders and more advanced economies often setting the agenda and leaving important gaps in the options available to address the needs of more vulnerable stakeholders. In addition, legal innovations, while abundant in Africa and around the world, are often sidestepped for more narrow "best practices." Yet, it is precisely this innovation that can be best tailored to particular needs and circumstances. Achieving greater equity and inclusion in international and national economic law is a significant challenge, but a more focused assessment of economic law and its implementation could shift the balance towards broad-based, sustainable development.

The seven dimensions for inclusive law and regulation presented in this paper allow for a systemic evaluation of economic law in the context of development. Approaching trade law and regulation through these different dimensions will give rise to more diverse RTA options and fit-for-purpose regulatory approaches with the potential for deeper impact, while still maintaining a rules-based system for open trade. By cataloguing and comparing options, States and stakeholders could more fully consider ways to make the rules of trade more equitable, drawing upon innovative practices that arise in all corners of the world. Through this new approach to law and regulation, the next era of global trade law would be more inclusive and better able to meet the sustainable development challenges on our horizon.

186 Trubek et al., *supra* note 6, at 7.

Informality as a Sticky Sector in the Post-Pandemic Era of the Fourth Industrial Revolution

Christopher Changwe Nshimbi*

Abstract: World Development Report 2019 engaged with the disruptions caused by innovation, technological progress and the fourth industrial revolution (4IR). It also assuaged apprehensions that machines would take over jobs in developed and developing countries in the future. This paper is located in debates on post-Fordism, a form of economic governance which manifests and progresses neoliberal globalization, and argues that post-Fordism intensified the casualization of labor and thus contributed to informality in Africa, but 4IR (and the disruption caused by the Covid-19 pandemic) provide opportunities to catapult Africa's development. Past post-Fordist policies continue to generate major underlying conditions that impact the nature of work in Africa's foreseeable and digital future. Some of the consequences assume an evolutionary path where formal firms create conditions for informality to flourish, through continuous innovations to avoid responsibility for workers' welfare.

Keywords: informal economy, casualization of labor; post-Fordism; labor standards; future of work; fourth industrial revolution—4IR

Introduction

The World Bank published the World Development Report 2019 before the outbreak of the coronavirus disease (Covid-19) and the Covid-19 pandemic. The report was titled, *The Changing Nature of Work*.[1] It had a companion report that focused on Africa titled, *The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All*.[2] The two reports centered on the disruptions caused by innovation, technological progress and the fourth industrial revolution (4IR). The reports also discussed apprehensions that machines would take over jobs in developed and developing countries in the future.

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1 World Bank, *World Development Report 2019: The Changing Nature of Work* (2019).

2 The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All, (Jieun Choi, Mark A Dutz, & Zainab Usman eds., 2020).

Three of the reports' findings are noteworthy for the discussion in this paper. The first concerns the increasing demand for advanced, adaptable, cognitive and socio-behavioral skills. This demand arises because of technology and reshapes desirable skills for work. The finding implies that 'new' technology-based jobs replace 'old' ones and that, old jobs require workers to acquire new skills. The second finding is that almost two-thirds of workers in many developing countries continue to occupy low-productivity jobs. Most of those jobs are in the informal sector, where access to technology is poor. It is worth quickly pointing out that informality in such countries is stable. This is contrary to expectation. It is also despite the changing nature of work and economic growth, which are assumed to lead to reduction in informality and increased formalization of work.[3] Actually, informality in Africa is a permanent and increasing reality.[4] The *Future of Work in Africa* report asserts that addressing informality is a pressing concern for African countries.[5] A third finding in the reports concerns the apprehensions in developed countries about the prospective effects of technology on employment. The reports assuage these anxieties and the likelihood that rising inequality aggravated by the gig economy will worsen working conditions for workers. They assuage the anxieties by arguing that technology generates new tasks and new sectors through innovation.

On its part, the Covid-19 pandemic helped bring attention to the informal economy, a sector that constitutes a significant proportion of the economies of most African countries.[6] The pandemic also helped expose the precarious conditions in which informal economy workers operate. The precarious working conditions, in connection with the World Development Report (WDR) 2019 and its companion report, make it crucial that any discussion of the future of work in Africa should consider informal economy workers.

It is equally important to consider the economic reforms implemented in Africa in the late 1980s and early 1990s, when thinking about the future of work. There are several reasons for this. First, those reforms will have long-term impacts on the nature and organization of work in the 21st century. This necessitates examination of their ongoing impacts and is imperative, before discussing the tensions regarding the impact of 'old' manufacturing job losses caused by the automation associated with 4IR [7] and the disruption of Covid-19. Second, the impacts of those reforms need urgent assessment because they are concomitant with the disruption already here because of 4IR. Third, the impacts of those reforms are, moreover, more pronounced

3 Johannes Jütting & Juan Ramón de Laiglesia, Is informal normal?: Towards more and better jobs in developing countries (2009); Nguyen Vinh Khuong et al., *Does informal economy impede economic growth? Evidence from an emerging economy*, 11 J. Sustain. Financ. Invest. 103–122 (2021).

4 Christopher Changwe Nshimbi, *Issues in African Informality What is the Relevance for Regional or Continental Integration?*, 48 Afr. Insight 41–61 (2018).

5 The Future of Work in Africa: Harnessing the Potential of Digital Technologies for All, *supra* note 2.

6 L Sommer & C Nshimbi, *The African Continental Free Trade Area: An Opportunity for Informal Cross-Border Trade | International Centre for Trade and Sustainable Development*, 7 Bridg. Africa 7–10 (2018), https://www.ictsd.org/bridges-news/bridges-africa/news/the-african-continental-free-trade-area-an-opportunity-for-informal (last visited Jul 20, 2018).

on a generation of workers declared redundant then, who nonetheless bear the responsibility to support, uphold (in sociological and cultural terms) and lead Africa's next generation into the future. That cohort of parents/guardians suddenly assumed full responsibility of providing social services that had previously been under the care of government in countries that implemented those economic reforms. This is because the reforms, which included structural adjustment programs (SAPs), set parameters that restricted the provision of social services and had devastating socioeconomic consequences.[8] The #FeesMustFall protests started around 2015 in South Africa, for instance, partly arose from frustrations with this reality and the demand for access to free, decolonized education.[9] The parents/guardians of many students who demanded for free education included casualties of economic and corporate restructuring similar to the reforms implemented earlier in other African countries. Fourth, the impacts of the reforms implemented in Africa need urgent attention because issues with digital technology adoption rather concern harnessing it to leapfrog development[10] than pursuing the linear progression to industrialization that developed countries followed. This potentially makes Africa a unique lab in which to investigate and comprehend the outworking of various issues concerning 4IR. Investigation of the many possibilities and possible futures of 4IR in this regard is, however, beyond the scope of this paper and worthy of further research.

This paper is located in debates on post-Fordism, a form of economic governance which manifests and progresses neoliberal globalization. It argues that post-Fordism intensified the casualization of labor in Africa and, therefore, contributes to informality on the continent, but 4IR (and the disruption caused by the Covid-19 pandemic) provide opportunities to catapult Africa's development. Although an expansive literature exists on Fordism, post-Fordism, neoliberal restructuring, neoliberalism and globalization and their impacts on developing countries, no studies engage with these notions and their relationship with the informal economy in Africa. The paper picks post-Fordism or the transition from Fordism thereto, to emphasize that it constitutes a negated stage that bears consequences on Africa well into the future.

The problems that bedevil Africa cannot be explained merely by institutional and/or state failure, wrong economic theories or public maladministration and corruption.

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7 KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION (2016).

8 Joel B. Babalola, Geoffrey Lungwangwa & Augustus Adeyinka, *Education Under Structural Adjustment in Nigeria and Zambia*, 34 McGill J. Educ. 79–98 (1999); The Impact of Structural Adjustment on the Population of Africa: The Implications for Education, Health and Employment, (Aderanti Adepoju ed., 1993); Michael Thomson, Alexander Kentikelenis & Thomas Stubbs, *Structural Adjustment Programmes Adversely Affect Vulnerable Populations: A Systematic-Narrative Review of Their Effect on Child and Maternal Health*, 38:13 Pub. Heal. Rev. 1, (2017).

9 Francis B Nyamnjoh, *Decolonizing the University in Africa*, in Oxford Res. Encycl. Pol. (July 29, 2019).; Francis B. Nyamnjoh, #RhodesMustFall. Nibbling at Resilient Colonialism in South Africa (2016)."

10 Vera Songwe, *A Digital Africa Technology can be a Springboard for Faster, More Inclusive Growth*, 56 Fin. Dev. 27–29 (2019).

They must, instead, be examined against the backdrop of contradictions that exist within some of the prescriptive solutions handed down to those responsible for managing Africa's economies. Hence, the paper argues that the specifics of some of Africa's problems are inherently related to (the transition from Fordism and) the emergence in the 1970s of a post-Fordist and neoliberal profit-driven regime. In essence, the paper is located at the juncture in the shift from Fordism to post-Fordism wherein the world experienced changes in, among other things, dominant ideologies, politics and the economy.

The location helps to underscore the socioeconomic changes introduced by post-Fordism. Among the changes is the way that production is considered. The sociocultural changes due to the transition to post-Fordism including the ways that consumption is imagined and the supply of specialized goods to consumers on the basis of luxury or positional goods [11] are, however, beyond the scope of the paper.

But relevant to the paper is the production aspect, wherein the shift to post-Fordism saw the rise of multinational corporations (MNCs), global markets and internationalization of production, financial and trade markets.[12] The state's regulatory role of the national economy, economic activities as well as its involvement in production declined simultaneously. This introduced changes in the workforce. Of particular relevance here is the notable increase within this transition in sub-contracting of workers; in the numbers of temporary workers, part-time workers and of workers who opted to be self-employed and/or to work from home. In other words, the transition from Fordism to post-Fordism introduced conditions that reduced job security for workers and made them more vulnerable to unemployment. The individualized labor force and flexible labor in this juncture made workers lose the protection and care of labor movements or trade unions that they had previously enjoyed.[13] The expansion of globalization is in this regard a defining feature of post-Fordism and particularly the growth and interconnection of MNCs or, more aptly, the transnational corporations (TNCs) that penetrate nation-states in interconnections that spread across the world. This global expansion and internationalization of TNCs defines the transition from Fordism to post-Fordism. The nation-state in the Fordist mode of governance was the central organizing feature of society. However, the expansion of TNCs diminished the significance of nation-states and ushered in post-Fordism, wherein labor movements and trade unions were weakened or abolished[14] With this, the laying off of workers so that the corporation could achieve jobless growth became easier.

Further, MNCs in this (transition to) post-Fordist era mix the laying off of workers with outsourcing of most of their activities and effectively end up with fewer

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11 Krishan Kumar, From Post-Industrial to Post-Modern Society: New Theories of the Contemporary World (2d ed. 2005); Manuel Castells, The Rise of the Network Society, The Information Age: Economy, Society and Culture Vol. I. (1996).

12 Alex Demirovic, *Postneoliberalism and Post-Fordism – Is There a New Period in the Capitalist Mode of Production?*, 51 Dev. Dialogue 45–50 (2009).

13 David Harvey, *Is This Really the End of Neoliberalism?*, Counterpunch (March 13, 2009), https://www.counterpunch.org/2009/03/13/is-this-really-the-end-of-neoliberalism/.; David Harvey, *Anti-Capitalist Politics in the Time of COVID-19*, Jacobine (March 20, 2020), https://jacobinmag.com/2020/03/david-harvey-coronavirus-political-economy-disruptions.

full-time workers for whom they are financially responsible to cover social security and other needs. The engagement of a flexible workforce works well for MNCs because they can retain a minimal core of an 'essential' work force while effectively increasing the number of workers they place on part-time, contract or sub-contractual bases. In essence, MNCs expediently get to use workers when it is cost effective and let the workers go when they no longer need their services. The point to make here is that while MNCs optimize production in the post-Fordist era, the situation is different for workers. Production for profit indeed remains the organization principle for MNCs,[15] and they seem to achieve the motif very well. But their employees are less secure in their jobs. They are less stable and are vulnerable to unemployment or joblessness. In short, the employees work in the precarious conditions that are characteristic of the informal economy.

History Does Matter: (Transition to) Post-Fordism, Casualization of Labor and Informality in Africa

The future of work in Africa cannot be dissociated from the post-Fordist mode of production and accompanying internationalization of production, financial markets, trade, globalization and generally, the progression of capitalism. The profit motif in capitalism drives innovation[16] and the continuous push to lower the cost of production and increase profits. This motivated the economic reforms, restructuring and accompanying downsizing, retrenchment and laying off of workers from private companies and the public sector in most African countries in the late 20th century. It came as a given, with progression of and the process of neoliberal globalization.[17]

The process does not end there (to give way to the automation of work) as the world is immersed further into 4IR. Some firms outsource services that even constitute the core of their businesses in the continuous push to lower production costs. This too works to the advantage of the firms because they can increase profit margins by cutting down payments associated with the socioeconomic needs of employees. In essence, the firms shirk, among other things, social security and welfare payments such as health care, pension and contributions towards retirement for employees.

But this casualization of labor entails insecurity on the part of workers. It expels them into the informal economy where they add to the downsized, retrenched, those declared redundant as well as those who had always worked in that sector. These

18 International Labour Organization, The Informal Economy and Decent Work: A Policy Resource Guide, Supporting Transitions to Formality 4 (2013).

14 David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change (1991); Harvey, *supra* note 13; Robert Cox & Michael G. Schechter, The Political Economy of a Plural World (1 ed. 2003).

15 *Id*.

16 Sarwat Jahan & Ahmed Saber Mahmud, *What Is Capitalism? - Back to Basics*, 52 Fin. Dev. 44–45 (2015).

17 Samuel O. Oloruntoba, *Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations*, *in* Regionalism and Integration in Africa (1 ed. 2016).

processes constitute a recurring reality of the post-Fordist era. They occur outside of and even without bringing 4IR into consideration and make the point concerning the suggestion in this paper that the informal economy in Africa is both permanent and increasing. Thus, Africa faces the double challenge of increasing informality in labor markets due to retrenchments and ongoing casualization of labor as it progresses further into the 21st century.

A clear definition of the informal economy and informal labor helps establish why this paper argues that the casualization of labor by private companies and the public sector in African countries contribute to the permanence and the increase in the numbers and category of labor in this precarious sector. The International Labour Conference (ILC) points out that the informal economy is broad in terms of scope and diversity. It thus broadly defines it as "all activities that are, in law or practice, not covered or insufficiently covered by formal arrangements."[18] Within this broad definition, informal labor consists of *any* work where an employee does not receive any (form of) legal and social protection from their employer. This means that a worker could even be employed or engaged by formal organizations but still be an informally employed.[19] They are considered informally employed because they are not provided with any legal and social protection by their employer. This is what the casualization of labor in the post-Fordist era essentially does. There are various reasons why this happens. But Chen[20] interestingly indicates that workers should not be blamed. This is because the workers might work in the informal sector on account of employment relationships that were previously formal but are informalized as employers, *not employees*, attempt to avoid state regulation and taxation. Retaining a sizable core workforce of regular employees, such employers choose to hire the rest on an informal basis to avoid taxes on payrolls and contributions to pensions and social security. Informal labor thus includes both self-employment in the informal economy and waged employment in the informal as well as in the formal sector where labor is engaged without the employer making any contributions for social protection.

Thus, past post-Fordist policies continue to generate major underlying conditions that will impact the nature of work in Africa's foreseeable and digital future. Some of the consequences assume an evolutionary path where formal firms create conditions for informality to flourish, through continuous innovations to avoid responsibility for workers' welfare. The firms work out flexible relationships with labor and sub-contract production to unprotected workers.[21] This contributes to the persistence of the informal economy and makes it a sticky sector.

19 Nshimbi, *supra* note 4.
20 Martha Alter Chen, *The Informal Economy: Recent Trends, Future Directions*, 26 New Solut. A J. Env't Occup. Heal. Pol'y 155–72, 157 (2016).
21 *Id*.

Informality, a Sticky Sector

While the WDR 2019 suggests that informality in developing countries has remained stable in spite of economic growth, it fails to account for the causes of informality and to recognize that the drivers of informality continuously evolve. In the process, workers continuously get expelled from formal work into the informal economy. Apart from its permanence, the informal economy *is* thus growing in Africa. A major contributor, post the reforms of the late 20th century, is the increase in the casualization of labor. While many studies and policy makers are quick to assert that informality is illegal, criminal and disruptive [22], they fail to call out public organizations and corporate firms for creating conditions that give rise to informality. This could be stretched further from the discussion on casualization and informality in the 'History does matter' section of this paper to two of multiple challenges that most developing countries face vis-à-vis investments by MNCs and the contribution they make to informality—weak laws and corruption in developing countries.

Weak Laws and Regulations in Developing Countries

One of two views can be highlighted concerning the weakness of the laws and regulatory environment that governs the operation of firms in the developing countries of Africa. In either case, I argue that the outcome contributes to the increase and permanence of informality in Africa. The view holds on one hand that laws are absent and/or the legal-regulatory environment for firms in most African countries is weak. Because of this, foreign businesses are reluctant to invest on the continent. To the poor legal and regulatory conditions are added factors such as macroeconomic and political instability, poor infrastructure, inefficient institutions, poor governance, lack of information and poor investment promotion strategies that are ill-conceived, all leading to poor foreign direct investment (FDI) in Africa.[23] The shunning of African countries because of poor legal and/or regulatory environment translates into foregone investment. It impacts on prospects for creating jobs and formal employment opportunities. Foregone jobs increase the chances for employable human resources to venture into informal economic activities because formal alternatives do not exist. This reality is especially pronounced on a continent that not only hosts a large and growing

22 C. Lesser & E. Moisé-Leeman, *Informal Cross-Border Trade and Trade Facilitation Reform in Sub-Saharan Africa* (OECD, Working Paper No. 86, 2009); Friedrich Schneider & Dominik Enste, *Hiding in the Shadows : The Growth of the Underground Economy*, 30 Econ. Issues (2002).; *Trade Facilitation and the Global Economy*, OECD (May 31, 2018), https://www.oecd-ilibrary.org/trade/trade-facilitation-and-the-global-economy_9789264277571-en.

23 Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities*, 17 J. Asian Econ. 241–260 (2006); John C Anyanwu, *Why Does Foreign Direct Investment Go Where It Goes?: New Evidence From African Countries*, 13 Ann. Econ. Fin. 425–62 (2012); Elizabeth Asiedu, *Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability*, 29 World Econ. 63–77 (2006); Sandra F. Joireman, Where There is No Government: Enforcing Property Rights in Common Law Africa (2011).

youthful population, but also has the highest levels of unemployment in the world.[24] Where standards for governing labor exist on the other hand, the weak laws and poor regulatory environment disadvantage workers. The disadvantages are, of course, very obvious where laws and regulations to protect labor are non-existent. But even where labor standards exist, research shows that most African countries are faced with either weak or none enforcement of the standards.[25] Further, many categories of workers in these countries tend to be left outside of the scope of labor laws.[26] Labor thus finds itself in situations where either legislation that protects workers' rights in the formal environment and in firms does not effectively protect them or labor is excluded from legislation altogether. This adds to factors that make working conditions precarious for most workers in Africa and strongly correlates with their casualization. It more so explains why some MNCs consider developing countries favorable destinations for locating production in the first place; because they provide environments where production costs associated with requirements to comply with labor standards can be lowered.[27] Employers in such firms may also deliberately ignore labor standards that promote workers' rights or seek out ways to limit their legal liability for compliance.[28] The aim here too is to cut costs and ultimately increase profits.

Weak legal and labor regulatory environments that characterize most African countries thus attract businesses that seek to cut costs by minimizing costs associated with labor. They provide a convenient location for the operation of such entities. Further, the motivations and actions of the employers in such firms also seem to be facilitated by weaknesses or unwillingness on the part of host governments to enforce labor standard.[29] Some countries may genuinely desire to apply labor standards but have deficient and/or limited enforcement capabilities.[30] These conditions, again, add

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24 John C. Anyanwu, *Does Intra-African Trade Reduce Youth Unemployment in Africa?*, 26 Afr. Dev. Rev. 286–309 (2014); Atif Awad, *Economic Globalisation and Youth Unemployment–Evidence from African Countries*, 33 Int'l Econ. J. 252–69 (2019); Dadirai Mkombe et al., *The Effects of Foreign Direct Investment on Youth Unemployment in the Southern African Development Community*, 38 Dev. South. Afr. 1–16, (2020).

25 Haroon Bhorat, Ravi Kanbur & Benjamin Stanwix, *Compliance with Labor Laws in Developing Countries*, 80 World Labor 1–11 (2019); Matthew Alford, *Trans-scalar Embeddedness and Governance Deficits in Global Production Networks: Crisis in South African Fruit*, 75 Geoforum 52–63 (2016); Angela Dziedzom Akorsu & Fang Lee Cooke, *Labour Standards Application Among Chinese and Indian Firms in Ghana: Typical or Atypical?*, 22 Int. J. Hum. Resour. Manag. 2730–48 (2011).; E. S. Fourie, *Non-standard Workers: The South African Context, International Law and Regulation by the European Union*, 110 Potchefstroom Electron. Law J. 110–11 (2008).; R. Loewenson, *Globalization and Occupational Health: A Perspective from Southern Africa*, 79 Bull. World Health Organ. 863–68 (2001).

26 Tzehainesh Teklè, Labour Law and Worker Protection in Developing Countries, (Bloomburg Academic ed., Feb. 11, 2010).

27 Mahmood Monshipouri, Claude E. Welch Jr. & Evan T. Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, *in* Human Rights and Corporations 123–47 (David Kinley ed., 2017); Bhorat, Kanbur & Stanwix, *supra* note 25.

28 James Heintz, *Global Labor Standards: Their Impact and Implementation*, *in* The Handbook of Globalisation, 225–39 (Jonathan Michie eds., 3d ed. 2019); Layna Mosley, Labor Rights and Multinational Production (2011); Richard M. Locke, The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy (2013).

29 Locke, *supra* note 28.

30 Bhorat, Kanbur & Stanwix, *supra* note 25; Akorsu & Cooke, *supra* note 25.

to the precarity of work and contribute to casualization that increases informality in Africa.

Corruption in developing countries

Research and media reports make a clear link, regarding corruption, between foreign investment as well as the operation of MNCs and public officials in developing countries.[31] Such corruption is usually a consequence of collusion between political and economic interests. Hence, public officials in many developing countries may take bribes from MNCs to, among other things, push business deals, facilitate the awarding of contracts, avoid or overcome bureaucratic delays and overlook labor rights violations.[32] Such corruption in a host country influences the volume of foreign direct investment (FDI) inflows by creating conditions that are unfavorable to rational economic activity concerning investment. Some literature on corruption and foreign investment goes on to specifically suggest that high levels of corruption in a host country reduce the inflows of FDI because they make the country less attractive to foreign investors.[33] High levels of corruption also deter other economic actors from entering and investing in the host country, because the prospective entrants could be faced with obstacles such as overpricing and barriers to entry.

But even for firms that get to enter and invest in such environments, government officials as well as private agents of the host country might prey on them, which consequently introduces inefficiencies and imposes transaction costs that have a bearing on productivity.[34] This has severe welfare impacts too, with huge sums of

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31 Planning and Economic Development, AU/ECA Conference of Ministers of Finance, *Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa* (2015); James Kleinfeld, *Anatomy of a Bribe: A Deep Dive into an Underworld of Corruption*, Al Jazeera (Dec. 1, 2019), https://www.aljazeera.com/features/2019/12/1/anatomy-of-a-bribe-a-deep-dive-into-an-underworld-of-corruption.; *Al Jazeera English investigates the role of multinational companies in South Africa's corruption saga*, Al Jazeera, (March 29, 2018), https://network.aljazeera.net/pressroom/al-jazeera-english-investigates-role-multinational-companies-south-africa's-corruption.; Josef C. Brada, Zdenek Drabek & M. Fabricio Perez, *The Effect of Home-country and Host-country Corruption on Foreign Direct Investment*, 16 Rev. Dev. Econ. 640–63 (2012).; M. Umur Tosun, M. Onur Yurdakul & Pelin Varol İyidogan, *The Relationship Between Corruption and Foreign Direct Investment Inflows in Turkey: An Empirical Examination*, 42 Transylvanian Rev. Adm. Sci. 247–5 (2014).

32 Roberto A. Ferdman, *How the World's Biggest Companies Bribe Foreign Governments—in 11 Charts* , The Wash. Post, (Dec. 3, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/03/how-the-worlds-biggest-companies-bribe-foreign-governments-in-11-charts/.; Anne Peters, *Corruption as a Violation of International Human Rights*, 29 Eur. J. Int. Law 1251–87, (2018); Jonathan P. Doh et al., *Coping with Corruption in Foreign Markets*, 17 Acad. Mgmt. Persp. 114–27, (2003); Susan Rose-Ackerman, *When is Corruption Harmful?*, *in* Political Corruption: Concepts and Contexts 353–72 (Arnold I. Heidenheimer & Michael Lohnston eds., 3d ed. 2002).

33 Brada, Drabek & Perez, *supra* note 31.

33 Brada, Drabek & Perez, *supra* note 31.

34 *Id.*; Rose-Ackerman, *supra* note 32.

35 Aksel Sundström, *Corruption and Regulatory Compliance: Experimental Findings from South African Small-Scale Fisheries*, 36 Mar. Pol'y 1255–64, pincite? (2012).

36 Shaomin Li & Jun Wu, *Why Some Countries Thrive Despite Corruption: The Role of Trust in the Corruption-Efficiency Relationship*, 17 Rev. Int'l Pol'y Econ. 129–54 (2010).

37 Sundström, *supra* note 35.

money getting lost in distorted trade.[35] Predatory corruption has, indeed, been shown to cause harm to a country's economic growth.[36]

But firms also pay bribes to reduce regulatory burdens, and this directly impacts workers vis-à-vis their rights in the workplace. This is because corruption tends to weaken enforcement measures in the sense that it impacts the risk assessment of being caught and reduces possibilities of deterring would-be offenders, as they pay lower than what they would for the actual sanction of their offence.[37] Public organizations that ought to enforce labor standards and protect workers' rights are thus undermined. Corruption by firms has, in this sense, been shown to have vast societal consequences.[38] Specifically, MNCs seem to use their power in congress with poor governance in developing countries to create a combination of influential factors that lead to the abuse of labor ethics.

Contrary to expectation, the power of public organizations in developing countries may thus be deployed to suppress rather than enact labor codes on behalf of marginalized labor. Uddin et al.,[39] for example, have particularly established that labor practices in Bangladesh did not reflect any of the spiritual and ethical values enshrined in labor codes and as expected of public organizations. They show that despite the significance of the garment sector to Bangladesh's national economy and the global fashion retail markets in Europe and North America, labor exploitation in the sector is rife and has severe consequences. Thousands of employees are subjected to occupational hazards, injuries and deaths. Despite this, exploitation persists and workers' freedom of association is suppressed.

The public sector is not only complicit in fairly enacting labor codes and ensuring that strict compliance with labor codes on workers' behalf exists, but political influence, poor governance and institutional corruption collude as factors that drive labor exploitation. Uddin et al. argue that public inspectors entered into unfair relationships with owners of businesses in Bangladesh and took bribes from them to inspect their enterprises and not effect regulatory action against them for non-compliance with labor codes.[40] This exemplifies the ways in which MNCs collude with public officials and exploit labor in developing countries, despite the existence of labor codes and public agencies that are established to protect workers' rights. It, in turn, translates into the persistence of precarity of work and informality.

In summary, corruption too deters potential investors from investing in countries wherein, as in the case of weak laws and regulatory environments, this amounts to foregone investment that translates into lost opportunities for the creation of formal jobs. It also has implications for the worker in that it contributes to precarious working

38 Susan Rose-Ackerman, International Handbook on the Economics of Corruption, (Jan. 1, 2007); Susan Rose-Ackerman & Bonnie J. Palifka, Corruption and Government: Causes, Consequences, and Reform, (2d ed. March 7, 2016).

39 Jassim Udin et. Al., *Do Public Sector Organizations Ensure Labor Ethics? Perspectives from Ethics and Workplace Spirituality in Bangladesh's Garment Sector*, 40 Pub. Adm. Dev. 168–78 (Dec. 2020).

40 *Id.*

conditions and relates to casualization that adds to the increase in and the perpetuation of informalization.

Space for Informality in 4IR Africa

Since states and governments are responsible for the legal environment in which all economic workers operate, in what ways can those in Africa start to enhance the informal economy's productivity when they, in the first place, criminalize and are hostile towards that sector and actors? Where they seem 'sympathetic', they aggressively seek to draw tax rather than establish conditions that are conducive to the operations of informal workers and businesses.[41] Much as informal economy workers should pay tax, the authorities are better off, first, improving business and conditions/environments in which informal workers operate. This should go along with the authorities acknowledging that the informal economy is real, and that it contributes to development. In this way, the authorities will pave the way for meaningful participation of informal workers in development. It will also facilitate the enhancement of the productivity of the informal economy through the exploitation of new technologies that define 4IR.

This would also help cushion the reported possible negative impacts of 4IR. It is argued that automation, and now, the adoption of new technologies such as mobile payment systems may lead to job losses.[42] Technology-based work of the future threatens to exclude people with less advanced skills as well as those who may be wrongly skilled. The latter might be skilled and qualified for 'old' jobs, but not those in new platform-based sectors and driven by or based on digital technologies. In other words, they are threatened with exclusion because they lack the skill set required for the new jobs. Reports also exist, however, that allay fears of job losses because more people will be recruited in new technology jobs.[43] The question to the latter, however, is whether the new jobs are qualitatively comparative to older jobs. That is, do workers that end up in the informal economy due to 4IR find themselves in precarious conditions? Or, are those who hold formal jobs better off?

The Future of Informal Labor in 4IR Africa: Some Concluding Remarks

The recommendation in WDR 2019 for society to, among other things, invest in early childhood education as a way of ensuring benefits from the opportunities that new technologies offer is welcome. But it is also long term. In the meantime, what

41 James Thuo Gathii et al., *Report: The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective* (2017), http://www.fes-globalization.org/geneva/documents/2017/2017_07_CFTA_HRIA_Publication.pdf.

42 *Jobs and the Fourth Industrial Revolution*, World Economic Forum (2021), https://www.weforum.org/about/jobs-and-the-fourth-industrial-revolution (last visited May 24, 2021).

43 Jayant Menon, *The Fourth Industrial Revolution Could Spell More Jobs – Not Fewer*, World Economic Forum (Sept. 17, 2019), https://www.weforum.org/agenda/2019/09/fourth-industrial-revolution-jobs/.

happens to the cohort of workers thrown out of the formal workforce in the late 1980s and early 1990s due to globalization and related structuring and restructuring? And the casualties of digitalization too? A quick and concise suggestion is, reskilling and retooling.

Another recommendation in WDR 2019, which seems meant to address the segment of the workforce discussed in this paper, is to create stable, formal sector jobs (or the formalization of informal jobs). This proposed solution to informality is, however, not novel.[44] It is a rehash of an old argument based on the assumption of a dual, i.e., traditional—modern, economy.[45] That argument posits that the informal economy is backward and unable to transform an economy into modernity.[46] To this is added the assertion of criminality and law breaking because it is argued that informal workers avoid paying tax, operate in the shadow economy and engage in clandestine activities. Formalization is thus proposed as a catch all solution that should meet the needs of both the informal workers and the state, which seeks to raise revenue from the workers. The argument is pushed without making working conditions better for them or their operating environment any better.[47]

The suggestion has not been successful in reducing informality either. It is further unlikely to lead to any meaningful change or provide real solutions to the purported problem of informality in Africa. It is, however, noteworthy that even with the double challenge of increasing informality in African labor markets, informal economy workers will find ways to leverage and exploit the power and potential of digital technologies to their advantage. In fact, these actors and the informal economy, even without formalization, are already leveraging digital technologies to their advantage.[48] Finally, the new industrial organization represented in 41R raises policy questions regarding competition, taxation and privacy. However, it does not adequately address the age-old question of labor and job creation and optimal levels of employment in an economy, which in the case of Africa and its bulging youth sector portends major challenges into the future.

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44 *See, e.g.*, Ragui Assaad, *Formalizing the Informal? The Transformation of Cairo's Refuse Collection System*, 16 J. Plan. Educ. Res. 115–26, (1996).; Caroline O. N. Moser, *Informal Sector or Petty Commodity Production: Dualism or Dependence in Urban Development ?*, 6 World Dev. 1041–64 (1978) who address this issue; Kevin F. McCrohan, *Barriers to the Formalization of Economic Activity and Marketing Aolutions for Developing Economies*, 7 J. Nonprofit Pub. Sect. Mark. 45–61 (2000); John McLaughlin & Hernando de Soto, *Property Formalization: The Proform Solution*, 48 Gomatica 307–14 (1994).

45 P. N. Rosenstein-Rodan, *Problems of Industrialisation of Eastern and South-Eastern Europe*, 53 Econ. J. 211, pincite? (1943); John R. Harris & Michael P. Todaro, *Migration, Unemployment and Development: A Two-Sector Analysis*, 60 Am. Econ. Rev. 126–142 (1970).

46 C. Geertz, Peddlers and Princes: Social Change and Economic Modernization in Two Indonesian Towns (1963); J. S. Furnivall, Netherlands India: A Study of Plural Economies (1939).

47 GATHII ET AL., *supra* note 41.

48 Digital Trade in Africa: Implications for Inclusion and Human Rights, (David Luke, Hubert René Schillinger, & Nwanneakolam Vwede-Obahor eds., 2019).

Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance

Okanga Okanga and Lyla Latif

Abstract

Implicit within the African fiscal architecture are embedded vulnerabilities to exogenous factors which challenge their domestic revenue mobilization (DRM) strategies. These DRM challenges are attributable to asymmetrical power relationships that exist within the international tax regime (ITR). The rules governing international taxation have largely been devised by developed countries resonating their own economic purposes, resulting in a regressive relationship that overlooks African perspectives in the creation of tax norms. Consequently, policymaking, and scholarship have focused extensively on curbing these power asymmetries that have resulted in vulnerable African tax systems. Continental and domestic approaches are now aligned towards fostering reform of the international tax regime to be more inclusive and participatory. This chapter adds voice to advocacy for the development of the ITR based on a triangular foundation of true inclusivity and interactionalism. The paper advocates for effective participation in the tax rules making process; reform-oriented agenda setting; and a deliberate materialization of outcomes that aim to strengthen tax revenue mobilization in developing countries (participation–agenda–outcomes). As a continent that consistently derives the negative revenue-to-GDP ratios, countries on the continent would, no doubt, derive more from a global tax system that pivots towards inclusivity and development.

1. Introduction

Africa is the least developed continent in the world. Of the 47 countries classified by the United Nations (UN) as least developed countries (LDCs), 33 are African.[1] That is not to say that Africa is not rich. The continent boasts a young and vibrant population,[2] an abundance of natural resources, and various industries that are boosting economic growth and investment opportunities.[3] Regrettably, large portions of Africa's tax-based revenue are eroded because of both legal and illegal structures through which capital and untaxed profits flow.[4] Statistics published by Cobham and Jansky show that the distribution of global tax base erosion is disproportionately concentrated in Africa.[5] Recent statistics show that African countries derive an average of 16.5% taxes from gross domestic product (GDP).[6] This is markedly below the OECD average of 34.3%

and the Latin American and Caribbean average of 23.1%.[7] The most effective taxer on the continent in 2018 – the Seychelles (32.4 percent) – had a lower tax-to-GDP ratio than the OECD average.[8]

Such evident shortfall in tax revenue capturing in Africa shows tax as a remission that has no commensurate benefits or guarantees for African citizens. Shortfalls in domestic revenue mobilization undermine a country's ability to invest in the needs of its people and can increase overreliance on debt and foreign aid, with their attached conditions. Increased DRM is central to achieving structural transformation in Africa which is in turn essential to addressing social and economic challenges on the continent, such as poverty, inequality and unemployment.[9] The emergence of the COVID-19 pandemic is particularly troubling for African countries as it threatens to aggravate their revenue constraints and to widen the chasm of inequality that already exists between African countries and their developed counterparts[10] as well as cause a dramatic fall in foreign direct investment.[11] The pandemic is not only aggravating the financial challenges facing many African countries – revenue contraction, mounting debt obligations and skyrocketing reliance on government welfare packages[12] – it is also forcing countries to reevaluate their international tax commitments. An example is Zambia that canceled its (exploitative) tax treaty with Mauritius. Zambia's official statement records that: "the engagement of creditors that are owed money by Government is an essential strategy to address the country's prevailing debt sustainability and fiscal challenges, especially in view of the negative impacts of the COVID-19 pandemic which has further constrained the Treasury's resources envelope."[13]

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1 *Map of the Least Developed Countries*, United Nations Conference on Trade and Dev., https://unctad.org/topic/vulnerable-economies/least-developed-countries/map (last visited Nov. 19, 2021).

2 Joe Myers, *19 of the World's 20 Youngest Countries are in Africa*, World Economic Forum (Aug. 30, 2019), https://www.weforum.org/agenda/2019/08/youngest-populations-africa/.

3 Acha Leke & Landry Signé, "Spotlighting opportunities for business in Africa and strategies to succeed in the world's next big growth market", Brookings, (Jan. 11, 2019), https://www.brookings.edu/research/spotlighting-opportunities-for-business-in-africa-and-strategies-to-succeed-in-the-worlds-next-big-growth-market/.

4 Alex Cobham & Petr Jansky, *Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies and Findings* (2020); Alex Cobham & Petr Janský, *Global Distribution of Revenue loss From Corporate Tax Avoidance: Re-Estimation and Country Results,* 30 J Intl. Dev. 206 (2018) ["our findings support a somewhat lower estimate of global revenue losses of around US$500 billion annually and indicate that the greatest intensity of losses occurs in low-income and lower middle-income countries and across sub-Saharan Africa, Latin America and the Caribbean and South Asia"].

5 *Id.*

6 Org. for Economic Co-operation and Dev.("OECD")/African Tax Admin. Forum ("ATAF")/African Union Commission ("AUD"), *Revenue Statistics in Africa: 1990-2018* (2020), https://doi.org/10.1787/14e1edb1-en-fr.

7 *Id.*

8 *Id.*

9 United Nations Economic Comm'n for Africa, *Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises* (2018).

10 *See* Woodrajh Aroun, *Coronavirus Shows the Inequality Among Nations*, New Frame (Sept. 14, 2020), https://www.newframe.com/coronavirus-shows-the-inequality-among-nations/; Kunal Sen, *Five Ways Coronavirus is Deepening Global Inequality*, The Conversation (Aug. 18, 2020), https://theconversation.com/five-ways-coronavirus-is-deepening-global-inequality-144621.

Africa's tax revenue mobilization challenges have been attributed to factors that include inadequate rules, poor institutional coordination, capacity gaps, difficulties accessing taxpayer information, and political interference.[14] Some of these challenges can be viewed in the broader context of flaws in the international tax regime (ITR) that disproportionately undermine developing countries.[15] The structural design of the ITR itself undermines the capacity of developing countries to fulfill their tax revenue potentials.[16] Thus, an important way to ensure effective taxation in the developing world is to decolonize and reform the ITR itself. So, while there are significant avenues for domestic improvement in taxing capacity, it seems that African countries cannot on their own overcome the endemic tax loopholes that bedevil them. Systematic changes must be made to the ITR to unshackle the tax mobilization potential of African countries. African countries would benefit from an ITR that is retooled for inclusivity and/or development.

African countries inherited a tax design system already put in place by the old powers today assembled as the OECD. This old system, effectively at play today, based its entire tax philosophy around the mobilization of taxable income, regardless of where it was sourced, to the resident country.[17] This effectively embedded inequality within the international tax regime in which Africa states appeared as vulnerable entities open to the *'scramble for tax'*.[18] The vulnerability in the form of tax base erosion subsequently resulted in the removal of the provision of social services from the center of government's fiscal obligation to its taxpayers.[19] This implied social engineering of the development of the African states is the direct contribution of the ITR. Hence, a move towards making the regime more inclusive is of paramount importance not only toward the financing of SDGs but also controlling fiscal shocks emanating from stressors like the Covid-19 pandemic.

11 United Nations Conference on Trade and Dev., *Word Investment Report 2020: International Production beyond the Pandemic* (2020).

12 Mickaël Sallent, *External Debt Complicates Africa's COVID-19 Recovery, Debt Relief Needed Calls made for Temporary Debt Standstill for all African Countries*, UN Africa Renewal (July 30, 2020), https://www.un.org/africarenewal/magazine/july-2020/external-debt-complicates-africas-post-covid-19-recovery-mitigating-efforts; OECD, *A "Debt Standstill" for the Poorest Countries: How much is at Stake?* (May 27, 2020), https://www.oecd.org/coronavirus/policy-responses/a-debt-standstill-for-the-poorest-countries-how-much-is-at-stake-462eabd8/.

13 Zambia, Office of the President, *Press Statement By Chief Government Spokesperson And Minister Of Information And Broadcasting Services Ms Dora Siliya On The Decisions Made By Cabinet At The 16th Cabinet Meeting Held At Mulungushi International Conference Centre On Monday, 22nd June, 2020,* https://www.sh.gov.zm/?wpfb_dl=250.

14 *See*, *e.g.*, Alexandra Readhead, *Preventing Tax Base Erosion in Africa: A Regional Study of Transfer Pricing Challenges in the Mining Sector,* Nat. Resource Governance Inst. (2016), https://resourcegovernance.org/sites/default/files/documents/nrgi_transfer-pricing-study.pdf.

15 *See*, *e.g.*, Tarcisio Diniz Magalhães, *What Is Really Wrong with Global Tax Governance and How to Properly Fix It,* 10 World Tax J. 499 (2018).

16 See Allison Christians & Tarcisio Diniz Magalhães, *A New Global Tax Deal for the Digital Age* 67 Canadian Tax J. 1153 (2019).

17 Lyla Latif, *The Lure of the Welfare State Following Decolonisation in Kenya*, Imperial Inequalities: States, Empires, Taxation (Gurminder K Bhambra & Julia McClure eds, forthcoming 2021).

18 *Id*.

19 *Id*.

20 *Id*.

The three pillars of inclusivity discussed in this paper – process, agenda, and outcomes – are earmarked to reflect the international tax governance dimensions of Africa's tax vulnerabilities. As such inclusivity is to be seen as a process that enables African countries to effectively participate in determining the rules of international taxation that apply to them. Inclusivity as to agenda entails that the global tax governance structure must consciously attend to issues that are of specific, if not peculiar, importance to African countries. Inclusivity will catapult African countries into 'negotiating a global fiscal relationship that treats the continent at par with the developed countries, thereby curbing the power asymmetries and inequalities'[20] that have exposed the continent to base erosion. However, beyond giving attention, international tax reform should aim to materialize important, sometimes predetermined, outcomes that would strengthen the revenue mobilization profile of African countries. If these vulnerabilities are effectively addressed, African countries stand a better chance to combat their tax challenges and assert greater control over their socioeconomic trajectories. The ensuing segments of this chapter discuss the three identified perspectives of inclusivity, drawing illustrations from OECD domination of global tax governance, international taxing rights distribution, tax base erosion, and global digital tax reform.

2. Inclusive Process

"Representation matters" is the modus operandi guiding discussions around diversity and inclusion. Their postmodern inclusion within the international tax system spearheaded by the United Nations revealed how the historic absence of the African voice from the formulation of international tax norms contributed to the continent's abysmal tax performance. An obvious plot in the evolution of modern international taxation is that African countries – still formative and gripped by the shackles of colonialism – did not have a voice or vote when the rules of international taxation were first formalized vide the League of Nations a century ago, effectively embedding vulnerability into Africa's fiscal law and policy negotiations.[21] With the emergence of BRICS, and ATAF, Africa has begun to play its part within this ITR but vulnerabilities in the form of reliance on foreign aid and its political fascination toward a race to the bottom in offering tax competition has catapulted Africa into a different form of vulnerability – arising from within instead of the previous exogenous forces. Relatedly, vulnerabilities from within, in the form of tax competition, is still framed around power asymmetries despite the post-colonial inclusion offered to African states to be part of the ITR's decision-making process. Despite this, African countries, have played a peripheral role in shaping international tax rules; and this is not necessarily of (their) choice.

21 *See* Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Treaty Provisions—And Why It Is Important to Know About It*, 54 CTJ 907 (2006) [discussing the history of tax treaties].

22 Magalhães, supra note 15.

For a century, the wealthiest and most powerful nations on the planet have systemically gathered in small groups of experts, scientific committees and working parties, to decide on the appropriate tax policy norms for global implementation.[22] The first of such gatherings took place under the auspices of the League of Nations, which in the 1920s, amidst early pressure from business interests on governments to coordinate their tax legislation to avoid double taxation, published a report authored by four economists that articulated an appropriate basis for delimiting the tax jurisdiction of nations.[23] That report concluded that nations are justified in taxing income where the taxpayer owes some "economic allegiance" to the country.[24] The conceptual basis of economic allegiance is that the tax base, as a product of economic activity, must be understood not in terms of a taxpayer's political or social connections to a country, but by their economic interaction with and within it.[25] Therefore, even where a taxpayer was not resident in a state, it was accepted that income with an economic attachment to that jurisdiction is justifiably taxed by that state.[26]

After reviewing different methods of allocating the tax base between a source and a residence state, the authors of the League of Nations Report ultimately leaned in favour of residence state taxation for income from personal property while recognizing the logic of greater source country taxing rights over income related to land and business property in the source country.[27] The principles articulated by the League of Nations have since become widely accepted and incorporated in domestic tax legislation and tax treaties.

The demise of the League of Nations, post-World War II left a gap in international tax governance that would not be filled by its successor – the most representative international organization – the United Nations (UN). Rather, the OECD emerged in 1948 and thereupon assumed the responsibility for strategically formulating the international tax governance structure, shaping the ITR, largely doing so to suit the needs of its members, sometimes to the exclusion of non-members.[28] According to Magalhães: "the immediate consequence was, and still is, the creation of an exclusionary architecture that deprives the majority of the world's countries from meaningfully influencing legal-institutional choices vis-à-vis what countries should tax cross-border transactions, a process that has clear global distributional implications."[29] Given that the OECD is accountable only to its members, who are mostly industrialized countries, it comes as no surprise that it is often described as

23 Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, Tax Design Issues Worldwide, Series On Int'l Tax'n 159, 162 (Geerten Michielse & Victor Thuronyi, eds, Vol 51, 2015).

24 Bruins, Einaudi, Seligman, Stamp, *Report on Double Taxation submitted to the Financial Committee, Economic and Financial Commission Report by the Experts on Double Taxation*, League of Nations, Doc. E.F.S. 73. F. 19, (1923) [League of Nations Report].

25 *See Id*. at 19

26 Brooks & Krever, *supra* note 23 at 162.

27 *Id*.

28 *See* 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) [On the emergence of the OECD as a *de facto* world tax organization].22 Magalhães, *supra* note 15.

29 Magalhães, *supra* note 15.

a rich countries club looking after the interests of the "Global North".[30] The self-interested nature of the OECD's decision-making is confirmed by: "(i) the ITR's inbuilt distributive bias towards residence or capital-exporting countries; (ii) the resilience of outdated concepts and methods, such as the "permanent establishment" (PE) and separate entity taxation on the basis of the arm's length standard (ALS) for transfer pricing (despite this being ineffective and exceedingly difficult for poor countries to administer); and (iii) the difficulty of linking international tax with the development agenda.[31] These 4 categories also establish systemic hegemony in ensuring a single tax order within which a command model of law is developed. The 1948 OECD led international tax regime reflected power differentials in formulating these categories rather than ensuring an interactional process by which source countries would secure a portion of the tax base.[32]

Despite the copious flaws in the first "transnational legal order" that it created, the OECD maintains a hegemonic influence on the ITR, occasionally welcoming piecemeal changes rather than wholistic reform.[33] For these reasons, it may be more accurate to describe the current framework of international tax rules as a form of international fiscal imperialism[34] where countries have been pressured to conform to international standards fixed by the OECD.[35] Consequently, it is not surprising that a collective push for inclusivity led by developing countries is now at the core of OECD reform, bordering on arguments for the creation of a more representative global tax governance body.

In advocating for the establishment of an International Tax Organization (ITO), Horner argues that "a new global institution in taxation policy will make a significant, non-redundant contribution to global governance if – and only if – it gives a full and true voice to the fiscal concerns and needs of developing countries".[36] According to her, five conditions are essential for an international tax arrangement to be valuable: (1) "no gag rules: all issues must be eligible for discussion at the forum"; (2) "fair share: attention should be given to profit allocation rules"; (3) "link to official development assistance: development issues should be relevant in formulating tax policy"; (4) "tax administration efficiency: developed countries should assist developing countries in improving tax administration"; and (5) "governance: developing countries should

30 *Id.*

31 *Id.* at 510.

32 *Id.*

33 Philip Genschel & Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, Transnational Legal Orders, 154 (Terrence C Halliday & Gregory Shaffer eds, 2015), 169 cited in Magalhães *supra* note 15, at 511. (was this cited within the article? Is this a new cite?)

34 *See* Sergio Rocha, *International Fiscal Imperialism and the "Principle" of the Permanent Establishment,* 68 IBFD Bull. for Int'l Tax'n 83 (2014).

35 Magalhães, *supra* note 15, at 511. Note that the OECD used the template of the League of Nations drafters and their model treaties in drafting its influential model tax treaty in 1963 (OECD Model) which has been subsequently amended severally: 1977, 2010 and 2017. *See* OECD, *Draft Double Taxation Convention on Income and Capital* (1963); *See* 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 NC. J. Int'l. L. & Com. Reg. 39 (2016).

36 Frances M. Horner, *Do We Need an International Tax Organization?* 24 TAX NOTES INT'L 179 (2001).

37 *Id.* at 185-187.

have a meaningful voice in any world tax".[37] These conditions, in our view, if placed at the core of OECD reform process may have the potential to overturn the embedded inequalities within ITR and remove the power asymmetries.

Other institutional proposals have also discussed the need to make international tax governance more inclusive of the perspectives of developing countries.[38] Yet, despite various efforts to this end, the proposed ITO never took root and the OECD maintains a stranglehold on international tax policymaking.[39] The OECD, keen to protect its tax hegemony, successfully lobbied the G7 against the ITO.[40] The OECD has also managed to stave off the UN from taking a more central role in global tax policymaking despite the UN undertaking various tax policy initiatives of its own. During intense negotiating at the UN development finance summit in Addis Ababa, OECD countries foiled a push by the group of 77, representing low- and middle-income countries, for the creation of a UN tax body where all countries could participate on equal footing.[41] The UN Tax Committee since its establishment has focused on reducing the tax regressive relationship between the Global North and South countries. This is an example of institutional level facilitation of inclusivity and alleviation of vulnerability in global tax decision-making.

Intense criticism of the OECD's role and the gaping consequences of its tax policies, especially in the wake of the 2008 global financial crisis, spurred the OECD members, with the mandate of the G20, to launch an elaborate plan to fix the flaws of international taxation: the Base Erosion and Profit Shifting (BEPS) Action Plan.[42] However, despite expanding participation in the BEPS project from its narrow membership to an "Inclusive Framework" (IF) that comprises over 135 countries/territories (including 25 African countries), the BEPS project continues to attract skepticism and criticism about its inclusivity process. For instance, Michael Lennard observes that:

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38 *See*, *e.g.*, United Nations, Secretariat, Ad Hoc Group of Experts on International Cooperation in Tax Matters, *Institutional Framework for International Tax Cooperation*, ST/SG/AC.8/2003/L.6 (2003).

39 Magalhães, *supra* note 15.

40 Vito Tanzi, *Globalisation and Coordination of Fiscal Policies*, 11 (Proceedings of a Conference Organized by the School of International Studies, University of Trento, Working Paper 03/2004, University of Trento 2004) cited in Magalhães, *supra* note 15 at 514.

41 The UN has historically championed the cause of developing countries on international tax issues. The UN Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) was responsible for developing the UN Model Double Taxation Convention between Developed and Developing Countries (1980) and, more recently, the UN Practical Manual on Transfer Pricing for Developing Countries (2017). The UN Tax Committee has a sub-committee on BEPS issues for developing countries (2013), which monitors developments on BEPS, communicates them to officials in developing countries, and ensures that their views are fed into the OECD/G20 BEPS project and on-going UN tax cooperation work. *See* Annet Wanyana Oguttu, *Tax Base Erosion and Profit Shifting in Africa – part 1: What Should Africa's Response be to the OECD BEPS Action Plan?* 48 The Comp & Int'l LJ SA, 516 (2015). While only an expert body, the work of the UN Tax Committee has drawn intense interest from developing country governments and international civil society because of its more representativeness. *See* Manuel F. Montes Danish & Anna Bernardo, eds, *International Tax Cooperation: Perspectives from the Global South,* xiv, (2019).

42 OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) [BEPS Action Plan].

> "Even in that body, non-OECD/G20 countries participate as "associates" on an "equal footing" (another undefined term). In determining to what extent the associates have truly become partners, an assessment would need to be done of the future drafting and interpreting roles of the OECD Secretariat (overwhelmingly, especially in policy development, from OECD country governments) and OECD Working Parties (such as WP 1 on treaties and WP 6 on transfer pricing), of which the non-OECD countries are only observers."[43]

Professor Christians, responding to a publication of the BEPS IF, remarks that "countries from outside a core group of key players have not really experienced inclusive participation." "If anything, what is unified in the OECD approach is its commitment to an exclusive process of consensus building that replicates that of the founders of the international tax order, apparently unchanged by developments like inclusive participation and equal footing."[44]

Directly responding to that criticism, the OECD's Ben Dickinson asserts that:

> "[t]he 135 countries in the Inclusive Framework are working together on the new rules in a participatory way."[45] Dickinson added that the OECD BEPS Inclusive Framework Steering Group "comprises 24 countries from the OECD, G-20, and developing countries including in Africa from Ivory Coast, Nigeria, Senegal, and South Africa. In this body, 'the great powers' include China (vice chair) and India."

Dickinson detailed some of the inner workings of the IF, concluding that "suggestions that there is no radical departure from the current rules on international taxation are therefore very wide of the mark." Relatedly, in our view, while the BEPS project aimed to introduce inclusivity within the process to reform international tax, this inclusivity is chained towards consensus building which flows from a vulnerable stand that most developing countries have in relation to OECD political power. It is an asymmetrical consensus building. This is expressive in the following ICTD statement:

> "[t]he IF's expansion has made little difference to the number of lower-income countries attending meetings at which the practical technical policy work is done, and that most members are fairly silent participants. This is partly because of well-documented structural obstacles not unique to the IF, but is exacerbated by some aspects of the OECD's decision-making processes, such as the pace and intensity of discussions, the culture of policymaking, the costs of attending regular meetings in Paris, and the absence of routine and timely translation of documents and meetings. This can make the OECD a daunting environment for member state delegates, but especially for those from lower-income countries.

43 Michael Lennard, *Act of Creation: The OECD/G20 test of "Value Creation" as a Basis for Taxing Rights and Its Relevance to Developing Countries,* 25 Transnat'l Corporations 55, 77 (2018).

44 Alisson Christians, *OECD Secretariat's Unified Approach: How to get things on a truly Equal Footing,* International Centre for Tax and Development (Nov. 5, 2019) https://www.ictd.ac/blog/oecd-secretariat-unified-approach-equal-footing/.

45 Ben Dickinson, *The Inclusive Framework is Considering Radical Proposals, but in the Real World*, ICTD (Nov.18, 2019), https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/.

> In addition, many have joined with no intention of influencing standards, but rather in pursuit of technical assistance or prestige, or under coercion from the European Union."[46]

On specific issues, it is somewhat perceivable that the resolution inevitably comes down to the business and economics interests of the OECD members, in particular the U.S.[47] It is, after all, disagreements between the U.S. and its OECD allies that has long held up a global digital tax deal.[48] It seems unimaginable that an African country could hold up a global tax deal of any sort the way that the OECD countries have held up a global digital tax deal. This reiterates our position earlier emphasized on the fact that the ITR was based on conceptualizing only OECD countries as participants within the global economic order while others are curtailed from intervening. If African countries were to take a different course from a path set by the big players, they risk being blacklisted by the big powers, as some countries have experienced in the recent past.[49] Bottomline, it is how far the IF is willing to go to address "Afrocentric" issues that will validate the claims of genuine inclusivity. In any 'negotiations', the onus on African countries is to continue to forge alliances with willing partners in the common goal of building a global tax village where all voices matter.[50]

3. Inclusive Agenda

One way to approach the (tax) vulnerability discourse from an African perspective is to scrutinize whether the issues that international tax governance institutions prioritize for reform align with the priorities of African countries. An inclusive international tax reform endeavor is one that attempts to address issues that would also specifically matter to African countries, not just issues that seemingly matter to "all countries" but by implication, capital exporting countries.

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46 Rasmus Corlin Christensen, Martin Hearson & Tovony Randriamanalina, *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations,* 8 (ICTD Working Paper 115, 2020).

47 Elizabeth Schulze, *US and France have Reached a Deal on Digital Tax, Macron Says*, CNBC (Aug. 26, 2019), https://www.cnbc.com/2019/08/27/france-and-us-reach-draft-compromise-on-french-digital-tax.html;

48 *Very clear' US is Blocking Digital Tax Talks, Says French Finance Minister*, France 24 (Sept. 9, 2020), https://www.france24.com/en/20200909-very-clear-us-is-blocking-digital-tax-talks-says-french-finance-minister

49 Pedro Goncalves, *EU to Roll out Sanctions against Blacklisted Jurisdictions*, International Investment (Sept.17, 2019),https://www.internationalinvestment.net/news/4008313/eu-roll-sanctions-blacklisted-jurisdictions#:~:text=The%20EU%20has%20approved%20a,by%20the%20end%20of%202020.

50 Various African countries Egypt, Kenya, Nigeria, and South Africa, inclusive are part of the G24, an inter-governmental group of non-OECD countries pushing for international tax reform that is more favorable to developing countries. *See*, *e.g.*, G-24 Working Group On Tax Policy And Int'l Tax Coop., *Proposal for Addressing Tax Challenges Arising from Digitalisation* (Jan. 17, 2019), https://www.g24.org/wp-content/uploads/2019/03/G-24_proposal_for_Taxation_of_Digital_Economy_Jan17_Special_Session_2.pdf. Also, African countries are working together through the African Tax Administration Forum (ATAF) to present a united front on tax issues of common concern and to develop customized solutions for African countries. One of ATAF's more recent contributions is in the area of digital taxation. *See* ATAF, *Suggested Approach to Drafting Digital Services Tax Legislation* (2020).

During the consultations on BEPS, developing countries pointed at some of their specific tax-related issues such as allocation of taxing rights between source and residence states, taxation of informal economy and the need of countries to attract investment by way of tax incentives. However, these problems have not been addressed by the BEPS Project.[51] Here we interrogate two pertinent policy issues that are important to African countries: base erosion and allocation of taxing rights. Addressing base erosion is important because African countries lose significant taxable revenue to BEPS by MNEs and through double tax treaties. Addressing tax allocation rights is important because the current ITR disproportionately favors residence states over source states, with most African countries falling only into the latter category. However, while BEPS has recently been the target of substantial international tax reform effort, the reallocation of taxing rights has not, except to the extent that it concerns taxation of the emergent digital economy.

3.1 BEPS Project Approach to Base Erosion and Profit Shifting

Base erosion and profit shifting refers to tax avoidance by MNEs, which exploit gaps in the interaction of different tax systems to artificially diminish taxable income or to shift profits to low-tax jurisdictions in which little or no economic activity is performed.[52] OECD partly attributes BEPS to the fact that the current international corporate taxation framework has not kept pace with the changing business environment.[53] The early 20th century saw an unprecedented easing of the ability of capital, goods and services to flow across international borders, accompanied by a proliferation of double taxation treaties, which allocated taxing rights among countries and provided them with specific jurisdiction to tax income or capital.[54] With globalization and the global operations of MNEs, taxation and its regulatory frameworks have gained intrinsically global dimensions. The rise in cross border e-commerce transactions is also bringing forth new issues, such as the shift towards a service-based digital economy and use of intangibles, with their associated fees and royalties. The adoption of platforms and advertisement driven business models, along with fundamental questions on value addition and characterization of income for tax purposes have disrupted entrenched rules and provided MNEs with new avenues to indulge in aggressive tax planning activities. MNEs are able to shift their profits to offshore jurisdictions where they would pay little to no taxes on their income.[55]

51 Irma Johanna Mosquera Valderrama, Dries Lesage & Wouter Lips, *Tax and Development: The Link between International Taxation, The Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agenda*, (United Nations University ICRIS Working Paper Series W-2018/4, 2018).

52 *See* BEPS Action Plan, *supra* note 42.

53 OECD, *Addressing Base Erosion and Profit Shifting,* 7, (2013) [2013 BEPS report].

54 Manuel F. Montes Danish, Daniel Uribe & Monica Victor, *Introduction*, International Tax cooperation: Perspectives from the Global South, 2–3 (Manuel F. Montes, Danish & Anna Bernardo eds, 2019).

55 *Id.*

BEPS has been an endemic problem in the international tax system for decades, with MNEs and various countries (including OECD members) exploiting weaknesses in the ITR to erode the tax base of countries.[56] In the wake of the 2008 financial crisis, the OECD issued a 2013 report[57] which acknowledged the enormous detrimental impact of BEPS and subsequently, in July 2013, issued an Action Plan comprising 15 specific action items that intend to facilitate multilateral cooperation on the taxation of MNEs, with the overarching goal better aligning taxing rights with economic activity.[58] In August 2014, the OECD issued a two-part report where it acknowledged the peculiar challenges that more severely expose developing countries to BEPS.[59] The OECD identified "lack of necessary legislative measures"; "lack of information"; "difficulties in building the capacity needed to implement <u>highly complex rules</u> and to challenge well-advised and experienced MNEs; exposure to potentially more aggressive, tax avoidance practices as some of the peculiar challenges confronting developing countries.[60]

The fundamental premise of the BEPS project is that a coordination of national responses to BEPS can both eliminate double non-taxation and protect against material unrelieved double taxation.[61] The BEPS project is of great importance to African countries because of its overwhelming focus on corporate taxation. Unlike OECD countries that have diverse sources of tax revenue, such as personal income taxes and consumption taxes, many African countries rely heavily on the corporate tax as a source of domestic revenue mobilization.[62] The corporate tax is crucial for developing countries where it "frequently amounts to over twenty-five percent of total revenues"[63] In many African countries, most corporate tax is levied on corporate profits derived from rents for the exploitation of country-specific resources, which makes it an efficient tax for a country to impose.[64]

Beside causing critical under-funding of public investment that could help promote economic growth, BEPS undermines the integrity of the tax system. It discourages tax morality and encourages a perception that the tax system is unfair. This reduces voluntary compliance by all taxpayers. It also undermines competition, since

56 *See* Oguttu, *supra* note 41.

57 2013 BEPS report, *supra* note 53.

58 OECD BEPS Action Plan, *supra* note 41, at 11.

59 OECD, "Two-Part Report to G20 Developing Working Group on the Impact of BEPS in Low Income Countries" (2014) at 7–8, https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

60 Given these findings, especially as regards the implementation of highly complex rules, one would have expected the OECD to toe the path of the UN Tax Committee in prioritizing regime simplicity. However, this is not the impression that one gets when perusing various rules so far advanced. How much use is expertise if it does not produce workable outcomes?

61 Hugh J. Ault, Wolfgang Schoen & Stephen E. Shay, *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 Bull. for Int'l Tax'n 275 (2014).

62 *See* Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, Mich. Bus. & Entrepreneurial L. Rev. 137, 139 (2016); Ernesto Crivelli, Ruud De Mooij & Michael Keen, *Base Erosion and Profit Shifting and Developing Countries* (International Monetary Fund Working Paper No. 15/118, 2015).

63 Avi-Yonah, *Id*.

64 *Id*.

MNEs have a competitive advantage over enterprises that operate at domestic level (especially small- and medium-size enterprises).[65] It is clear, therefore, that fixing the ITR that governs corporate taxation is an agenda that is crucial for African countries. Fixing the BEPS problem also gives African countries a clearer path to development, as envisaged by the UN sustainable development goals (SDGs).[66]
It is worth mentioning that the BEPS project has overseen the development of various new rules and processes that aim to combat BEPS. Notable progress can be identified in at least three areas: transfer pricing, information exchange and tax treaties, briefly discussed next.

Transfer pricing reform is an area where the OECD has significantly exerted its influence. 'Transfer mispricing' has long been identified as a major contributor to the BEPS problem in Africa.[67] TP emphasizes the independent entity principle while aiming to decide, through complex methods, an appropriate allocation of profit by allowing the adjustment of prices of transactions between related entities. The methods that are applied rest on a conceptual flaw in only assessing profits where economic activities occur, and value is created – both principles divesting tax out of Africa. The OECD IF has tried to address these challenges by developing various regulatory instruments that it recommends to countries for adoption.[68] It is hard to conclude that the many changes to transfer pricing rules have eradicated the criticisms that have trailed the arm's length principle (ALS) for years, especially about its complexity and susceptibility to base erosion practices.[69] It should be noted that MNEs possess significant resources which even the tax authorities of rich countries sometimes struggle to match.[70] Perhaps, there is a future where the ALS could be jettisoned for some

65 Oguttu, *supra* note 41, at 535–536.

66 *See* Irene Burgers & Irma Mosquera Valderrama, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries*?, Erasmus L. Rev. 29, 33 (2017) ["In their Global Framework for Financing Development Post-2015 Program the Heads of State and Government and High Representatives gathered in Addis Abba from 13 to 16 July 2015 recognised 'that significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieve the SDGs'. Further, they committed to 'enhance revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection'; and to 'work on improving the fairness, transparency, efficiency and effectiveness of their tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances'…; At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030…"].

67 UNECA, *supra* note 9.

68 *See* OECD, *Guidance on Transfer Pricing Aspects of Intangibles, OECD/G20 Base Erosion and Profit Shifting Project* (2014); OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2017); OECD, *Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10, OECD/G20 Base Erosion and Profit Shifting Project 2018* (2018).

69 *See, e.g.*, Action Aid, *Comments IMF 2019 Analysis of International Corporate Taxation*, IMF (2019), https://www.imf.org/external/np/exr/consult/2018/corptaxation/pdf/2018commentscorptaxation.pdf: ["the arm's length principle (ALP) has proven to be burdensome and ineffective, in particular in developing countries' context. The underlying problem – the incompatibility of the ALP with the reality of global economy – has not been addressed by the BEPS project, despite broad-based critiques of it from many sources, including the Independent Commission for the Reform of International Corporate Taxation (ICRICT)"].

70 Ajay Gupta, *Why has the IRS Outsourced Microsoft's Transfer Pricing Audit?*, 76 Tax Notes Int'l 847 (2014).

other approach to taxing MNEs, such as formulary apportionment.[71] This approach however, is politically unpopular. OECD countries have demonstrated an ambivalent disposition towards formulary apportionment since it interferes with their direct financial interests by increasing their resident MNEs tax burdens to source countries.[72] For the OECD's signature product on the information exchange, one would point to **Country-by-Country Reporting** (BEPS Action 13), a policy framework that aims to improve transparency and close the transfer pricing information asymmetry between MNEs and tax authorities by requiring the former to report their group business activities, income, taxes payable from all jurisdictions where they operate.[73] Tax transparency and exchange of information are at the heart of a global effort to tackle aggressive tax planning of MNEs.[74] The information disclosed can help tax authorities more effectively discharge their tax assessment functions and more readily detect when an MNE is being insincere or contradictory with its tax filings. Many African countries have joined their counterparts to incorporate the CbCR into their domestic *corpus juris,* amidst concerns that the CbCR regime discriminates against developing countries.[75]

Another notable achievement of the BEPS project is the **Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting** (MLI). The MLI is a mechanism devised to swiftly update the thousands of bilateral tax treaties in the international tax system. It aims to lessen opportunities for MNEs to engage in BEPS through exploitation of tax treaties. While the MLI was not designed primarily to address the priorities of developing countries in relation to the international tax system, it nevertheless offers a means to tackle practices such as "treaty shopping" and companies avoiding setting up taxable

The U.S. IRS retained a consultant in 2014 at a cost of over $2m to assist in the transfer pricing examination of Microsoft. The UK's HMRC expanded its transfer pricing specialists from 65 to 81 between 2012 and 2016; its 6-year investigation of Google involved about 30 specialists, eventually resulting in a settlement agreeing payment of an additional £130m covering a 10-year period (UK Parliament, Public Accounts Committee, Corporate Tax Settlements, HC 788, 2016: paras. 4-6). The challenge is, of course, steeper for developing countries. Which is why high priority should be to devise rules for allocation of income that are simple, clear and easy to administer. *See* Sol Picciotto and Daniel Bertossa, *Taxing Multinationals: A New Approach*, Publ'n Serv. Int'l, 12 (2019), https://pop-umbrella.s3.amazonaws.com/uploads/9dacd52a-6987-4dcb-a90c-4a1146f4a342_Taxing%20Multinationals.pdf.

71 Michael Hanlon, *Country-by-Country Reporting and the International Allocation of Taxing Rights* 72 Bull. for Int'l Tax'n (2018) [suggesting that the CbCR "may be a step (maybe one of many?) towards a different global tax regime - the abandonment of the arm's length principle in favor of source or destination-based taxation (or formulary apportionment)]; *See* Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development* (CIGI Policy Brief No. 4, 2019) [arguing that taxing MNEs as separate entities, which the ALS attempts, is incompatible with economic reality, is incompatible and undermines implementation of the UN SDGs].

72 Richard Krever & Peter Mellor, *History and Theory of Formulary Apportionment*, The Allocation of Multinational Business Income: Reassessing the Formulary Apportionment Option, 9–39 (Richard Krever and François Vaillancourt, eds., 2020); Sol Picciotto, *Taxing Multinational Enterprises as Unitary Firms,* 27-40 (Institute of Development Studies, 2017).

73 *See* OECD, *Action 13: Country-by-Country Reporting Implementation Package* (2015).

74 Preetika Joshi, *Does Private Country-by-Country Reporting Deter Tax Avoidance and Income Shifting? Evidence from BEPS Action Item 13*, 58 J. Acc. Research 333, 334 (2020).

"permanent establishments."[76] In force since 1 July 2018, an ever-growing list of countries has signed up to the MLI.[77]

3.2 BEPS Project Approach to Allocation of International Taxing Rights

The allocation of taxing rights is a fundamental issue that remains largely ignored by the ongoing OECD-led reform of the ITR.[78] The current ITR vests the primary right to tax cross-border business income in the country of residence. In contrast, a source country can only tax if it demonstrates that a nonresident company (NRC) derived income from activities carried on there. The primary territorial nexus recognized under international tax law is the permanent establishment (PE). The implication of this rule is that to be able to exercise the power to tax, a source country must demonstrate that the income was derived from its territory through engagement with a PE. Disenchantment lies in the relative difficulty of establishing source vis-à-vis residence. From the beginning, the League of Nations' four economists did worry that it would be harder to determine in which countries income was sourced than to determine in which country the taxpayer was resident.[79] This explains why the residence-source dichotomy tilts heavily in favor of residence[80] and, by implication, capital-exporting countries, since most of the MNEs that export capital (and repatriate profits) are resident in the former.[81] In direct contrast with developed countries, African countries make up a large chunk of low-income, capital-importing category.

The distributive bias of the ITR is aggravated by double tax treaties that not only embody the lopsided rules but further transfer vested taxing rights from source countries to residence countries under the illusion of curbing double taxation.[82] The

75 No fewer than 13 African countries have introduced domestic legislation on CbCR. These include some of the continent's biggest economies: Cote D'Ivoire, Egypt, Kenya, Nigeria, Senegal, and South Africa. See OECD/G20, *CountrybyCountry Reporting – Compilation of Peer Review Reports (Phase 1)* (2018). Critics of the CbCR argue that the group income threshold (€750 million) recommended by the OECD is too high for developing countries and could lead to the income of most MNEs not getting reported. *See* Oladiwura Eyitayo, *The Global Fight against Base Erosion and Profit Shifting under the OECD's Country-by-Country Reporting Rules: A Possible Solution?* (Dalhousie University Master-of-Laws Thesis, 2017). Ideally, the threshold should be lowered, even if jurisdictionally, to improve the chances of developing countries deriving the benefits of the CbCR regime. A similar concern is discussed with regard to digital tax policy in paragraph 3.

76 Annet Wanyana Oguttu, *Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures*? (CGD Policy Paper 132, 2018).

77 *See* OECD, *Signatories and Parties to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

78 Christians & Magalhães, *supra* note 16.

79 Brooks & Krever, *supra* note 23, at 163.

80 Even the League of Nations Committee of Experts that designed these principles recognized then that the rules tilted in favour of capital exporting countries. They, however, reasoned that this tilt would not be a significant problem where two countries with similar economies are dealing with each other since the disparity could even out through cross-investment. *See Id.,* at 161.

81 *See*, *Fortune Global 500 for the list of top 500 MNEs and their countries of residence*, https://fortune.com/global500/search/

82 *See* Tsilly Dagan, *The Tax Treaties Myth* 32 NYU J. Int'l L. & Pol. 1 (2000).

83 Brooks & Krever, *supra* note 23. Tax treaties are often based on the OECD Model Double Tax Convention. However, the model retains the pro-residence distributional bias that was entrenched in the 1920s.

League of Nations' experts also recognized that a division of taxing rights, which shifted rights from the source country to the residence country was only appropriate where countries had similar economies.[83] In other words, the arrangement was likely to produce lopsided results between low-income and high-income countries.[84] Yet, for decades, African countries have contracted such tax treaties with developed countries with the anticipation – sometimes under pressure – of attracting investment. They often end up losing significant tax revenue to developed countries, without materializing the anticipated investment boom.[85] Tax treaties also facilitate BEPS through various forms of treaty abuse.[86]

Although the OECD has engaged in tax treaty reform to address the tax treaties aspects of BEPS, it is important to note that these efforts have focused on plugging tax avoidance loopholes, while the distributive lopsidedness of tax treaties remains unattended.[87] The OECD made clear from the onset that there was no intention to alter the taxing rights allocation arrangement when it stated that "[w]hile actions to address BEPS will restore both source and residence taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates, these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income."[88] History also records that past attempts by the UN Tax Committee to produce a tax treaty model that rebalances taxing rights by attributing greater relevance to taxation at source were thwarted by developed countries. The UN Model ended up very similar to the OECD Model and failed to achieve its objective of fairly distributing taxing rights between developed and developing countries.[89] African revenue authorities under the banner of ATAF then produced a double tax treaty model for the continent to use when negotiating the cross border international tax rules to prevent double taxation, but this model is scarcely used despite its Afrocentric origin. This is indicative of power asymmetries – in that even after having a continental model on tax treaty making, the continent still subordinates its cross-border tax imposition to the OECD/UN models. These two models have become the *modus operandi* for international tax – reiterating our claim to prevent African reorganization of the ITR.

84 History records that during the preoccupation of the world's big powers with World War II, developing countries from the Americas, at the 1940 Fiscal Committee Conference, worked to ensure replacement of the League of Nations' 1928 Model Convention with the 1943 Mexico Model Tax Treaty. This new model was intended to promote the use of tax treaties between developing and developed countries and was consistent with the general principle of taxing income at its source. However, the new treaty policy was widely unaccepted by developed countries, so, in response, the 1946 London Model Convention was drafted. The amended model reasserted the pro-residence country bias. *See* Doron Narotzki, *Tax Treaty Models - Past, Present, and a Suggested Future*, 50 Akron L. J. 383, 385 (2017).

85 Paul Baker, *An Analysis of Double Taxation Treaties and their Effect on Foreign Direct Investment*, 21 Int'l J. Econ. Bus. 341 (2014).

86 *See* Sebastian Beer & Jan Loeprick, *The Cost and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa,* (IMF Working Paper 18(227), 2018), https://www.elibrary.imf.org/view/IMF001/25495-9781484378007/25495-9781484378007/25495-9781484378007.xml.

87 *See* OECD, *Model Tax Convention on Income and on Capital* (2017), Article 7.

88 BEPS Action Plan, *supra* note 41, at 11.

89 Rocha, *supra* note 34.

It would, no doubt, further the fiscal interests of African countries to see a shift in emphasis in taxing rights to benefit source countries. Such a shift may be justified on the ground that the existing structure does not meet the standards contemplated of an equitable international tax sharing or, more ambitiously, on a need to marry international taxation with development, in alignment with the UN's recognition of taxation as a crucial source of domestic revenue mobilization for sustainable development.

Regrettably, perhaps, from an African perspective, development has never gained traction as a determinant factor for international tax policy. Even the various proposals that discussed the establishment of an ITO did not go as far as to advocate the need to include developmental and other interests of poor nations for serious consideration.[90] Horner observes that for the developing countries of the world, taxation policy and the development agenda are inseparable" and "rich countries make a serious mistake when they act globally to address either one of these issues on a stand-alone basis".[91] The ongoing OECD BEPS project does not demonstrate a broad shift in the willingness of developed countries to revisit the taxing rights allocation issue. On the contrary, OECD countries have pushed back on attempts by developing countries to use the project to revisit this fundamental issue. As far back as 2013, Robert Stack, a US Treasury Deputy Assistant Secretary for International Tax Affairs "expressed a concern that countries such as India and China are seeking to use the OECD's BEPS project to 'recalibrate the global paradigm' on source and residence-state taxation that has been in place since the 1920s.'"[92]

From the onset, critics of the OECD BEPS Action Plan have stressed the point that the OECD agenda was driven by the interests of developed countries and that the interests of developing countries are not being addressed, since they were not consulted to table their concerns before the OECD 15-Point Action agenda was drafted and closed.[93] Rocha argues that developed countries use taxation as a means of protecting their taxing rights in their commercial relations with developing countries and that the preservation of such rights has been the central principle underlying the OECD Model.[94] Oguttu asserts that the OECD's approach does not address basic fundamental international tax reform, or re-examining the basic principles of the international tax system that are pivotal in addressing BEPS – such as the allocation of tax income between residence and source countries. Instead, the OECD chose to focus on curtailing sophisticated tax avoidance schemes by strengthening existing anti-avoidance provisions, to ensure that they are more effective in curtailing BEPS under modern business models.[95] While curtailing sophisticated tax avoidance is not

90 Magalhães, *supra* note 15.
91 Horner, *supra* note 36, at 179.
92 *See* Jim Fuller & David Forst, *US Inbound: The US position on BEPS*, International. Tax Review (1 December 2013), https://www.internationaltaxreview.com/article/b1fbszrxzb2tzl/us-inbound-the-us-position-on-beps
93 Oguttu, *supra* note 41, at 540.
94 Rocha, *supra* note 34.
95 Oguttu, *supra* note 41, at 541.

an unwelcome agenda for African countries, there is no doubt that African countries would as well appreciate a global tax agenda that fairly redresses endemic taxing rights distribution. That does not look to be on the imminent agenda as current reform focuses on reallocation of taxing rights in the emergent digital economy, largely to addresses the aspirations of large market jurisdictions (most of which are OECD countries).[96]

While taxation of the digital economy is an issue of great importance to developed countries because of their stronger digital consumer markets, Africa's consumer markets lag very much behind. So, while African countries may derive some extra tax revenue from digital economy taxation, it has been argued that the narrow focus on digital markets appears to forestall a much-needed discussion on the broader distributive implications of the current global tax deal,[97] a situation that does not augur well for the revenue needs of African countries. There is also a risk that the reallocation of taxing rights towards "market jurisdictions" will further deplete tax revenue for a range of lower-income countries.[98]

It is, perhaps, apt to close this segment by asserting that the OECD's designation of a 15-point BEPS Action Plan without the input of non-OECD members epitomizes the power asymmetries in international tax governance. The fact that an institution that represents a minority of the world's countries (but its biggest economic players) drew up an elaborate global tax reform plan without global input quintessentially demonstrates the hegemonistic norm development posture that has characterized the ITR for a century. It also demonstrates a presumptive self-assurance that the BEPS issues that matter to OECD countries are the BEPS issues that matter to the rest of the world. Such presumption tends to be misguided since affected countries are at different levels of economic development, administrative capacity and vulnerability to BEPS.[99] That being said, the BEPS project, regardless of its timing, immediate triggers and scope, is a welcome venture for African countries because it contains some issues that resonate with African countries and provides some opportunities for countries to kick the international tax reform conversation forward.[100] A question that necessarily follows is whether, in addressing any given agenda, there is a pivot towards producing or sidestepping outcomes that appeal to the peculiar needs of African countries.

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96 Christians & Magalhães, *supra* note 16, at 1155–1156.

97 *Id*. at 1156.

98 Alex Cobham, Tommaso Faccio & Valpy Fitzgerald, *Global Inequalities in Taxing Rights: An Early Evaluation of the OECD Tax Reform Proposals*, SocArXiv (Oct 4, 2019), https://osf.io/preprints/socarxiv/j3p48/.

99 *See* Oguttu *supra* note 41 at 552.

100 The importance of the 15 BEPS Action Plans varies. Citing responses to UN Subcommittee of BEPS to its questionnaire, Oguttu notes that the priorities of developing countries would be: Action 4: Limit base erosion via interest deductions and other financial payments; Action 6: Prevent treaty shopping; Action 8: transfer pricing of intangibles; Action 10: Assure that transfer pricing outcomes are in line with value creation with respect to other high-risk transactions; Action 12: Require taxpayers to disclose their aggressive tax planning arrangements; and Action 13: Re-examine transfer pricing documentation. *Id.*

4. Inclusive Outcomes

Beyond addressing issues that matter to African countries, an inclusive international tax reform process must aim to actualize specific outcomes that cater to the needs of African countries as a historically vulnerable group. This objective should be triggered even when the issues being addressed are not themselves peculiar to African countries. International tax engineering must always proceed with clear recognition of the nuanced nature of some international tax challenges. It is from this nuanced understanding that solutions can be fashioned to fit peculiar situations. When it comes to addressing vulnerabilities in international taxation, exceptional positions on taxing methods, taxability thresholds, reporting thresholds can make a telling difference for developing countries. We illustrate this point with the current issue of digital tax reform.

4.1 BEPS Project Approach to Taxing the Digital Economy[101]

One of the more intense issues in international taxation is contained in pillar 1 of the BEPS project which deals with taxation of the digital economy. The OECD has been the main institution coordinating the reform process, mainly by crafting, reviewing and facilitating global consensus on proposals that aim to adapt international tax rules to enable countries tax income from activities that digitally occur in their jurisdiction. The OECD aims to outline a new taxing right for these countries by revising profit allocation and nexus rules.[102] The new rules will make MNEs liable to tax on profits made in countries where they have significant sales (and possibly users) even without the physical presence that is currently required.[103] The three main groups of market countries in this round of tax coordination seem to be, roughly, the European Union (EU), the U.S., and a group of key emerging economies (especially Brazil, India, and China).[104] For various reasons, each of these groups has a preferred proposal: user participation for the EU, marketing intangibles for the US and significant economic presence (SEP) for the G24 countries.[105] African states have collectively under ATAF developed a common position to respond within these three features instead of forwarding their own unique proposal.[106]

101 While the challenges of digital taxation concern all countries, in crafting solutions for these challenges, it is important to give specific regard to what is practicable and beneficial to developing countries, considering both administrability and inter-nation equity.

102 *See* OECD Work Program 2019.

103 *See* Martin Hearson, *Africa Responds to the Inclusive Framework's Digital Tax Agenda*, ICTD (Aug. 7, 2019) https://www.ictd.ac/blog/africa-responds-to-the-inclusive-frameworks-digital-tax-agenda/; Latif, Lyla, *The Evolving 'Thunder': The Challenges Around Imposing the Digital Tax in Developing African Countries*, 4 Int'l J Digital Tech. & Econ. (2020).

104 Christians & Magalhães, *supra* note 16, at 1167–1168.

105 *Id.* at 168–170.

106 Latif, *supra* note 102.

In late 2019, the OECD secretariat released a public consultation document for a "Unified Approach" to digital taxation.[107] Interestingly, the proposed Unified Approach focused on the common ground between the user participation and marketing intangibles models but appears to have sidelined the SEP model that is preferred by largely non-OECD countries.[108] The proposal would allocate a share of digital income taxing rights to market jurisdictions but invites further discussions, noting, particularly, that "such discussion should also include consideration of size limitations, such as, for example, the €750 million revenue threshold used for country-by-country reporting requirements."[109]

The purpose of a minimum threshold (*de minimis* threshold) is to ensure that companies only become taxable if they have sufficient involvement in a country's economic life.[110] A €750 million or some other high taxability threshold can significantly limit the number of MNEs that are "in scope" of the digital tax rules. There is also the question of the profit attribution rules, which determines the threshold of an MNE's activities that must take place within a country for that country to be able to assert its tax jurisdiction. A high threshold of in-country activities can particularly disadvantage low-income countries since such countries are also small market jurisdictions and, therefore, far less likely to host enough activities as high market jurisdictions.[111] Such outcomes can reinforce the distributional bias that already exists in the ITR.[112]

While a high taxability threshold may serve MNEs in terms of limiting multijurisdictional compliance burdens, it is also imperative that the tax needs of low-income countries are not sacrificed on the altar of optimal global taxation. A more nuanced approach is, therefore, required to preserve the tax base of smaller market jurisdictions. One path to an equitable outcome is for low-income countries to maintain their own low in-country activity thresholds or, within the IF, to allow low-income countries to implement flexible thresholds based on the taxable MNE's importance to the countries' economy.[113]

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107 OECD, *Public Consultation Document Secretariat Proposal for a "Unified Approach" under Pillar One* (2019), https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf

108 *Id*.

109 *Id*. at para 20.

110 *See* Hearson, *supra* note 103.

111 Going by recent World Bank statistics, the world's big consumer markets remain the OECD members and emerging markets such as India, Brazil, and China. With a high taxability threshold, it is unlikely that African countries will fall into the category of marketing jurisdictions that can tax digital trade. *See* World Bank, "Final consumption expenditure (current US$)", https://data.worldbank.org/indicator/NE.CON.TOTL.CD; *See also*, Latif, Lyla, *The Evolving 'Thunder': The Challenges Around Imposing the Digital Tax in Developing African Countries*, Int'l J. of Digit. Tech. & Econ. (Vol. 4, Number 1, 2020), http://www.ijdte.com/index.php/ijdte/article/view/52.

112 Christians & Magalhães, at 1175–1176: **is this a supra cite?** ["[u]sing the term "market jurisdictions" instead allows a strategic narrowing of scope while maintaining a broad enough terrain to accommodate the residence and source interests of members and other key consumer market states. A focus on the OECD consumer base as the market is a metric that, by definition, tends to favour the biggest consumer markets in relation to small-market, low-income countries—for example, those that heavily rely on exports of natural resources—which stand to be apportioned the least. Given the disparate levels of consumption across the globe, a market-based system would mostly benefit relatively more affluent countries and, in the best-case scenario, some emerging ones. Accordingly, no matter which of the proposals prevails, the result will be the reinforcement of a new global consensus on tax allocation that seems destined to favour the companies and governments of relatively affluent states"]

An inclusive ITR that appreciates the longstanding vulnerabilities of low-income countries must go beyond outcomes that are merely consensual and general. It must recognize that such countries have peculiar challenges that may require substantive concessions to meaningfully address. It is not clear that the OECD is a platform that recognizes the need for such concessions. In defending the OECD Secretariat's commitment to inclusivity in tax policy formulation, in early 2020, the OECD's Ben Dickinson notes that: "the Secretariat's role is not to propose solutions that favor one group or another but rather to explore a potential consensus solution that will appeal to states, with the inevitable compromises such a process necessitates."[114] Whatever way one reads this statement, it does raise concerns about whether the OECD platform is committed to solutions that address the peculiar needs of non-members. The approach of the UN to the digital tax conundrum, which is more centred on developing countries, demands some consideration here.

Amidst a cloud of uncertainty surrounding the OECD's digital tax project at the time, the UN Tax Committee tried to step in to advance a digital tax proposal that seems more responsive to the needs of developing countries. On 5 August 2020, the UN Tax Committee published an amended draft proposal for taxation of "automated digital services".[115]

The proposal tries to introduce a small portion of formulary apportionment into the global system.[116] The proposal would give source countries the right to tax cross-border payments for automated digital services via a withholding tax on gross income or an apportionment formula on net income.[117] Companies providing cross-border, automated digital services decide which taxing approach they prefer under a new Article 12B of the UN Model Tax Convention. They can opt for a withholding tax on gross income, at a rate that will be negotiated between treaty partners or they can opt for a net income tax on a company's "qualified profits" from automated digital services, at a rate determined by the source country's domestic law.[118]

The main advantages of the UN proposal over the OECD proposal are its simplicity and greater preservation of the tax base of developing countries. The withholding tax system, in particular, is one that developing countries are conversant with.[119] The absence of an income threshold also means that individual countries have the prerogative to decide whether to insert one either in its domestic tax legislation

113 *See* Hearson, *supra* note 102. The revenue threshold argument can also be made in respect of the CbCR.

114 Ben Dickinson, *The Inclusive Framework is Considering Radical Proposals, but in the Real World…* (Nov. 18, 2019), https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/.

115 United Nations Tax Comm., *New Article 12B on taxation of 'Income from Automated Digital Services* (2020).

116 Nana A. Sarfo, *Why the United Nations Digital Tax Proposal Deserves More Attention*, Tax Notes Int'l 995 (2020).

117 *Id*.

118 *Id*.

119 Oguttu notes earlier that "the BEPS project does not explore certain practical measures (such as withholding taxes) which may be more suitable for African countries in addressing BEPS." *See* Oguttu, *supra* note 41, at 551. The withholding tax option is retained in the ATAF Suggested Approach which buttresses the point that this system enjoys the support of African countries, perhaps far less so for the decision makers at the OECD.

120 *See* the Commentary on new Article 12B, para 7.

or in a tax treaty. As regards the simplicity of the proposal, the drafting committee explained that:

> "Many developing countries have limited administrative capacity and need a simple, reliable, and efficient method to enforce tax imposed on income from services derived non-residents. withholding tax imposed on the gross amount of payments made by residents of a country, or non-residents with a permanent establishment or fixed base in the country, is well established as an effective method of collecting tax imposed on non-residents. Such a method of taxation may also simplify compliance for enterprises providing services in another State since they would not be required to compute their net profits or file tax returns, unless they themselves opt for net income basis taxation."[120]

The favorable disposition of the UN proposal towards developing countries is not surprising considering that the members of the sub-committee that drafted the proposal were all drawn from developing countries. This should not be perceived as putting sentiment over expertise but rather as an approach that prioritizes solutions that do not appear to undermine the interest of weaker states. [121] African countries have had a rough ride with the complex ALS that applies to transfer pricing regulation. The last thing that they would want is another complex, alien body of rules that they have neither the tools nor the administrative capacity to apply.

The UN digital tax proposal illustrates how the peculiar interests of developing countries can be better articulated when developing countries have the platform to craft rules. However, despite the attractiveness of the UN draft, it is imprudent to assume that the proposal would make any real headway. The draft might well suffer the same fate as the UN Tax Committee's past attempt to reform taxing rights allocation. Regardless of what else may be out there, the OECD remains the platform of convergence and consensus. African countries may have to keep their patience and await a lingering OECD solution that may, in the end, do them no favors. Considering the power politics that has trailed the OECD's pillar 1 process it seems more likely than not that the "consensus" will come down to where the balance of power lies.[122] It is very much about power.

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121 The UN proposal is not without criticism. *See*, *e.g.*, Danish Mehboob, *UN Digital Tax Proposal Diverges from OECD Two-pillar Solution*, Int'l Tax Rev. (Aug. 17, 2020), https://www.internationaltaxreview.com/article/b1mzc71x7qqv2d/un-digital-tax-proposal-diverges-from-oecd-two-pillar-solution [A gross-based tax as the default option under the UN proposal veers away from the OECD pillar one approach, and may risk businesses passing the cost of the tax to consumers by raising prices on goods as Amazon has proposed to do in the UK with regard to its digital service tax (DST). However, other businesses, such as eBay, have chosen to avoid the same price hike to retain market share"].

122 Only a few of the many countries around the world that have enacted unilateral digital tax measures – including Nigeria and Kenya – have taken any steps to enforce them. To do so, especially for a low-income country, would be to incur the wrath of the rich and powerful, especially the U.S., which has put up the sternest opposition to unilateral digital tax measures. For a broader reflection on the politics of digital tax policy, especially as it impacts African countries, *see* Okanga O. Okanga, *The Political Economy of Nigeria's Digital Tax Experiment*, Afronomicslaw (June 30, 2020), https://www.afronomicslaw.org/2020/07/01/the-political-economy-of-nigerias-digital-tax-experiment/.

5. Conclusion

The international tax regime that previously had the effect of ensuring that the colonial legacy of expropriating resources in the form of tax extraction remained intact and buttressed from re-organisation has been undergoing a transitional shift. This historic hegemonic control of the global tax architecture subsequently eroded the confidence of developing countries in participating in developing the international tax rules that bind them. Tax base erosion was the subsequent result of the old tax order that has been the corpus setting the international tax agenda until the establishment of various UN led bodies and think tanks contributing to tax reform bringing in African inclusivity.

Inclusivity as part of the new tax order is a vital way to challenge the historic inequalities that have caused revenue to flow out of Africa untaxed. Inclusivity as a process and agenda setting phenomenon disentangles the bureaucratic structures of the OECD and the enduring inequalities of power asymmetries in negotiating tax policy at the international level. Inclusivity brings Africa to the table as an equal player and active decision maker. It ultimately gives African countries a better shot at advancing normative outcomes that meet the domestic revenue needs of its peoples.

African Practice in International Economic Law: 2020–2021

Tsotang Tsietsi [1*] ***& Akinyi J. Eurallayah*** [**]

In this second instalment of the section on African Practice in International Law we continue with our exposition of some of the most significant developments in international economic law on the African continent. From regional trade matters, such as the launching of trade under the African Continental Free Trade Agreement, to investment dispute resolution involving African governments, as well as urgent imperatives surrounding intellectual property law. The section updates readers on some of the issues that were captured in the last issue, and which are ongoing. It, further, gives an overview of significant milestones for Africa over the past twelve months.

Introduction

Significant developments have occurred in the practice of international economic law (IEL) on the African continent within the last year (2020 – 2021). Some of these involve intra-African relations, while others pertain to relations between Africa and external public and private actors. This section begins by providing updates on the United States (US) – Kenya Free Trade Agreement that had been at the negotiation stage in 2020.[1] It questions what the new United States administration might mean for the negotiations. The Covid epidemic continues to rage on across the globe. While the developed nations have taken great strides in implementing measures to protect their residents, developing countries – such as those in Africa – are lagging behind in containing the effects of the pandemic. That is why there have been growing calls for a waiver of intellectual property protection. We discuss the proposals and counter-proposals related to this paramount issue. African trade and investment disputes are further areas where we note important conflicts that have arisen and how some of them have been resolved and efforts to reform international dispute settlement in the interests of African States. Finally, we end on a triumphant note by taking stock of encouraging milestones that have been reached by Africa and Africans during the covered period.

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I. UPDATE ON THE UNITED STATES – KENYA FREE TRADE AGREEMENT

The negotiations on the United States (US) – Kenya free trade agreement (FTA) have not resumed in 2021. The Covid epidemic rages on and both nations have been consumed with plans and strategies to vaccinate their populations and to restore their bruised economies. This has put other initiatives, such as the negotiation of free trade arrangements, on the backburner for a while. Another impediment to the resumption of the negotiations was the expiration of the Trade Promotion Authority (TPA) in July 2021.[2] This now means that US President Biden will need to seek Congressional approval for its renewal for the negotiations to be resumed. As there is this moment of pause, before the possible reignition of negotiations, it is prudent to reflect on the possible implications of this potential agreement, given that the new US Presidency may signal a change in US - Africa trade relations.

To begin with, there have been many positive changes in the US's foreign policy towards Africa since the Biden presidency. For example, the lifting of travel bans from some African countries,[3] the raising of African refugee quotas, and the assignment of a special envoy to the horn of African in support of peace and security in that region.[4] But these are largely political matters. As far as economic matters are concerned, the fruits might not be as sweet. Under the Trump administration, the United States Trade Representative, Robert Lighthizer, made it clear that the intention of the United States was that the Kenya – US free trade agreement would "serve as a model for additional agreements across Africa."[5] With the Africa Growth and Opportunities Act (AGOA) set to expire in 2025,[6] this will necessitate the establishment of new ways of governing trading relationships between the US and Africa. African nations could, therefore, find themselves having to enter into similar reciprocal free trade agreements with the United States, as that being negotiated with Kenya. In essence, the US - Kenya FTA could be setting the trend for what these agreements could look like. That is,

2 This was a time-limited authority that was given to the executive by Congress to negotiate and to implement certain reciprocal trade agreements. *See* Cong. Rsch. Serv., IF10038, In Focus: Trade Promotion Authority (last updated Dec. 14, 2020), https://crsreports.congress.gov/product/pdf/IF/IF10038 (last visited Dec. 17, 2021).

3 *See* Joseph R. Biden Jr., Proclamation on Ending Discriminatory Bans on Entry to The United States (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/ (last visited Dec. 17, 2021). This has been to the benefit of nationals of, for example, Libya, Somalia, Eritrea, Nigeria, Sudan, and Tanzania.

4 *See US Envoy for Horn of Africa visits Egypt*, Egypt Today (May 4, 2021), https://www.egypttoday.com/Article/1/102572/US-Envoy-for-Horn-of-Africa-visits-Egypt (last visited Dec. 17, 2021).

5 *See* Press Release, U.S. Trade Representative (USTR), President Trump Announces Intent to Negotiate Trade Agreement with Kenya (Feb. 6, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya (last visited Dec. 17, 2021).

6 Trade Preferences Extension Act extended it to September 30, 2025. *See* Trade Preferences Extension Act of 2015, H.R. 1295, 114th Cong. § 103(a) (2015).

7 The United States has FTAs with twenty countries. These are: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru and Singapore.

comprehensive and reciprocal by nature. The US has entered into such agreements with other nations.[7] African countries tend to struggle with implementation capacity, and this may be exacerbated by this new form of engagement with the US.[8]

It is not yet apparent what the Biden administration will mean for US relations with Kenya. However, President Biden has given the American people assurances that American foreign policy remains, first and foremost, self-interested in its intentions.

> *When we invest in economic development of countries, we create new markets for our products and reduce the likelihood of instability, violence, and mass migrations.*[9]

Therefore, if the negotiations towards the conclusion of the free trade agreement do continue, it will be because the US views it as being in its own best interests. There were already concerns that the agreement would possibly be skewed in favour of the more developed nation, in terms of the general thrust of its provisions, and that this may not necessarily be in the interests of a developing state, such as Kenya. Kenya is interested in, for example, promoting foreign direct investment, expanding market access for its goods, and securing technical assistance. The United States is more interested in, for example, the protection of intellectual property, subsidies and digital trade.[10] It may be difficult for the smaller nation to obtain wins in its priority areas in the face of the asymmetries in the parties' negotiating capacities.

Therefore, what could be a possible solution to these potential threats? The type of FTA that is being negotiated between the US and Kenya is likely to be the new norm for US trading relations in general.[11] The original AGOA legislation had expressed that non-reciprocity in US trade relations with Africa would be a temporary benefit and that, eventually, the policy would be to enter into reciprocal arrangements "…including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa."[12] Therefore, FTAs, such as the one that was being negotiated between the US and Kenya, seem inevitable. However, it may not be inevitable that they, necessarily, be bilateral. African countries could come together and insist on a bilateral agreement between the continent, on the

8 *See* Emmanuel Nnadozie et al., *Domestic Resource Mobilization in Africa: State, Capacity Imperatives and Policy Actions*, 3 Afr. J. Mgmt. 184-212 (2017).

9 *See* Remarks by President Biden on America's Place in the World (Feb. 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/ (last visited Dec. 17, 2021).

10 US objectives for the negotiations were announced by the USTR. *See* USTR, United States - Kenya Negotiations: Summary of Specific Negotiating Objectives (May 22, 2020), https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf (last visited Dec. 17, 2021). The Kenya objectives were announced by the Kenyan Ministry of Industrialisation, Trade and Enterprise Development. *See* Proposed Kenya – United States of America Free Trade Agreement: Negotiation Principles, Objectives and Scope (June 22, 2020), https://www.tralac.org/documents/resources/external-relations/us-agoa/3787-proposed-kenya-us-fta-agreement-negotiating-principles-objectives-and-scope-22-june-2020/file.html (last visited June 23, 2021).

11 Even the North American Free Trade Agreement was replaced by the United States-Mexico-Canada Agreement (USMCA) of 2020.

12 African Growth and Opportunity Act, H.R. 434, 106th Cong. § 103(4) (2000).

one hand, and the US on the other. A broad-based FTA may be more in the interests of the African states, than succumbing to a divide and conquer approach. If this were to happen, it could even alleviate the power disparities and deficits in implementation capacity and further cement trade policy cohesion on the continent.

It is not unusual for several African countries to negotiate collectively with the United States. In 2003 the US and the Southern African Customs Union (SACU)[13] launched negotiations to conclude a reciprocal FTA.[14] The negotiations ultimately proved unsuccessful and were discontinued. However, that they began and took off for some time proves the point that the proposal for a unified approach is a realistic one. The US also signed Trade and Investment Framework Agreements (TIFA) with the EAC in 2008[15] and with the Common Market for Eastern and Southern Africa (COMESA) in 2001.[16] This shows that it would not be the first time that the US negotiates with a grouping of African countries, rather than one-on-one with a single African nation. There is evidence that the United States' policy towards Africa seems to be softening in this new era of the Biden administration. Africa can capitalise on this by proposing that FTA's be negotiated and concluded with the US as a bloc. This could ultimately support the African regional integration agenda and align with the spirit of unity that is encapsulated in the AfCFTA.

II. INTELLECTUAL PROPERTY WAIVER FOR COVID VACCINES

In a communication dated 2 October 2020, South Africa and India proposed that Members of the World Trade Organization (WTO) should:

> '…work together to ensure that intellectual property [IP] rights such as patents, industrial designs, copyright and protection of undisclosed information do not create barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of medical products essential to combat COVID-19'.[17]

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13 The members of the Southern African Customs Union (SACU) are: Botswana, Eswatini, Lesotho, Namibia and South Africa. *See What is SACU?*, SACU, https://www.sacu.int (last visited Dec. 17, 2021).

14 From the onset, this US-SACU accord raised fears within SACU because the demands put forward by the USA especially as they relate to investments and intellectual property on drugs and seeds were extremely radical for the SACU region. *See generally US-SACU*, bilaterals.org (last updated May 2012), https://www.bilaterals.org/?-us-sacu- (last visited Aug. 16, 2021).

15 *See* Trade and Investment Framework Agreement between the East African Community and the United States, *available at* USTR (last visited Dec. 17, 2021), https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file413_15020.pdf.

16 *See* Agreement Between the Government of the United States of America and the Common Market for Eastern and Southern Africa Concerning the Development of Trade and Investment Relations, *available at* https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file367_7725.pdf (last visited Aug. 16, 2021).

17 *See* Communication from India and South Africa, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, ¶ 3, WTO Doc. IP/C/W/669 (Oct. 2, 2020) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True (last visited Dec. 17, 2021).

The two countries, together with other supporters who have joined the call for the IP waiver, have raised concerns on the development of new diagnostics, therapeutics and vaccines for COVID-19 and 'how these will be made available promptly, in sufficient quantities and at an affordable price to meet the global demand.'[18] The pro-IP waiver battalion argues that IP rights hinder and continue to hinder the timely accessibility to affordable medical products to the patients, and that many developing countries continue to face institutional and legal challenges when using flexibilities available in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) due to the requirements of Article 31*bis* and the cumbersome and highly protracted import and export processes for the pharmaceutical products.[19] They therefore called upon the Council for TRIPs Agreement to recommend to the General Council a waiver that should continue until widespread vaccination is in place globally, and the majority of the world's population has developed immunity.[20] In sum, the IP waiver is intended to help meet the increasingly urgent global demand for vaccines, treatments and other pharmaceutical products to fight the pandemic by taking away any potential IP barriers.

On the other hand, this proposal has been termed 'radical one' by some stakeholders in the pharmaceutical industry as well as nations like the United Kingdom, Japan, Norway, Switzerland, and the European Union.[21] Instead, these high-income countries are advocating for and pledging to share more of their vaccines with the developing countries and to provide more funding to charitable vaccine-provision schemes like COVAX.[22] Surprisingly, even some of the Hollywood's film-industry lobbyists and renowned philanthropists have equally rejected the proposal deeming it too broad in scope and extremely harmful for performers.[23] However, in a surprising and welcome turn of events, the United States reversed its earlier stance on the waiver and joined the likes of Russia and China in supporting the waiver.[24] The significance of the US support for the waiver cannot be ignored. The country is the world's largest pharmaceutical market.

With these competing interests at play, this section provides a brief analysis on the impact of the COVID-19 vaccines IP waiver and what it means to Africa.

Arguments for the COVID-19 Vaccine IP Waiver

Pursuant to Article IX 3 and 4 of the Marrakesh Agreement Establishing the WTO, under exceptional circumstances, a WTO Member can request a waiver from certain obligations established under the WTO Agreements. The waiver should contain a justification based on the exceptional circumstances, the conditions and the time when the waiver terminate.

18 *Id.*
19 *Id.* ¶ 10.
20 *Id.* ¶ 13.
21 *See* Ellen 't Hoen, *The Arguments Against Sharing COVID-19 Intellectual Property Don't Add Up*, Barron's (May 3, 2021), https://www.barrons.com/articles/the-arguments-against-sharing-covid-19-intellectual-property-dont-add-up-51620056595 (last visited Dec. 17, 2021).
22 *See A patent waiver on COVID vaccines is right and fair*, Nature (May 25, 2021), https://www.nature.com/articles/d41586-021-01242-1 (last visited Dec. 17, 2021).
23 *Id.*
24 *See* Ambassador Katherine Tai (@AmbassadorTai), Twitter (May 5, 2021, 2:10 PM), https://twitter.com/AmbassadorTai/status/1390021205974003720 (last visited Dec. 17, 2021).

Waivers longer than one year are reviewed by the Ministerial Conference annually until their termination. The waiver debate revolves around the technical interpretations of the TRIPS Agreement. In their proposal, India and South Africa argue that 'an effective response to the COVID-19 pandemic requires rapid access to affordable medical products including diagnostic kits, medical masks, other personal protective equipment and ventilators, as well as vaccines and medicines for the prevention and treatment of patients in dire need.' Médecins Sans Frontières (MSF) added that treatment providers and governments have faced IP barriers over drugs, masks, ventilator valves and reagents for testing kits.[25] Supporters of the waiver argue that enforcing the waiver would negate the barriers to the timely access to affordable medical equipment and products, as well as enhance manufacturing, supply of essential medical products, research and development.[26] The waiver request covers four key intellectual property rights namely copyright and related rights,[27] industrial designs,[28] patents,[29] and protection of undisclosed information related to prevention, containment or treatment of COVID-19.[30] To them, the waiver should continue until widespread vaccination is in place globally, and the majority of the world's population has developed immunity. Granted, WTO Members would review annually until it is terminated.

The waiver impasse is emblematic of how the Global North, where major pharmaceutical companies are located, has used international law and governing institutions to continue the marginalization and domination of the Third World by monopolizing vaccine manufacturing and supplies.[31] The biggest problem is that the manufacturing, research and development on the COVID-19 vaccine is highly concentrated in a small group of middle to high income countries in the Global North.[32] Adversely, the companies manufacturing these vaccines have sold the vaccines to their own governments and to those in other high-income countries. According to the pharmaceutical industry, the expected vaccine doses to be manufactured by the end of 2021 stands at about 10 billion doses.[33] However, according to the IMF, this is unlikely to happen and the production is expected to be about 6 billion doses by the end of 2021.[34] The impact of this shortfall is that more people in the low-income countries, who happen to be in the Third World, will have to wait longer for their initial doses.

25 *See* Briefing Document, Médecins Sans Frontières Access Campaign, India and South Africa proposal for WTO waiver from intellectual property protections for COVID-19-related medical technologies (last updated Nov. 18, 2020), https://msfaccess.org/sites/default/files/2020-11/COVID_Brief_WTO_WaiverProposal_ENG_v2_18Nov2020.pdf (last visited Dec. 17, 2021).

26 *See* Hannah Balfour, *Waiving COVID-19 vaccine intellectual property rights*, Eur. Pharmaceutical Rev. (June 11, 2021), https://www.europeanpharmaceuticalreview.com/article/156412/waiving-covid-19-vaccine-intellectual-property-rights/ (last visited Dec. 17, 2021).

27 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) pt. II, § 1, Apr. 15, 1994, *as amended* Jan. 23, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

28 *Id.* § 4.

29 *Id.* § 5.

30 *Id.* § 7.

31 For a general discussion on how international law entrenches the interests of the First World over those of the Third World, *see* James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, *in* International Legal Theory: Foundations and Frontiers 37 (Jeffrey Dunoff & Mark Pollack eds., 2019), *available at* SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767.

32 *See* Nature, *supra* note 22.

Interestingly, several European countries have pledged support to low and middle-income countries by promising to share their vaccines. The European Commission equally proposed to clarify and simplify the existing compulsory licensing procedures.[35] However, these measures do not address the systemic problem in most low and middle-income countries that support the IP waiver. Those supporting the waiver do so because they want the right to manufacture their own vaccines to meet their local demand devoid of legal suits from patent holders. For example, in Africa, less than 2% of the total population is fully vaccinated. This is due to, *inter alia,* the Continent importing almost 99% of its vaccines, and because African countries lack the pre-order purchasing power as compared to their high-income counterparts in the Global North.[36] As a result of the import challenges by the Continent, the African Union has put in place a plan to have 60% of Africa's vaccines are manufactured in Africa by 2040.[37] This will be achievable if the waiver is granted.

Further, granted, the waiver will allow WTO Members the discretion to neither grant nor enforce patents and other IP rights related to all COVID-19 medical products and accompanying services such as drugs, diagnostics, personal protective equipment for the duration of the pandemic.[38] This will provide countries with the policy space essential for the collaboration in research and development, increasing manufacturing and supplies of COVID-19 products.

Arguments Against the COVID-19 Vaccine Waiver

There is a chorus of naysayers that offer a plethora of reasons against the waiver. According to a position statement issued by Max Planck Institute for Innovation and Competition, a COVID-19 IP waiver will not scale up vaccine manufacturing and distribution since the holds up in the vaccine manufacturing and distribution are as a result of shortage of raw materials, insufficient production capacity and highly complex manufacturing process.[39] Therefore, no amount of waiver would solve these factual issues. Secondly, that IP rights form the foundation for collaborations and contracts, in that voluntary patent licences are usually accompanied by a contractual transfer of the know-how necessary to exploit a licensed technology.[40] Further, that a waiver of IP rights will not waive the regulatory

33 *See COVID-19 Vaccine Industry Cautions Immediate Action Needed to Remove Manufacturing Supply Barriers to Meet Production Targets and Keep on Course to Equitable and Fair Access to COVID-19 Vaccines*, Int'l Fed'n Pharmaceutical Mfrs. & Ass'ns (Apr. 23, 2021), https://www.ifpma.org/resource-centre/covid-19-vaccine-industry-cautions-immediate-action-needed-to-remove-manufacturing-supply-barriers-to-meet-production-targets-and-keep-on-course-to-equitable-and-fair-access-to-covid-19-vaccines/.

34 *See* Ruchir Agarwal & Gita Gopinath, A Proposal to End the COVID-19 Pandemic, IMF Doc. SDN/2021/004 (May 2021), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/05/19/A-Proposal-to-End-the-COVID-19-Pandemic-460263.

35 *See* Nature, *supra* note 22.

36 *Id.*

37 *Id.*

38 *See* Médecins Sans Frontières Access Campaign, *supra* note 25.

39 *See* Reto M. Hilty et al., *COVID-19 and the Role of Intellectual Property: Position Statement of the Max Planck Institute for Innovation and Competition of 7 May 2021* (Max Planck Inst. Innovation & Competition, Rsch. Paper No. 21-13, 2021), *available at* SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841549 (last visited Dec. 17, 2021).

requirements for vaccine authorisation since any entity intending to place a medicinal product for human use on the market – whether an originator, generic or biosimilar product – needs to obtain marketing authorisation from drug authorities. Vaccines are biological medicinal products.[41] Therefore, rather than speeding up vaccine supply, a waiver would likely cause a delay, if the current patent holders cease cooperating and/or supplying self-produced vaccines. To them, even if they succeed in manufacturing these vaccines, quality cannot be assured.[42]

Another argument raised against the waiver is that a waiver of COVID-19 vaccine IP rights might not result in a substantially lower price for biosimilar versions compared to the currently supplied products.[43] Moreover, the TRIPS Agreement contains enough flexibilities such as Articles 30, 31 and 31*bis* to prevent negative effects of patents. In addition, a comprehensive waiver of IP rights will likely have a detrimental effect on incentives for drug innovation. For example, given the fast mutation of the coronavirus, a comprehensive waiver of IP protection could leave the society vulnerable to such emerging variants of Covid-19 if the current IP holders/vaccine developers abandoned research efforts as a result of such a waiver.[44] Finally, that the scope of the waiver is not clear enough.[45] South Africa and India argue for the waiver of IP 'in relation to prevention, containment or treatment of Covid-19'. To the opponents, the clause 'in relation to' can be interpreted extremely broadly as to encompass any remotely related subject matter.[46] Finally, they argue that global governance could provide better support to developing countries through global equitable access to Covid-19 vaccines.[47]

The Way Forward

The path ahead seems murky. With the major pharmaceutical industries vehemently opposing the waiver, the WTO still has a long way to go in the negotiations. In the fortunate event the WTO Members agree on the waiver, it remains bleak on how long it will take for the vaccine production to ramp up. However, this may not be the problem now. The bigger impediment lies on bringing every country on board. As to the impact the waiver will have on Africa, I would compare the current stalemate to the one that existed almost two decades ago. About twenty years ago, due to patent monopolies, the annual price per person for the triple cocktail of HIV treatment drugs was over USD

40 *See* Stephen Ezell, *Ten Reasons Why a COVID-19 TRIPS IP Waiver is Unwarranted*, Info. Tech. & Innovation Found. (Apr. 9, 2021), https://itif.org/publications/2021/04/09/ten-reasons-why-covid-19-trips-ip-waiver-unwarranted (last visited Dec. 17, 2021).

41 *See* European Medicines Agency procedural advice for users of the centralised procedure for similar biological medicinal products applications, at 5, EMA/940451/2011 (Aug. 19, 2019); *Biosimilar and Interchangeable Products*, U.S. Food & Drug Admin., https://www.fda.gov/drugs/biosimilars/biosimilar-and-interchangeable-products (last visited Dec. 17, 2021).

42 *See* 't Hoen, *supra* note 21.

43 *See* Ezell, *supra* note 40.

44 *See* Hilty et al., *supra* note 39.

45 *Id.*

46 *Id.*

47 *Id.*

48 *See* Médecins Sans Frontières Access Campaign, *supra* note 25.

10,000.[48] However, thanks to the access-to-medicines movements that comprised several stakeholders in Africa and beyond, the price of antiretroviral drugs plummeted by 99% over the next decade, enabling more people more access to the drugs.

This situation compares to the current COVID-19 pandemic. Granted, the COVID-19 vaccine waiver could be a much-needed wave of access to COVID-19 medical products and technologies. However, this alone will not be effective, but it will ease the complex global IP and export rules, thereby giving the WTO Members the breathing space to collaborate on transfer of technology and exports without the fear of WTO sanctions. In addition, more finances should be allocated to WHO-backed initiatives that ensure widespread access to vaccines such as COVAX.[49] The naysayers have a point when they argue that the IP waiver is not sufficient. Vaccine production is a highly complex process requiring not only access to patents but also state of the art technology, updated knowledge and other resources such as finances. Closing the knowledge asymmetry requires intentional proactive transfer of technology. The WHO appreciated this fact a year ago when it created the COVID-19 Technology Access Pool (C-TAP), and invited all vaccine manufacturers to collaborate to meet the huge global demand for the vaccine. However, little has been done to achieve this. From an idealistic perspective, rejecting both the C-TAP pool and the COVID-19 vaccine waiver proposal is not a feasible option. Something must give.

III. ETHIOPIA AND EGYPT'S DISPUTE REGARDING THE GRAND ETHIOPIAN RENAISSANCE DAM (GERD)

In April 2011, Ethiopia launched plans to construct what would be the largest hydroelectric power plant in Africa.[50] This was the Grand Ethiopian Renaissance Dam (GERD), which is located in the Benishangul-Gumuz Region of Ethiopia. The dam is being constructed on the Nile River. Although 85% of the Nile River flows in Ethiopia, eight other countries depend on its water for their own use.[51] Ethiopia has lauded the potential benefits of the project for these neighbouring states. For example, it proposes that the dam would lead to the removal of silt and sedimentation, which would increase the availability of irrigable land. Secondly, that the regulation of the flow of the water in the Nile river would guarantee a steady water supply and curb threats of flooding. Ethiopia's neighbours are not sold on these touted benefits. Egypt, for one, has expressed fears that the existence of the dam will have dire environmental and socio- economic impacts on its land and on its people,[52] as well as on the region as a whole.[53] Ethiopia has responded by justifying its stance by arguing that it has long

49 *See* Miriam Berger, *What it means for the U.S. to back waivers on coronavirus vaccine patents*, Washington Post (May 6, 2021), https://www.washingtonpost.com/world/2021/05/06/coronavirus-vaccine-patent-waiver-biden-wto/ (last visited Dec. 17, 2021).

50 *See Grand Ethiopian Renaissance Dam, Benishangul-Gumuz*, Water Tech., https://www.water-technology.net/projects/grand-ethiopian-renaissance-dam-africa/ (last visited Dec. 17, 2021).

51 Reuters Staff, *Factbox: The Nile River: treaties, facts and figures*, Reuters World News, (July 8, 2011) https://www.reuters.com/article/us-sudan-nile-fb-idUSTRE76742R20110709.

been excluded from arrangements regarding Nile water-sharing, [54] and that it is taking matters into its own hands.

In 2020, some notable external actors offered to mediate the dispute between Ethiopia and her neighbours. In the first two months of 2020, the United States of America sponsored a mediation process, wherein it was originally set to participate as an observer.[55] Five meetings were held between November 2019 and February 2020. A final meeting was due to take place in Washington, DC however there were Ethiopian allegations of the USA's lack of neutrality in the mediation. As a result, Ethiopia refused to continue with the mediation process. The State subsequently also rejected the proposal of negotiations that were to be facilitated by the European Union (EU).[56] It did, however, agree to an African Union (AU)-led mediation process. This began in July 2020 and centred on the physical aspects of water sharing. The negotiations continued in October and November 2020 however, they failed to yield a mutually satisfactory compromise on the operation and filling of the dam. The latest efforts to resolve the dispute took place in a meeting in Kinshasa on April 6, 2021. Therein, Congolese President Félix Tshisekedi, in his role as the new Chairman of the African Union, was unable to mediate a successful resolution to the dispute.

The current position with the dispute over the Grand Ethiopian Renaissance Dam project is that there is no date which has yet been set for the resumption of talks. Ethiopia has announced its intentions to continue to fill the reservoir. This has resulted in an ultimatum being issued by Egypt and Sudan for Ethiopia to desist with such plans or else they will have no choice but to resort to the use of force to protect their interests/historical rights over the waterway. This crisis underscores some key threats to regional integration in Africa. Firstly, historical conflicts can cause modern rivalries. Ethiopia has been historically excluded from arrangements that were concluded on the sharing of the resources of the Nile river. Left alone to brew over time, historical conflicts have a tendency to reach a crisis point. This threatens the prospects of regional peace and security and, therefore, regional integration and prosperity. Secondly, external actors may further fuel African conflicts. This is because there are often fears and/or allegations, from the disputants, regarding the partiality or

52 People Displacement, Biodiversity Impacts Water Share Reduction (The decreased amount of water supply will directly affect the agriculture sector in Egypt and all its related activities from food production to employing large numbers of people since agriculture alone consumes 80% of the Nile's fresh water). *See* Hagar ElBarbary, *Hydro-conflicts in the Nile Basin: An Analysis of the Grand Renaissance Dam (GERD) Project*, Master's Thesis in Peace, Mediation and Conflict Res. Dev. Psych., 16, 21 (Spring 2021), https://www.doria.fi/bitstream/handle/10024/181097/elBarbary_hagar.pdf?sequence=2&isAllowed=y.

53 *See* Tamim Heikal, *Ethiopia/Egypt: GERD fight sucks in global actors* (May 10, 2021), https://www.theafricareport.com/86360/ethiopia-egypt-gerd-fight-sucks-in-global-actors/.

54 For e.g., under a 1959 water allocation agreement, 1959 Egypt-Sudan Nile treaty Egypt's share of water amounts to 55.5 billion cubic metres (bcm), while Sudan's is 18.5 bcm, corresponding to about 90% of the river's annual flow.

55 Joint Statement from 15 January 2020 indicate, the discussion and debates under the US and the World Bank facilitation have been about the filling and operation of the dam under different hydrological conditions

56 Margaret Bersheer, *Egypt, Sudan seek UN help to resolve mega dam dispute with Ethiopia*, VOA (July 9, 2021), https://www.voanews.com/africa/egypt-sudan-seek-un-help-resolve-mega-dam-dispute-ethiopia.

self-interest of the mediators. The lack of trust in the processes stall progress in reaching a solution and can, ultimately, deepen the rift between the disputants. Lastly, the risk of political conflicts may spreading beyond the initial actors and region. Disputes may start between two States but, with time, other states may choose sides and the dispute can grow in its participants, scope and intensity.

This ongoing conflict relating to the GERD highlights the need for the peaceful settlement of disputes for the sake of regional integration and sustainable development. Conflicts over African resources have spilled over into armed conflicts.[57] Projects such as the GERD are vital for boosting investment, trade and development on the continent. However, in the absence of cooperation, such vital infrastructure can end up causing negative outcomes, instead of positive ones. The question is: how do we ensure peaceful resolution of disputes and the mutually beneficial exploitation of African resources? Our advice is that African disputes should be resolved through cooperative continental strategies. For example, through the efforts of the AU the parties can be assisted to reconcile their divergent positions. Such a process should be given support and time to lead to such an amicable resolution. This would be in line with the AfCFTA's mantra of "African solutions to African problems." External actors may be conflicted when it comes to participating in African disputes.[58] Therefore, they should, as much as possible, not be relied upon to guide conflicting parties towards a settlement. This can be seen with, for example, the United States' involvement not building confidence in the dispute resolution process. African alternative dispute resolution (ADR) mechanisms may offer effective solutions to African conflicts.

Lastly, where conflicting States are parties to regional arrangements, the regional economic community (REC) could intervene to compel them to abide by any commitments that their conflict might be breaching under the regional instruments. For example, in this instance, Egypt and Ethiopia are both members of the Common Market for Eastern and Southern Africa (COMESA). The founding agreement has provisions that are relevant to the dispute regarding the GERD. For example, Parties pledge to "promote joint development in all fields of economic activity"[59] and to "co-operate in the development and management of natural resources, energy and environment."[60] Therefore, Ethiopia and her neighbours should adopt a collaborative

57 Sylvester Bongani Maphosa, *Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa*, Pol'y Brief Africa Inst. of S. Afr. 74 (2012), https://media.africaportal.org/documents/No.-74.-Natural-Resources-and-Conflict..pdf

58 *See generally* Makane Moise Mbengue, *African Perspectives on Inter-State Litigation, in* Litigating International Law Disputes: Weighing the Options, (Natalie Klein, ed., Cambridge Univ. Press, 2014). Exposing the subtle dislike African countries have towards external actors, Mbengue narrates that in 1960, Ethiopia and Liberia, initiated contentious proceedings against South Africa at the International Court of Justice, thereby being the first time African countries were invoking the jurisdiction of the International Court of Justice on contentious proceedings. However, what prompted a cautious attitude and a subtly hostile reaction of African states to international adjudication was a feeling of dismay after the 1962 and 1966 ICJ judgement in the Ethiopia and Liberia cases which exposed the inability of international actors to defend the peculiar interests of African states.

59 Treaty Establishing the Common Market for Eastern and Southern Africa Art. 3(b)

60 *Id.* at 4.6((h)

approach to all economic endeavours. Article 106, in particular, recognises the importance of a secure supply of energy for development. It enjoins members to cooperate in the development and rational management of energy resources.[61] Lastly, article 163 recognises that:

> regional peace and security are pre-requisites to social and economic development and vital to the achievement of [the] regional economic integration objectives of the Common Market. In this regard, the Member States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations on issues pertaining to peace and security of the Member States with a view to preventing, better managing and resolving inter-State or intra-State conflicts.

This vindicates the argument made in this section: that international economic law has a role to play in the peaceful settlement of disputes. Such settlement is vitally important because the absence of peace will sabotage efforts to build an Africa that is united and prosperous. The commitments that are found in instruments of the RECs should guide disputing parties in their planning, launching and operation of projects. This is so that such conflicts do not impede the good progress that Africa is making towards sustainable development.

IV. Trends in African Investor-State Dispute Settlement

This section presents an overview of the developments in investor-state dispute settlement (ISDS) in Africa between 2020 and 2021. Although Africa has been a prominent participant in ISDS, there has been a lot of criticism levelled against the nature and consequences of its participation. These include concerns about, for example, the seat of arbitration, the costs of the proceedings, and the lack of representation of African arbitrators, to mention a few.[62] The question remains: what trends can be seen in ISDS over the covered year and have there been any initiatives undertaken to reform the system to make it fairer to African parties? This article will predominantly rely on disputes before the International Centre for the Settlement of Investment Disputes (ICSID) for illustrative purposes. This is because it is a popular forum for African ISDS.

61 Articles 122 and 123 are also relevant. They provide that members of the REC ought to cooperate and "take concerted measures to foster co-operation in the joint and efficient management and sustainable utilisation of natural resources within the Common Market." This would include the sustainable utilisation of the Nile waters.

62 Akinkugbe, Olabisi D., *Africanization and the Reform of International Investment Law*, 53 Case. W. Res. J. Int'l L. 7 (June 8, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766357; Andrew Mizner, *PAW2020: The future of ISDS in Africa,* Africa Law and Business (July 7 2020), https://iclg.com/alb/13832-paw2020-the-future-of-isds-in-africa.

Arbitrations Initiated

Altogether nine (9) arbitrations involving African States were initiated between 2020 and 2021. In all nine cases, the African state was the respondent. This aligns with the arguments that have been made that African States are more likely to participate in ISDS as respondents rather than as complainants. This trend has continued. The States that were involved include regional hegemons, such as Egypt and Nigeria, but they also include smaller and poorer States, such as Mozambique.[63] The States that appeared the most often are Egypt[64] and Tanzania.[65] The newly-initiated cases involved mining and quarrying (for example, of oil, gas and metal ore) and services (such as finance, insurance, environmental construction and transportation).

In terms of disputes that have been judged to finality, there were fifteen (15) such cases. Similar to the above, in all 15 of those cases, the respondent was an African State. Settled disputes related to: agriculture and forestry (for example, cotton) environmental (for example, waste management), manufacturing, mining and quarrying (for example, of oil and metal ore) and services (such as finance, real estate, and information and communication technology. Out of the 15 disputes, four (4) were discontinued – three on the basis of ICSID Arbitration Rule 43(1), where the Tribunal issues an order taking note of the discontinuance of the proceeding.[66] In four (4) other cases, ICSID tribunals held in favour of the claimant investor.[67] On six (6) occasions, tribunals held in favour of the African respondents. In one of the latter cases the claimant sought an annulment of the proceedings but failed to secure such.[68] There was one case where the tribunal held neither for the claimant nor for the respondent. This was the case of *Cementos La Union v Egypt*. The Spanish investor brought a claim based on the alleged overpricing of operating licences for cement manufacturing and an allegedly unusual system for the granting of such licences through tenders. The tribunal found that the government was indeed liable, but the award did not decide in favour of either party and, thus, no damages were awarded.[69]

63 The other States that have been involved in ISDS before ICSID are: Cameroon, Tanzania, Libya, and Algeria.

64 Gesenu v. Egypt (an Italian investor v. Egypt) & Qatar Airways v. Egypt (a Qatari firm v. Egypt).

65 Nachingwea et al., v. Tanzania (an entity from the United Kingdom v. Tanzania) & Winshear v. Tanzania (a Canadian investor v. Tanzania).

67 This was the case in Petroceltic Holdings Limited and Petroceltic Resources Limited v. Egypt (the investor is from the UK), SAUR & STEREAU v. Algeria (French investor) & Dagher v. Sudan (the investors are from Jordan and Lebanon). Ampal American et al., v. Egypt (was also discontinued, but there is no information on the basis for the discontinuation. The dispute was initiated by investors from the United States and Germany.).

67 In two of those cases, the defeated State party requested a judicial review of the judgement by a national court. In one of those cases (Etrak v. Libya) the judgement was upheld. In the other case (Sorelec v. Libya) the judgement was set aside.

68 Orascom v. Algeria. The investor – a national of Luxumberg, had complained of an alleged campaign of interference and harassment by the government against a local telecommunications company in which they had invested. This included including tax reassessments and an attempted forced sale of part of the company to Algeria.

69 Cementos La Union v. Egypt Cementos La Union S.A. & Aridos Jativa S.L.U v. Arab Republic of Egypt (ICSID Case No. ARB/13/29). Munia El Harti Alonso, *Award without Damages Rendered on Behalf of Egypt in Cementos la Union,* AFRNOMICSLAW (December 3, 2020), https://www.afronomicslaw.org/2020/12/03/award-without-damages-rendered-against-egypt-in-cementos-la-union.

With respect to ISDS awards, one of the critical concerns is the cost of awards. This can be significant in value, especially for poor African developing and least developed states.[70] Another concern is the lack of transparency of awards. In the above cases, only the damages that were awarded in four (4) cases have been made public. In all these cases, the awards were in favour of the investor.[71] The fact remains that, even now, African ISDS continues to claim millions from African governments. This poses a significant threat to African countries' abilities to invest in, and implement, their socio-economic obligations, such as the provision of education, healthcare, infrastructure etc., to their citizens. Interestingly, this is not an exclusively African concern. Other developing and emerging states such as Ecuador, Nicaragua, India, Indonesia and Venezuela have equally raised these concerns.[72]

It is imperative to note that these disputes stem from numerous Bilateral Investment Treaties (BITs) which African countries have signed with developed nations.[73] Some African scholars have voiced their concerns over the inability of African BITs to increase foreign direct investment (FDI) inflows into Africa.[74] To them, BITs are not instruments that inform investor decisions, but rather, tools that are used by multinational companies against developing and least developed countries.[75] Thus, several attempts have been made to reform the ISDS system to make it fairer to African parties.[76] These efforts exist at the national, bilateral, sub-regional and continental level, either through intra-African BITs or regional investment protocols which seek to address their 'subordinate' position in ISDS[77]. For example, at a regional level, given the COVID-19 surge that exposed the specific challenges and situations unique to Africa that may arise during virtual hearings, the African Arbitration Academy developed a bespoke Protocol on Virtual Hearings in Africa.[78]

69 For example, the case of Frazer Solar GmbH v. The Kingdom of Lesotho which was an adhoc arbitration that was initiated by a German claimant against Lesotho on July 30, 2019 with the seat of arbitration being Johannesburg, South Africa, and the applicable rules being AoA (Southern Africa) Arbitration Rules 2018. The State did not participate in the arbitration. An award, to the tune EUR 50 million, was granted in favour of the claimant on January 28, 2021. *Frazer Solar v. Lesotho,* Jus Mundi, https://jusmundi.com/en/document/decision/en-frazer-solar-gmbh-v-the-kingdom-of-lesotho-arbitration-award-tuesday-28th-january-2020(last visited Aug. 15, 2021).

71 Sorelect v. Libya (USD 555,800,000, however, this was set aside on review by the Paris Court of Appeal), Etrak v Libya (USD 21,900,000), Strabag v. Libya (USD 84,000,000) & De Sutter et al., v. Madagascar (USD 7,000,000).

72 Hankins-Evans, *supra* note 2; *see also Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, UNCTAD IIA Issue Note 2 (Dec. 2010) https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf.

73 Anna Hankins-Evans, *The Africanization of international investment disputes – from past to present*, Verfassungsblog (July 23, 2020), https://verfassungsblog.de/the-africanization-of-international-investment-disputes-from-past-to-present/; see also B.S. Chimni, *Customary International Law: a Third World Perspective,* The Am. Soc. of Int'l L. (2018), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DEDB6DB43A3B5A613B68FDBE56E20A20/S000293001800012Xa.pdf/customary_international_law_a_third_world_perspective.pdf (accessed 12 August 2021); Kanad Bagchi, *A bit of resistance: a response to Prof. Prabhash Ranjan's plea for embedded liberalism*, Völkerrechtsblog (Jan. 26, 2018), https://voelkerrechtsblog.org/a-bit-of-resistance/ (accessed 12 August 2021); Velimir Živković*, Of BITs and pieces, resistance and simplification*, Völkerrechtsblog, (Feb. 1, 2019) https://voelkerrechtsblog.org/of-bits-and-pieces-resistance-and-simplification/.

73 *Stop the unfair investor-state dispute settlement against Africa*, Bilaterals.org, https://www.bilaterals.org/?stop-the-unfair-investor-state.

74 *Id.*

V. The New World Trade Organization's Director General

A monumental development for Africa has been the appointment of a woman and an African to the helm of the World Trade Organisation. This occurred pursuant to Articles VI.2: 2 and IX.1 of the WTO Agreement. The former provides that "the Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General." The latter provides that "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947." In December of 2002, the General Council adopted procedures for the appointment of Directors Generals.[79] In application of these procedures, by 8 July 2020, eight candidates had been nominated by their governments for the position of the Director General of the World Trade Organization.[80] A series of confidential consultations began on 7 September 2020 until 28 October 2020. Following these, on 15 February 2021, Dr Okonjo-Iweala of Nigeria emerged as the candidate who had won the consensus of the General Council to be appointed as the seventh Director-General of the organization.

As DG, Dr. Okonjo-Iweala is the Chief Administrative Officer of the WTO. However, while an encouraging example that confidence has been placed on a female and African to manage the organization, her role in the organization is limited and she is not in a position to achieve much for African interests through her role. This is because WTO policy decisions are not made by the DG but by the member states, either through the Ministerial Conference or the General Council. Thus, the role of Dr. Okonjo-Iweala is mainly advisory in nature. However, through her diplomacy she can advocate for issues that she has spoken passionately about throughout her career and during the process of her vetting for the position. These include: fair trade, environmental sustainability, human welfare, gender,[81] health[82] and global development.[83]

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75 *See generally*, Won Kidane, *The China-Africa Factor in The Contemporary ICSID Legitimacy Debate*, Penn Law: Legal Scholarship Repository (2014)https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1866&context=jil.

77 Makane Moïse Mbengue & Stefanie Schacherer, *Evolution Of International Investment Agreements In Africa: Features And Challenges Of Investment Law*, "Africanization" Handbook Int'l Inv. L. & Pol'y 2 (2019)

78 *See generally The African Arbitration Academy Protocol on Virtual Hearings in Africa* (April 2020), Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf (africaarbitrationacademy.org) (last visited August 12, 2021).

79 World Trade Organization, WT/L/509, January 20, 2003.

80 Jesús Seade Kuri (Mexico), Ngozi Okonjo-Iweala (Nigeria), Abdel-Hamid Mamdouh (Egypt), Tudor Ulianovschi (Moldova), Ms Yoo Myung-hee (Republic of Korea), Amina C. Mohamed (Kenya), Mohammad Maziad Al-Tuwaijri (Kingdom of Saudi Arabia) & Dr Liam Fox (United Kingdom). https://www.wto.org/english/news_e/news20_e/dgsel_17jul20_e.htm, accessed July 12, 2021.

81 For example, as seen by her book, *Women and Leadership: Real Lives, Real Lessons with Julia Gillard*, MIT Press (Feb. 2, 2021).

82 She loaned her voice to a letter in the wake of COVID-19. See e.g., Erik Berglof & Jeremy Farrar, *The COVID-19 Pandemic – a letter to G20 Leaders*, Vox E.U. CEPR (Mar. 26, 2020), https://voxeu.org/article/covid-19-pandemic-letter-g20-leaders.

83 See, for example, her speech inaugural speech upon taking office on March 1, 2021. https://www.wto.org/english/news_e/spno_e/spno1_e.htm. (Last visited Aug. 13, 2021).

VI. The Commencement of Trading under the African Continental Free Trade Agreement

"*Today, as Africans, we are witnessing the beginning of a new chapter in terms of trade and investment relations of the African continent*." [84]

This sentiment was uttered by the Secretary-General of the African Continental Free Trade Area, H.E. Wamkele Mene, on the occasion of the official launch of trading under the African Continental Free Trade Agreement (AfCFTA) on the 1st of January 2021. Trading under the AfCFTA was originally scheduled to begin in July 2020. However, because of the corona virus pandemic the launch was postponed. An Extraordinary Summit of the Assembly of the African Union (AU) was held on December 5, 2020. In that meeting, the Assembly decided that trading under the AfCFTA would officially begin on January 1, 2021.[85] What did this date mean for African trade and integration? It didn't mean that, as of January 1st all goods across all fifty-four participating African nations would now flow free of any restrictions. What it did mean was that trading under the AfCFTA had started for those countries who had finalised their tariff schedules and were ready to begin trading. These are, for example, the regional hegemons: South Africa, Ghana, Egypt and Kenya. Why are some countries not ready to begin trading under the AfCFTA? There are a several factors that have contributed to the inability of many African states beginning to trade under the AfCFTA.

The first is the fact that the AfCFTA is massive in scope and demanding in its commitments. The negotiations that led to its finalisation took place at record speed. Phase I of the negotiations was launched in 2015[86] and was concluded in 2018.[87] The agreement entered into force in 2019. For fifty-four sovereign nations to agree on such an expansive agreement in such a short period of time was unconventional. It took roughly the same amount of time for just eight nations to conclude on the Southern African Development Coordinating Conference (SADCC) Memorandum of Understanding,[88] and it took almost twice that amount of time for only three states

84 *Statement by the Secretary-General of the AfCFTA Secretariat, H.E. Wamkele Mene, at the 13th Extraordinary Session of the Assembly of Heads of State & Government on AfCFTA*, AfCFTA Secretariat (Jan. 1, 2021), https://afcfta.au.int/en/news/speechs/2020-12-05/statement-he-wamkele-mene-13th-assembly-hosg.

85 *Thirteenth extraordinary session on the AfCFTA: The Assembly of the Union Adopts Decision on Start of Trading,* AfCFTA Secretariat (Dec. 5, 2020), https://afcfta.au.int/en/news/press-releases/2020-12-05/afcfta-assembly-union-adopts-decision-start-trading.

86 June 15, 2015 in South Africa. African Union Assembly Decision, Assembly/AU/Dec. 569 (XXV).

87 Phase I encompasses: trade in goods (including customs cooperation, trade facilitation, and transit trade), trade in services and a dispute settlement mechanism. Phase II of the agreement will cover investment, intellectual property rights, and competition policy (Article 7 of the AfCFTA- rendezvous clause).

88 *History and Treaty,* SADC, https://www.sadc.int/about-sadc/overview/history-and-treaty/.(last visited June 24, 2021).

89 The East African Community was originally active from 1967 until 1977 when it collapsed. In 1986 a working group was established to identify potential areas for future negotiations. In 1991, the Ministers of Foreign Affairs of Tanzania, Kenya and Uganda met to agree on a program for the re-activation of the Community. The first round of talks towards this end began in 1993, and a new EAC agreement was signed on November 30, 1999. The agreement entered into force on July 7, 2000.

to negotiate the reactivation of the East African Community (EAC).[89] It would appear that there was great incongruence between the level of ambition during negotiations and the starting point at which most African nations were, in terms of their preparedness to implement commitments. Four years may not have been adequate time for all parties to 'get their houses in order.' Implementation would have required a series of preparatory domestic actions. For example, a member state would have had to conduct proper stakeholder consultations to sensitise and receive buy-in from all concerned institutions and other contingents. Stakeholders need to fully understand what will be involved in implementation so that they can contribute to its success. Impact assessment studies would be needed to highlight preparedness deficits and to anticipate the possible effects of the treaty. It is only by understanding the magnitude of what is involved in implementation that governments could strategize and set timelines for needed actions.

As it stands many States lack the necessary regulatory frameworks to implement the agreement (for example, policies and laws on trade dispute resolution, or on the procedures applicable to trade). They have not yet established competent domestic institutional arrangements (for example, border agencies that are capacitated to apply rules of origin, trade remedies, standards etc. that are required under the agreement. This includes training officials to implement the new trading rules. Long-standing domestic weaknesses have not been rectified. These include: the high costs of trade, the poor quality of trade infrastructure, the lack of trade finance, high levels of illicit trade, the failure to sensitise local traders on how to take advantage of trade preferences and the absence of robust bilateral and regional coordinating channels. These continue to challenge successful trading under this new agreement.

Secondly, the agreement has, so far, only been ratified by thirty-seven out of the fifty-four state parties.[90] Ratification is required for a State to be bound by an international agreement. The failure of all states to have ratified the agreement delays implementation because it prevents cohesion of readiness to trade. Thirdly, despite Phase I of the negotiations having been officially concluded, many aspects are yet to be completely finalised. For example, only forty State parties have submitted their tariff offers under the protocol for trade in goods.[91] Some services tariff schedules remain outstanding. In terms of rules of origin, they currently only cover approximately 81% of tariff lines. While these important issues are outstanding, trade in goods cannot begin in full force. There can only be limited trade that occurs under the tabled tariff offers and where rules of origin have been finalised. June 2021 had been given as the

90 Status of AfCFTA ratification as of June 23, 2021. In chronological order these are: Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Côte d'Ivoire, Mali, Namibia, South Africa, Congo, Rep., Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, Gambia, Sahrawi Arab Democratic Rep., Sierra Leone, Zimbabwe, Burkina Faso, São Tomé & Príncipe, Equatorial Guinea, Gabon, Mauritius, Central African Rep., Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, and Algeria. *See Infographics Status of AfCFTA Ratification,* Trade Law Centre (Tralac) (Oct. 4, 2021), https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

91 Tariff schedules have been submitted by the individual nations of Malawi, Mauritius, and São Tomé and Príncipe and CEMAC, EAC, ECOWAS and SACU.

deadline to complete the tariff negotiations and the rules of origin. However, this has not been achieved. It remains to be seen when these milestones will be achieved.

Finally, the role of the corona virus epidemic cannot be under-played in explaining delays in the preparedness of States to begin trading under the AfCFTA. The epidemic necessitated States to shift their focus from preparing to begin trade to implementing measures of containment. Delays were also experienced with the establishment of the AfCFTA Secretariat. His Excellency Mr. Wamkele Mene was appointed as the Secretary General of the Secretariat in March 2020, but the Secretariat was only opened five months later, in August 2020.[92] The Secretariat is responsible for, *inter alia*, overseeing the implementation of the AfCFTA. Thus, delays in its establishment delayed a facet of implementation support that the State parties ought to have received in order to meet the deadline for the launch of trading.[93]

Phase II of the AfCFTA negotiations had been scheduled to be launched in July/ August, 2021. It remains to be seen whether this deadline will be met. This second phase will concentrate on the adoption of protocols on investment, competition and intellectual property rights.[94] In the same way that the agreement and the protocols that were adopted in phase I of the negotiations are collectively binding on the States that have ratified the AfCFTA, Article 8 of the agreement explains that the Phase II protocols will also, “upon adoption, form an integral part” of the agreement, and “shall form part of the single undertaking.”[95]

Regardless of what happens with Phase II this year, there is much to be positive about regarding the launch of trading under the AfCFTA. Firstly, it is a huge development because, for the first time, the African State parties are actively thinking differently and more seriously about trade liberalisation and harmonisation. The countries don’t have much experience with the new ambitious reforms that they are eyeing. This is why it will take time for them to implement them. However, we see many States (such as Nigeria, Kenya and Ethiopia) already beginning to take measures which they had not undertaken before their participation in the AfCFTA. Ethiopia had never signed any African trade agreement, except for a very limited one with Eritrea and Djibouti. However, it has taken a bold step and ratified the AfCFTA. As a result, Chambers of Commerce in Ethiopia are strategizing on how to tap into regional markets. The government is also keen to form partnerships to build its implementation capacity. These encouraging actions can be attributed to the launch of trading under the AfCFTA.

Secondly, we can be optimistic that the challenges will be overcome because the States are working together, bilaterally and regionally, to overcome them. This is also due to the fact that there is mutuality in the stumbling blocks that are being

92 African Union, *Newly sworn-in AfCFTA Secretary General, Wamkele Mene, undertakes to serve Africa with resolute determination* (April 18, 2020), https://au.int/en/pressreleases/20200418/newly-sworn-afcfta-secretary-general-wamkele-mene-undertakes-serve-africa.

93 As it stands, the Secretariat is still in the process of filling many of its posts.

94 AfCFTA Agreement Art. VII.

95 As with the Phase I protocols, the new protocols will also enter into force after twenty-two States have ratified them. AfCFTA Agreement Art. XXIII.

experienced by the members, for example, the absence of capable institutions to implement trade remedies. Such reforms are critical for the success of the agreement. State parties are considering pooling their resources together to run a regional trade remedies institution. There is further scope for cooperation and collaboration in with regards to regional digital and physical connectivity, implementing standards, trade surveillance to identify and react to illicit trade etc. In addition to the members' apparent commitment to the AfCFTA trading regime, there is firm support for implementation from bodies such as the United Nations Economic Commission for Africa (UNECA),[96] AfreximBank,[97] the United Nations Conference for Trade and Development (UNCTAD), the United Nations Development Programme (UNDP) and the World Bank.[98] This support will bolster the States' implementation will and capacity. Finally, in December 2020, the African Union (AU), the European Union (EU) and the International Trade Centre (ITC) launched a trade intelligence tool called the African Trade Observatory (ITO). This enables firms to research on market access conditions across Africa, including trade data and information on importers and exporters across the continent.[99] This will assist firms to exploit trading opportunities under the AfCFTA. Therefore, in conclusion, even though trading has technically started, it will still take some time for it to visibly take off and for its impacts to be seen and experienced. However, without doubt, January 1, 2021 signified a momentous new era in the history of African regional integration and the States are poised to capitalise on this extremely important initiative.

Conclusion

This contribution has highlighted some issues that could potentially cause disruptions to regional trade and integration on the continent. These are: the dispute surrounding the

96 For example, UNECA supported the Democratic Republic of Congo to conduct a validation exercise for a strategy to implement the AfCFTA. https://www.uneca.org/stories/eca-supports-drc-to-organize-workshop-to-validate-its-national-afcfta-implementation, accessed June 24, 2021. So far, only eleven parties, including Regional Economic Communities (RECs), have validated their AfCFTA implementation strategies; *see also* Jake Luke, *On Implementing the AfCFTA in 2021,* Trade for Dev. News (Mar. 26, 2021) https://trade4devnews.enhancedif.org/en/op-ed/implementing-afcfta-2021 ("The strategies aim at complementing the broader development framework of each country or region, especially in relation to trade and industrialization policies. Some are already implementing their AfCFTA strategies and have a National Committee in place to ensure proper coordination of implementation, policy coherence and effective domestication of the agreement.").

97 The Bank supported the development of an Adjustment Facility Pan-African Payments and Settlement Platform to enable African companies to clear and settle intra-African trade transactions in their local currencies.

98 The World Bank's Regional Integration Cooperation Assistance Strategy (RICAS 2021 – 2023). This provides for support for regional connectivity (of transport, energy and digital infrastructure), trade promotion, market integration through trade facilitation, technical assistance and support to regional value chains and integration of financial markets. *See Supporting Africa's Recovery and Transformation: Regional Integration and Cooperation Assistance Strategy - Update for the Period FY21–FY23,* The World Bank (Dec. 7, 2020), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/249911623450779120/supporting-africa-s-recovery-and-transformation-regional-integration-and-cooperation-assistance-strategy-update-for-the-period-fy21-fy23.

99 *African Trade Observatory,* African Union, https://ato.africa/en (last visited June 24, 2021).

100 *Id.*

GERD and the US- Kenya proposed FTA. We have proposed some measures that could be considered in both instances. The fact that less than 2% of the Africa population is fully vaccinated has prompted our discussion on the importance of the IP waiver for Covid vaccines. The continent lacks purchasing power and faces import challenges in accessing vaccines. The African Union has put in place a plan to have 60% of Africa's vaccines being manufactured in Africa by 2040.[100] This will be achievable if the waiver is granted. Further, the waiver will provide countries with the policy space that is essential for collaboration in research and development, increasing manufacturing and supplies of COVID-19 products.

From the discussion on ISDS, it is evident that African countries have played a significant role in its development over the past year. Over the years ICSID has had several proposals for its reform. However, it is not predictable whether these reforms will materialize and lead to tangible benefits for African countries. The continued participation of African States in ISDS is to be anticipated. It remains to be seen how the attitude of African countries towards *international* ISDS will evolve. Finally, the continent celebrated the assumption of an African as CEO of the World Trade Organization. Further cause for celebration came with the long-awaited chapter in the development of the practice of international economic law on the African continent: the launch of trading under the AfCFTA. However, it must be understood that the launch of trading under the AfCFTA did not signify an event, but rather a process that was only just beginning. African nations are poised to address the remaining outstanding factors that need to be concluded before the fullness of the benefits of free trade can be experienced across the continent.

Case Note: Panel Report in Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (DS578)

Oluyori Ehimony*& Maryanne Kamau*

Abstract

After nearly 25 years, a trade dispute on imports of school exercise books from Tunisia to Morocco has set a new statistical record at the World Trade Organization (WTO) as the first intra-African trade dispute to be heard by a WTO Panel. The case concerns anti-dumping duties by Morocco on imported exercise books from Tunisia and raises issues surrounding the initiation of anti-dumping investigations, construction of normal value and determination of injury. This case commentary gives a bird's eye view of the Panel's findings on the (in) consistency of Morocco's measure with its WTO obligations and the emerging legal issues. It also briefly discusses the likely implications of the case and the signals it sends concerning the participation of African countries in the WTO.

1 Introduction

The limited participation of developing countries, particularly African countries, in the dispute settlement system of the World Trade Organization (WTO) is well documented since the inception of the WTO. Several reasons have been advanced for the diminutive participation including, low trade volumes, structural difficulties and expensive nature of the WTO dispute settlement system and the lack of legal expertise at the desired level.[1] One recent WTO dispute involving two African countries (as complainant and respondent), indicates a positive change in African participation in the WTO dispute settlement system.[2] This dispute appears to deviate from the notion that African states have a culture of non-litigation of economic disputes between and among themselves.[3]

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1 *See* Victor Mosoti, *Africa In The First Decade Of WTO Dispute Settlement*, 9 J. Int'l Econ. L. 427, 428-427 (2006); *see also* Proposal by the African Group, *Negotiations on the Dispute Settlement Understanding*, WTO Doc. TN/DS/W/15 (Sep. 25, 2002).

By way of background, the dispute arose as a result of the definitive anti-dumping (AD) measure imposed by Morocco on imports of schoolbooks from Tunisia.[4] The measure was imposed following a complaint from three Moroccan producers of school exercise books, regarding alleged dumping by Tunisian exercise book manufacturers which allegedly caused significant injury to producers in Morocco. [5] The complaint led to an AD investigation by the Moroccan Ministry of Industry, Investment, Trade and the Digital Economy (MIICEN) and the introduction of definitive AD duties on exporters of school exercise books from Tunisia at a rate ranging between 15.69% and 27.71%. Consequently, on 21 February 2019, Tunisia requested consultations with Morocco on the AD measure. The consultations between the parties failed to resolve the issues, prompting Tunisia to request the establishment of a panel to hear the dispute.[6]

To recall, a product is considered to be dumped if its export price to another country is *less than* its normal value. Normal value refers to the price of the product on the domestic market of the exporting country. [7] WTO law only condemns dumping if it *causes or threatens material injury* to the domestic industry of the importing country.[8] In response to injurious dumping, WTO Members may unilaterally impose AD measures which typically take the form of AD duties or price undertakings, and remain in force for five years.[9] These measures are imposed after a thorough investigation has established the existence of (1) dumping, (2) material injury suffered by the domestic industry in the importing country (or threat thereof) and (3) a causal link between the dumping and injury.[10]

In this dispute, Tunisia challenged the consistency of the AD measure with Articles 2, 3, 5 and 12 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement or ADA). In particular, Tunisia challenged the definitive findings by MIICEN concerning (1) dumping; (2) injury to the domestic industry; (3) a causal link between dumping and injury; and (4) the initiation of the AD investigation and requested that the Panel recommend that Morocco bring its measure into conformity with its WTO obligations.

This case commentary examines the Panel's findings on the (in) consistency of Morocco's AD measure with its WTO obligations. It also briefly discusses the

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2 African countries, and in particular, Egypt and South Africa, have often played limited roles historically, either as Respondents or third party participants.

3 *See* Olabisi D. Akinkugbe, *Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment,* 28 Afr. J. Int'l Comp. L. 138 (2020).

4 This is the second consultations request submitted by Tunisia against Morocco on a similar matter. *See* Request for Consultations by Tunisia, *Morocco – Provisional Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO Doc. WT/DS555/1 (July 10, 2018).

5 *See* Soufiane Chahid, *Dumping sur les cahiers scolaires : la Tunisie recourt à l'arbitrage de l'OMC*, Telquel (July 11, 2018), https://telquel.ma/2018/07/11/dumping-sur-les-cahiers-scolaires-la-tunisie-recourt-a-larbitrage-de-lomc_1602735 (last visited Nov. 30, 2021).

6 The Panel was established on October 28, 2019. For a procedural history of the dispute, see *DS578: Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO (last visited Nov. 30, 2021), https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS578_e.htm.

likely implications of the case and the signals it sends concerning the participation of African countries in the WTO. The commentary examines some of the pertinent issues addressed by the Panel and proceeds as follows. Section 2 examines first, some of the Panel's findings on procedural and preliminary issues raised by Morocco, and then addresses notable substantive findings made by the Panel on the issues raised by the parties. It also reviews, where appropriate, the reasoning adopted by the Panel and discusses emerging issues. Section 3 considers the likely implication of the dispute on African participation in the international trade dispute space.

2 Key Panel Findings

2.1 Procedural issues

On 19 June 2020, Morocco challenged the jurisdiction of the Panel to hear certain claims made by Tunisia, because they were either not contained in the request for the establishment of a panel (panel request) or were too vague. The challenge was hinged on Article 6.2 of the Dispute Settlement Understanding (DSU) of the WTO which set out the standards for a Panel request, namely, (1) identification of the specific measures at issue, and (2) provision of a brief summary of the legal basis of the claims. The Appellate Body has clarified that a panel request must be sufficiently precise because it forms the basis for the panel's terms of reference and informs the respondent aware of the legal basis of the claims made.[11]

Morocco argued that Tunisia's claims relating to the distribution cost, exclusion of certain costs and expenses from the calculation of the profit margin and questions around the mathematical formulas used in calculating the margin of dumping were not contained in the panel request. Instead, these claims were raised in the first written submission and therefore fell outside the Panel's terms of reference.[12] The Panel issued a preliminary ruling and held that Morocco had failed to demonstrate that these claims were not included in the panel request.[13]

7 *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 12, 1979, 1868 U.N.T.S. 201 [hereinafter ADA]; General Agreement on Tariffs and Trade 1994 art. VI, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

8 *See* GATT art. IV(1); ADA art. 1.

9 *See* ADA art. 11.3. *See also* Appellate Body Report, *United States – Anti-Dumping Act of 1916*, ¶ 137, WTO Doc. WT/DS136/AB/R (Aug. 28, 2000).

10 *See* Chad P. Bown, *The World Trade Organization and Antidumping in Developing Countries* (World Bank Pol'y Rsch. Working Paper, Paper No. 4014, 2006), https://openknowledge.worldbank.org/bitstream/handle/10986/9305/wps40140BOX0311113B01tell0JS0when0done1.pdf?sequence=1&isAllowed=y.

11 *See* Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 126, WTO Doc. WT/DS436/AB/R (Dec. 8, 2014). *See also* Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 142, WTO Doc. WT/DS27/AB/R (Sep. 9, 1997).

12 *See* Panel Report, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, ¶¶ 1.12, 7.14, WTO Doc. WT/DS578/R (July 27, 2021) [hereinafter Panel Report (Exercise Books)].

Subsequently, Morocco raised new objections on the Panel's jurisdiction in its second written submission, arguing that in two instances, the panel request made reference to multiple obligations in the ADA and was thus imprecise, contrary to Article 6.2 DSU.[14] In response, Tunisia argued that the objections were time-barred and thus, should not be addressed.[15] The Panel found that although Morocco's objections were late, it was necessary to address the objections and clear all doubts concerning its jurisdiction before turning to substantive issues.

The Panel rejected Morocco's objections and found that for the claims in question, the panel request indicated the specific aspects of the measure at issue and the provisions alleged to have been violated. Further, Tunisia had connected the measure at issue with the provisions it alleged had been violated. In the Panel's view, the demonstration of the precise manner in which the ADA provisions had been violated did not need to be included in the panel request.[16]

While the procedural issues considered in this case and the ensuing Panel findings are not groundbreaking, they reaffirm the applicable legal standard on the sufficiency of a panel request which WTO Members, as users of the WTO dispute settlement system, should be familiar with.

2.2 Determination of Dumping

Tunisia raised two sets of claims concerning errors in the determination of dumping regarding (1) construction of normal value contrary to Article 2.2 and 2.2.2 ADA; and (2) comparison between normal value and the export price, contrary to Article 2.4. Tunisia also argued that in all these instances, there was a consequential violation of Article 2.1. The Panel rejected these claims because Tunisia failed to demonstrate the violation.[17]

For context, Article 2.1 provides that dumping exists where the export price of a product is less than its normal value. Typically, normal value is based on the price of the like product in the exporting country. In some circumstances, such domestic sales cannot be relied on.[18] Article 2.2 identifies these circumstances where normal value may be on (1) a representative export price to an appropriate third-country; or (2) *cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits* (constructed normal value).[19]

13 *See id.*, Annex A-3.

14 *See id.*, ¶¶ 3.4, 7.16, 7.24, 7.26, 7.32 (referencing Request for the Establishment of a Panel by Tunisia, *Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, ¶¶ B.5, B.6, WTO Doc. WT/DS578/2 (Sep. 20, 2019)).

15 *See id.*, ¶¶ 7.17-7.22.

16 *See id.*, ¶¶ 7.29-7.31, 7.33.

17 *See id.*, ¶¶ 7.59, 7.86, 7.107, 7.144, 7.184. These claims are not covered in this comment.

18 *See* ADA art. 2.2 (examples include: (1) no sales of the like product in the domestic market of the exporting country; or (2) low volume of sales in that market; or (3) because of a particular market situation, such sales do not permit a proper comparison).

19 *See id.*

Article 2.2.2 provides some insights on how to calculate administrative, selling and general costs by relying on actual data. Article 2.4 requires that a fair comparison of the export price and the normal value be made in calculating the margin of dumping.

Before turning to the substantive claims on the dumping determination, the Panel addressed Morocco's objection to these claims based on arguments that the issues before the Panel were not first raised before the investigating authority. Morocco argued that addressing such claims would amount to a *de novo* review contrary to the standard of review in Article 17.6(i) of the ADA. This provision precludes a panel from assuming the role of an investigating authority and engaging in an independent fact-finding exercise. However, if the disputing parties request, a panel can determine whether the facts are properly established and whether the investigating authorities' evaluation of the facts was unbiased and objective. The Panel found that Tunisia had only invited the Panel to apply the law to the existing facts before the Panel and not to re-evaluate the facts and thus, rejected Morocco's objections.

2.2.1 Construction of normal value

In this dispute, MIICEN constructed normal value for certain exercise book models using data provided by the two exporting producers participating in the AD investigation.[20] Tunisia claimed that in doing so, *first* MIICEN acted inconsistently with Article 2.2 and 2.2.2 by failing to calculate and use a reasonable amount for profits, and identified two errors (1) including expenses that were unrelated to profits and (2) excluding sales of certain exercise book models. *Second*, MIICEN acted inconsistently with Article 2.2 by including costs that were not part of the normal value components.

Exporting producer	Cost and pricing data declared
SITPEC	• Non-adjusted unit price (as charged to the customer) • An adjusted unit price (excluding certain selling expenses charged to the customer) • Cost of production including fixed and variable manufacturing costs
SOTEFI	• Value and quantity sold for each transaction • An adjusted unit price (excluding certain selling expenses charged to the customer) • Cost of production including administrative and financing costs • Distribution and marketing costs (separately)

The first error in the profit margin calculation relates to the inclusion of expenses that do not count as profit. MIICEN calculated the general profit by subtracting the cost of production from the unit selling price of each sale and then added up the results. For SITPEC, it used the declared *non-adjusted* unit price and the cost of production. For SOTEFI, it used a *non-adjusted* unit price and cost of production comprised of fixed and variable manufacturing costs, along with *distribution* and marketing costs. This resulted in profit margins that included the profit itself and expenses that were not linked to profit such as taxes, duties, transport and credit costs.[21]

The ADA does not provide a methodology to determine a 'reasonable amount" for profits. However, Article 2.2.2 provides that these amounts should be based on "***actual data*** pertaining to production and sale in the ordinary course of the like product by the exporter or producer under investigation".[22] Interestingly, Morocco did not contest Tunisia's claim but instead asserted that it used actual data provided by the producers which did not meet MIICEN's required format. This created confusion on the composition of the normal value components.

The Panel recognized that an investigating authority may have difficulties interpreting responses by companies in AD investigations. However, any errors or ambiguity in these responses does not exempt an authority from the obligation in Article 6.6 of ensuring the "accuracy of the information supplied by interested parties upon which their findings are based."[23] The Panel found that while MIICEN had gathered the relevant data, it had failed to establish "actual profit". The Panel found that amounts used by MIICEN were not based on "actual data" and therefore inconsistent with Article 2.2.2. As a result, the profits were not a "reasonable amount" for profits within the meaning of Article 2.2.

This reasoning begs the question of whether Article 2.2.2 includes a separate test on the reasonability of the results arrived at through the use of "actual data" provided by the exporting producer. In *EC – Bed Linen*, the Panel found that testing the results obtained against some arbitrary or subjective standard of reasonability serves no purpose.[24]

With respect to the second error, MIICEN excluded sales prices and the cost of production of certain state-subsidized exercise books from Tunisia, because they were subject to an export ban.[25] The profit margins did not include profits from sales of these books, which inflated the profit margin because the profits from the excluded sales were lower. Tunisia argued that these sales met all the conditions in Article 2.2.2

20 *See* Panel Report (Exercise Books), *supra* note **Error! Bookmark not defined.**, nn.60, 96, 131 (normal value was constructed for models of exercise books that: (1) were not sold in the Tunisian market; (2) did not exceed the standing threshold; and (3 were not sold in the ordinary course of trade).

21 *See id.*, ¶¶ 7.49, 7.51.

22 *See* Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 7.263, WTO Doc. WT/DS264/R (Apr. 13, 2004) [hereinafter Panel Report (Softwood Lumber V)].

23 *See* Panel Report (Exercise Books), *supra* note 12, ¶ 7.54.

24 *See* Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.99, WTO Doc. WT/DS141/R (Oct. 30, 2000).

25 *See* Panel Report (Exercise Books), *supra* note 12, ¶¶ 7.70, 7.75.

and thus, there was no valid justification for their exclusion. As a result, Morocco did not use a "reasonable amount" for profits as required by Article 2.2.

Notably, Morocco did not argue that the excluded sales of state-subsidized books, subject to an export ban were not in the ordinary course of trade. In its analysis of this claim, the Panel seems to imply that had MIICEN done so, the exclusion may have been justified.[26] Instead, Morocco argued that the exclusion was justified because "actual data" under Article 2.2.2 does not relate to all sales, but to those likely to provide a fair comparison between the normal value and the export price under Article 2.4. This argument found support from the European Union.[27] By excluding these sales, Morocco avoided including products that are subject to an export ban and thus unable to be dumped in the dumping calculation.

The Panel considered that there was no evidence offered showing that including sales from these books in the determination of profits would not result in a normal value that permits a fair comparison with the export price. Rather, excluding these costs led to profits that were not based on "actual data" contrary to Article 2.2.2. As a result, Morocco did not use a "reasonable amount" for profits as required by Article 2.2.

Tunisia also claimed that in calculating SOTEFI's normal values, MIICEN incorrectly included expenses related to the distribution cost (domestic transportation and port fees) in the "cost price", based on the data provided (table 1 above). In Tunisia's view, these costs are not included in the "cost of production" or "administrative, selling and general costs" in Article 2.2. Further, where an investigating authority decides to construct normal value at the ex-factory level, it ought to consider only the administrative, selling and general costs and expenses that form part of an ex-factory price. Tunisia argued that distribution costs (transportation costs from the factory door to the point of delivery) are not part of the ex-factory price.

The ADA does not include a definition or methodology of determining the amount of each normal value component or make an explicit reference to distribution costs. Curiously, Morocco responded that MIICEN accepted data presented by the producer and that any resulting errors were not brought to its attention. Thus, MIICEN is not accountable for any error that is based on data provided by the exporting producer. As noted above, the Panel found Morocco's contention to defy the spirit of Article 6.6 which requires the investigating authority to verify data used during the investigation.

The Panel found that there was no ambiguity in the costs declared by SOTEFI because it presented the distribution costs separately and broke down their contents. Further, domestic transportation and port fees are not part of the ex-factory level price and thus should not form part of the normal value constructed at the ex-factory level. The Panel concluded that Tunisia sufficiently demonstrated that MIICEN's inclusion of these costs was inconsistent with Article 2.2.[28]

26 *See id.*, ¶¶ 7.74-7.76.
27 *See id.*, ¶ 7.78.
28 *See id.*, ¶¶ 7.103, 7.107.

2.2.2 Fair price comparison

Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and export price for the dumping margin determination. Due allowance should be made for differences that affect the price comparability. The provision does not provide a definitive methodology for making allowances and instead grants discretion to the authorities. However, it specifies that while an authority carries the burden of making a fair comparison, parties seeking allowances must substantiate their requests constructively.

In this case, Tunisia claimed that MIICEN failed to make a fair comparison contrary to Article 2.4 by (1) excluding the use of licenses as a relevant factor affecting price comparability; and (2) using an erroneous mathematical formula. The first claim was rejected because the Panel found that the parties had failed to demonstrate that the use of licenses affected comparability. For the second claim, Tunisia argued that the numerator and the denominator of the mathematical formula used by MIICEN to calculate dumping margin were expressed in units of volume and not in monetary terms, which distorted the comparison between normal value and export price. Morocco did not dispute the factual description of the formula used and instead argued that errors in the dumping margin calculation are not covered by the first sentence of Article 2.4.

The Panel established that the formula used was erroneous because the numerator and the denominator represented irrelevant export volumes instead of the amount of dumping. Further, the fair comparison principle in Article 2.4 applies to the formula used to calculate the dumping margin. As a result, the use of an erroneous formula violated the fair comparison obligation in Article 2.4.[29]

2.2.3 Comments on the Panel's findings

The Panel's findings place the duty of an investigating authority to rely on accurate data in proper perspective. For instance, it is observed that in calculating SOTEFI's profit margin, MIICEN used a non-adjusted unit price, which includes not only the cost of production declared by SOTEFI but also certain selling expenses charged to the customer. Meanwhile, the unit cost of production used by MIICEN comprises fixed and variable manufacturing costs, as well as a "distribution cost" and a "marketing cost." Subtracting these two figures, therefore, resulted in an inaccurate profit margin that includes not only the profit itself but also expenses that are not linked to the profit (such as credit costs, rebates and refunds). [30]

In responding to this inconsistency, Morocco provided a technical defence by stating that "*the cost of production and profits data submitted by one of the two Tunisian exporting producers (SOTEFI) were not presented in the format required by MIICEN, which created a certain amount of "confusion" regarding the exact composition of the cost*

29 *See id.*, ¶¶ 7. 168, 7.179.
30 *See id.*, ¶ 7.51.

of production, the administrative costs, the cost price and the profits."[31] This is a clear case of admission of miscalculation of the profit margin of the exporting producer and an apparent derogation from the obligations of the investigating authority as created by Articles 2.2 and 2.2.2 of the ADA.

On this point, the Panel's finding was spot-on where it noted that while errors may slip into responses to the investigation questionnaires and while it may be difficult for the investigating authority to interpret the responses provided by the interested parties, any error or ambiguity in the data provided does not exempt the investigating authority from its obligation to ensure "the accuracy of the information supplied by interested parties upon which their findings are based" and to establish the facts "proper[ly]." The obligation to base the amount used for the profits on "actual data" unquestionably rests with the investigating authority: that obligation is not limited to gathering data from businesses but also implies that the authority must use the data correctly to determine the amount for profits on that basis.

2.3 Determination of Injury

Under Article 3.1, an injury determination (material injury or threat thereof) must be based on positive evidence and involve an objective examination of (i) the *volume* of the dumped imports and the corresponding impact on prices in the domestic market for similar products, and (ii) the consequent impact of the dumped products on domestic producers.[32] With respect to volume, Article 3.2 mandates an investigating authority to examine whether there has been a significant increase in dumped imports in absolute terms or relative to production or consumption. For the effects on prices, an authority should examine whether there has been significant price undercutting, depression, or suppression.

Article 3.4 identifies a non-exhaustive list of economic factors and indices to guide an investigating authority in the examination of the impact of dumped imports on the domestic industry.[33] Article 3.5 is instructive on the requirement for a causal link between dumping and injury. It requires investigating authorities to ensure that injury to the domestic industry caused by any known factors other than dumped imports is not attributed to the imports. By necessary implication, an inconsistency with Articles 3.2 and 3.4 would likely undermine an investigating authority's overall causation determination and consequentially lead to inconsistency with Article 3.5.[34] Tunisia challenged MIICEN's findings flowing from its injury and causation analysis and claimed that MICCEN acted inconsistently with Articles 3.1 and 3.2 of the ADA. In particular, MIICEN had (1) failed to objectively analyze the volume of imports in relation to the domestic production and consumption of exercise books, (2) erroneously and non-objectively analyzed the effects of imports on the price of domestic exercise books (3) failed to objectively analyze the state of the domestic industry and (4) erred

31 *See id.*, ¶ 7.53.
32 *See* ADA art. 3.1.

in finding a causal link between the imports and injury on the domestic industry. Claims on (1) were not examined because the Panel applied judicial economy.[35]

The analysis of price effects of dumped imports essentially requires investigating authorities to examine whether the dumped imports have caused significant price undercutting, price depression or price suppression. As concerns price undercutting, Tunisia challenged the use of a constructed domestic price (notional target selling price) in Morocco when compared with the actual import price. The Panel found that Article 3.2 does not permit the construction of a notional target selling price in a price undercutting analysis, and instead, in its context, requires the use of *actual* prices. Further, Tunisia claimed that MIICEN indicated that the injury analysis covered the period from 1 January 2013 to 30 April 2017. However, the examination of price effects was limited to the period between 1 May 2016 to 30 April 2017. The Panel noted that "to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analyzed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry."[36] Moreover, Morocco failed to justify its approach.

As concerns price depression, Tunisia claimed that MIICEN (1) compared prices from 2013 to prices in the first four months of 2017 (end-point to end-point) instead of examining the price trends over the entire period of investigation (POI); and (2) failed to consider whether the decline in domestic prices was due to imports. On the argument concerning the POI, the Panel found that data for a whole year provides a more accurate picture of the situation than data for part of the year. In this case, MIICEN should have explained why the data for the last four months was more decisive in assessing the extent of the depression. [37] The Panel also found that while MIICEN found a gradual decline in the prices throughout the POI, it did not address the magnitude of this decline. The price decline was, at most, 1.69% which did not meet the "*significant*" threshold. Further, the Panel found that MIICEN failed to sufficiently explain how imports depressed prices of Moroccan exercise books when import prices were higher than domestic prices of like products.

On price suppression, Tunisia claimed that MIICEN (1) focused on a limited comparison of prices from the first year in the POI with prices from the last four months in the last year of the POI; and (2) failed to analyze whether the suppression observed was due to imports. The Panel agreed and found that there was no explanation

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33 Examples include actual or potential decline in sales, profits, output, market share, productivity, return on investments and the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

34 Other panels have come to similar determinations. *See, e.g.*, Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, ¶ 5.196, WTO Doc. WT/DS504/AB/R (Sep. 10, 2019); Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, ¶ 7.239, WTO Doc. WT/DS425/R (Feb. 26, 2013); Panel Report, C*hina – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, ¶ 7.327, WTO Doc. WT/DS440/R (May 23, 2014); Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, ¶ 7.182, WTO Doc. WT/DS479/AB/R (Mar. 22, 2018); Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (Recourse to Article 21.5 of the DSU by the United States)*, ¶ 7.186, WTO Doc. WT/DS427/RW (Jan. 18, 2018).

on why a limited comparison was more relevant than an evaluation of the price trends over the entire POI. Further, MIICEN did not examine whether price pressure was caused by imports or explain why domestic prices could not be increased between 2014 and 2016, despite the import price being higher than domestic prices and the cost of domestic production. Based on this, the Panel found that the examination of price effects was inconsistent with Article 3.1 and the first sentence of Article 3.2.

On the examination of the state of the domestic industry, Tunisia claimed that the analysis of the factors listed in Article 3.4 was not objective. In this regard, the Panel noted that "to conduct an objective examination, the authority must take into account conflicting evidence and plausible explanations that may contradict its own hypotheses".[38] Recalling that Article 3.4 requires an examination of the impact of dumped imports on the domestic industry, the Panel noted that "an investigating authority is required to examine the explanatory force of subject imports for the state of the domestic case".[39] The Panel found that MIICEN failed to conduct an objective assessment of the trends in sales, market shares and the domestic industry's production and profitability because there was either (1) no examination of whether the imports had an explanatory force for the state of the domestic industry or (2) MIICEN failed to examine how conflicting evidence could affect its conclusions.[40]

Finally, Tunisia claimed that MIICEN violated Articles 3.1 and 3.5 by failing to properly examine (1) the causal relationship between the injury observed and Tunisian imports and (2) the impact of competition from one domestic producer (Imprimerie Moderne) in the non-attribution analysis. On the first claim, the inconsistencies with Articles 3.2 and 3.4 in MIICEN's determination of injury (described above) led the Panel to conclude that the causation examination was also inconsistent with Article 3.5. By relying on analyses for its injury determination that was not objective, MIICEN tainted the causation analysis.

The Panel rejected Tunisia's second claim because there was no evidence on the effect of competition from Imprimerie Moderne on the domestic industry. The Panel found that an objective authority would not have concluded, based on the record, that competition from domestic producers was injuring the domestic industry.

2.3.1 Comments on the Panel's findings

It is interesting to note that the price comparison between Tunisian books and Moroccan books did not reveal the existence of price undercutting. However, the Authority reconstructed the price of the domestic industry by including a high profit

35 *See* Panel Report (Exercise Books), *supra* note 12, ¶¶ 7.262, 8.2.
36 *See id.*, ¶ 7.216.
37 *See id.*, ¶ 7.232.
38 *See id.*, ¶ 7.192.
39 *See id.*, ¶¶ 7.268, 7.303.
40 *See id.*, ¶¶ 7.263-7.310.
41 *See id.*, ¶ 7.203.

margin of 15% to 25%, based on the profit margin made by the Tunisian exporting producers in their domestic market.[41] In a bid to justify this aberration, Morocco argued that Article 3.2 did not use the word '*actual price*' and given that sales by the local marketers were made at a loss, the authority had the discretion to reconstruct a profitable price for the examination. The logical inference that may be drawn from the price reconstruction is that MIICEN's examination was orchestrated to achieve the desired outcome and this outcome could not be achieved if MIICEN had relied on the actual data or domestic price.

While the price of Tunisian imports increased from 2014 to 2016, the price of the domestic product decreased during the same period. By implication, not only were the prices of the Tunisian books higher than that of Moroccan books, but they also followed an opposite trajectory. Despite having this evidence at hand, MIICEN failed to act on it or explain how imports would have depressed domestic prices when import prices were higher than the domestic price of the like product. The Panel was therefore right in stating that by disregarding evidence that could contradict its conclusions, MIICEN failed to conduct an objective examination as required by Article 3.2.[42]

Another pointer that is indicative of MIICEN's failure to meet the standard set out in Article 3.2 is Tunisia's challenge on the period the price suppression was conducted. The record shows that the assessment considered the period from 1 May 2016 to 31 April 2017 (11 months) whereas the POI was 1 January 2013 to 31 April 2017 (4 years and 4 months). No compelling justification was provided by MIICEN to explain why it selected a different period of price undercutting analysis from the one used for the rest of the injury analysis, and this impugned the credibility of the assessment for injury determination.

2.4 Propriety of Initiating the Investigation

Article 5.2 sets the legal standard on the evidence required in an application for initiation of an AD investigation by exporting producers. Evidence of the existence of dumping, injury and a causal link must accompany the application. Investigating authorities should examine the accuracy and adequacy of the evidence provided in a complaint to determine whether there is sufficient evidence to justify the initiation of an AD investigation. When authorities are satisfied that there is no sufficient evidence of dumping or injury, the application should be rejected, and investigations terminated promptly. [43]

Admittedly, an investigating authority does not need to possess *irrefutable proof of dumping or injury* before initiating an AD investigation.[44] However, it must have *prima facie* evidence that is at the very least, compelling enough to invite a reasonable, objective, and fair authority to initiate an investigation to ascertain the existence of dumping.[45]

42 *See id.*, ¶ 7.235.
43 *See* ADA arts. 5.2, 5.3, 5.8.
44 *See id.* arts. 2.4, 5.1, 5.2; Panel Report (Softwood Lumber V), *supra* note 22, ¶ 7.164.
45 *Id.*

In this case, Tunisia claimed that the application filed by domestic producers did not contain sufficient evidence of the required elements, thus, there was no basis for an investigation. Consequently, the measures introduced by Morocco were inconsistent with its obligations under Articles 5.2, 5.3 and 5.8.

Tunisia challenged the sufficiency and relevance of the evidence that formed the basis of the investigation and asserted that MIICEN did not act as an unbiased and objective authority would, in determining whether there was sufficient evidence to justify initiating an investigation. For instance, the export price evidence provided by the domestic industry was based on one invoice without an explanation on why export prices from that day were representative of the entire POI. The normal value evidence was based on the online catalogues of a retail supermarket and chain store without demonstrating that the prices were domestic prices for Tunisian producers or if at least representative.[46] Thus, the evidence included in the domestic industry's application was insufficient to initiate an investigation within the meaning of Article 5.3.

The Panel noted that Article 5.2 does not impose a direct obligation on investigating authorities but is a useful reference when examining the obligations in Article 5.3 which fall squarely on the investigating authority. Further, a violation of Article 5.8 can only be found where following a determination that there is no basis for an investigation, the authority nonetheless fails to terminate the investigation. A violation of Article 5.3. does not result in a consequential violation of Article 5.8. Based on this, the Panel only examined claims relating to Article 5.3. The Panel found that MIICEN failed to examine the accuracy and sufficiency of the export price and normal value evidence when determining whether that evidence was sufficient to justify the initiation of an investigation.[47]

3 Concluding remarks: potential implications of the dispute

The dispute between Morocco and Tunisia marks the first time, in 25 years of the WTO's existence, for a Panel to hear an intra-African trade dispute. Prior to this, no African country had ever been a complainant in any WTO dispute. African countries have been involved as respondents in nine disputes, out of which two were heard by a Panel and the rest were either resolved through a Mutually Agreed Solution or stuck at the consultations stage.[48] While the significance of this dispute has been noted, it is not clear that this dispute marks the beginning of active participation in the WTO dispute settlement system by African countries. This single decision may not, on its own, be a sign of things to come.

Away from the WTO, the culture of limited participation of African countries in litigating intra-African trade disputes is also observed in the dispute settlement regimes set up under African regional economic organizations such as the Common Market

46 For Tunisia's first written submission, see Panel Report (Exercise Books), *supra* note 12, ¶¶ 8.22-8.38.

47 *See id.*, ¶¶ 7.381-7.395; *see also* Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, ¶ 7.19, WTO Doc. WT/DS331/R (June 8, 2007).

for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Southern African Development Community (SADC) and trade agreements such as the Tripartite Free Trade Area Agreement. In the regional context, the East African Court of Justice stands out for having adjudicated, in 2019, the first case that was based purely on an international trade question.[49]

The participation of African countries in formal economic dispute resolution is particularly relevant now, following the extensive and growing ratification of the African Continental Free Trade Area Agreement (AfCFTA) by 38 African Countries.[50] The AfCFTA has an inbuilt dispute settlement mechanism (DSM) which provides rules and procedures for the settlement of trade disputes between member states. The AfCFTA DSM is largely modelled after the '*functioning aspects of the WTO Dispute Settlement Body*' but departs from the WTO DSM in two (in)significant regards (tenure and appointment of the Appellate Body).[51]

This wholesale adoption of the WTO-like DSM suggests that the AfCFTA may not fill the gaps in the WTO DSM including weak enforcement mechanism, lack of political will, lack of technical expertise, cost of dispute resolution proceedings, questionable quality of some decisions and the undue delay of the appellate process. These are political and institutional challenges that may not be easily cured by ratification of treaties, as history has demonstrated. Admittedly, these are early days for AfCFTA DSM, and the mechanism is still untested. It will be interesting to see whether the mechanism can provide a pro-African solution to intra-continental trade disputes.

While the dearth of intra-African trade litigation matters at the WTO and regional level is not explored in any detail in this commentary, it is important to point out that the non-participation is not caused by an absence of intra-African trade disputes. The question of why non-participation in formal trade disputes systems persists among African countries may need to be re-examined, to offer tangible solutions.

Turning to the legal and jurisprudential value of the dispute, we observed from the findings and rulings of the Panel that, the Panel Report does not particularly set new legal standards or reasoning. This may be explained away by the factual circumstances and legal issues that the Panel had to address, being somewhat familiar in the world of WTO AD case law. We observed that in several instances, the Panel adopted the reasoning advanced by other Panels and the Appellate Body, without going to great lengths of developing new legal arguments.

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48 *See Dispute settlement*, WTO (last visited Dec. 17, 2021), https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

49 *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. 339, 344 (2020).

50 *See Status of AfCFTA Ratification*, tralac (Oct. 4, 2021), https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

51 *See Inaugural Meeting of the Dispute Settlement Body of the African Continental Free Trade Area (AfCFTA)*, AfCFTA Secretariat (Apr. 26, 2021), https://afcfta.au.int/en/events/2021-04-26/dispute-settlement-body-aims-settle-trade-disputes-between-member-states.

In any case, the Panel Report emphasizes the duty of an investigating authority in dumping investigations and the need for careful consideration of evidence during the examination. There is a notion that states tend to adopt a protectionist approach to trade by restricting imports into their domestic market, it then behoves an investigating authority to maintain a fair and objective examination to allay these fears. Morocco came short of the standards created by the ADA for the most part and this was exemplified by the Panel's findings, both on preliminary and substantive issues.

More significantly, the Panel Report in this dispute has not yet been adopted by the WTO Dispute Settlement Body (DSB). In addition, soon after the Panel Report was published and circulated to WTO Members, Morocco notified the DSB of its decision to appeal certain findings and rulings in the Panel Report.[52] Given the ongoing impasse concerning the filling of Appellate Body vacancies, this effectively suspends the proceedings until such a time when the Appellate Body resumes operation.

52 *See* Communication, *Morocco—Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (Notification of an Appeal by Morocco under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review)*, WTO Doc. WT/DS578/5 (Aug. 4, 2021).

Book Review: Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe,

by Tinashe Kondo, Cape Town, University of the Western Cape Press, 2021, 282 pp., R275 (hardcover) ISBN 9781990995026

Reviewed by Talkmore Chidede

Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe provides a critical examination of recent investment law developments in Zimbabwe.

The book not only unpacks investment law developments in Zimbabwe but also explores contemporary developments related to investment governance at international, relevant regional and bilateral levels. Tinashe Kondo's meticulous analysis of these developments gives the reader context and perspective of the regulation of foreign direct investment (FDI) in Zimbabwe from international, regional and national positions.

Kondo's book is published at a time when Zimbabwe's economy and investor confidence are deteriorating, and the current government is allegedly making efforts to revive the economy and restore investor confidence.

Kondo undertakes a historical analysis of the investment law and policy developments in Zimbabwe from the early 1980s (when the country attained its independence) to recent times. The analysis shows that the government of Zimbabwe has recently 'intensified its efforts to reform investment law and policy' (Kondo 2021:153) through implementing the Investment Guidelines and Opportunities in Zimbabwe (2018),[1] amending the Indigenisation and Economic Empowerment Act

1 The Investment Guidelines is a new policy document that 'seeks to balance the land redistribution programme (which was improperly executed) and a commitment to protect investing companies. The Investment Guidelines enlists eight principles underpinning investment in Zimbabwe including non-discrimination, protection of property, transparency and good regulatory practices, maintenance of environmental and social standards, promotion of investment retention and avoidance of mandatory performance requirements, facilitation of the entry and sojourn of foreign personnel and pursuance of high standards governance.

2 The IEEA has been amended to apply only to the platinum and diamond sectors. That means at least 51 per cent of the shares of every business in the 'platinum and diamond sectors' must be owned or controlled by indigenous Zimbabweans. Foreigners are limited to owning or controlling 49 per cent only.

3 ZIDA Act provides for the promotion, entry, protection, and facilitation of investment, establishes the Zimbabwe Investment and Development Agency and provides for the One-Stop Investment Services Centre. The Act also repeals several pieces of investment laws including the Zimbabwe Investment Authority Act [Chapter 14:30], the Special Economic Zones Act [Chapter 14:34] and the Joint Ventures Act [Chapter 22:22].

(Chapter 14:33) (IEEA)[2] and enactment of the Zimbabwe Investment Development Agency Act (Chapter 14:37) (ZIDA Act).[3]

Kondo lauds the Investment Guidelines for laying out reform action plans[4] and a timeline of six months. Kondo (2021:98) remarks this as a significant and unique development 'in the sense that, previously, government blueprints were not properly backed by tangible and practical actions to ensure their implementation.'

Kondo further applauds the enactment of the ZIDA Act and for consolidating and streamlining investment processes and procedures,[5] providing investment incentives, balancing the rights and obligations of investors and host states. Kondo (2021:152) further commends the ZIDA Act for allowing both domestic and international arbitration for the settlement of investment disputes because it 'is more practical, balancing treaty protection and domestic procedures.' Conversely, Kondo (2021:151) criticises that ZIDA Act 'does not expressly clarify which courts or tribunals have default competence over investment disputes … also fails to make a distinction between State-State arbitration and investor-State arbitration.' Kondo also disapproves of the ZIDA Act's omission of the right to regulate provisions.

Kondo also undertakes a comparative examination of Zimbabwe and South Africa's investment regimes. The comparison depicts that Zimbabwe's regime – based on the ZIDA Act – attempts to provide investment protection consistent with the international norms and standards on investment. However, South Africa's regime – primarily based on the Protection of Investment Act 22 of 2015 – *inter alia*, diminishes investment protection provided under international law and customary international law. South Africa has adopted a cautious approach towards FDI protection.

The book critically evaluates Zimbabwe's investment obligations under bilateral investment treaties (BITs). The analysis reveals that investment protection provided under BITs (concluded by Zimbabwe) is characterised by many shortcomings including, *inter alia*, limiting the right to regulate and biased towards investors. Kondo proposes the modification of certain provisions to allow investment liberalisation, adoption of more concise definitions of investors and investments, alignment of investor-state dispute settlement (ISDS) provisions with recent trends.

Kondo further scrutinises Zimbabwe's investment standards or practice in comparison to other states in the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). This scrutiny exposes that the investment standards and practices differ across the region and, in some instances, with Zimbabwe's national investment law. Notable differences are in standards such as definitions of investor and investment, treatment of investors and investments, expropriation and compensation, as well as dispute settlement. Kondo recommends incorporating certain provisions to enhance Zimbabwe's investment regime and align it with the regional investment agreements of COMESA and SADC.

4 The action plans include payment of compensation to commercial farmers for losses suffered during the land reform programme, the amendment of the IEEA and the establishment of special economic zones.

5 The ZIDA Act has streamlined investment processes and procedures through repealing the Zimbabwe Investment Authority Act [Chapter 14:30], the Special Economic Zones Act [Chapter 14:34] and the Joint Ventures Act [Chapter 22:22]. The provisions of these statutes have been integrated into the ZIDA Act.

Provisions concerning the right to regulate and investor obligations on corruption, corporate social responsibility, human rights, environment and labour.

Notwithstanding these significant developments, Kondo (2021:256) concedes that there are 'some teething problems with Zimbabwe's revamped laws and policies relating to foreign investment.' These problems relate to compliance with regional obligations, the need to update the Investment Guidelines to focus on fresh challenges, and government adherence to investment laws and policies or respect of rule of law.

Despite its virtues, the book has a few shortcomings. Kondo overlooked some contemporary developments on international investment law happening at the multilateral level. For instance, the ongoing Investor-State Dispute Settlement (ISDS) reforms under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)[6] and discussions on investment facilitation for development at the World Trade Organization (WTO).[7] These discussions are also relevant to Zimbabwe because once completed, they will have significant implications on investment governance in Zimbabwe.

Furthermore, the version of the COMESA Common Investment Agreement (CIA) Kondo refers to is an old one. The COMESA CIA was revised (in 2017) to include detailed provisions on investor obligations (Part Four) and allow the use of African international arbitral institutions in resolving investment dispute arising under the COMESA CIA (Article 36(2)(a)) and permits a defence of counterclaim or right of set-off when investors violate their obligations (Article 36(7)). The Agreement does not only protect COMESA investors[8] but also investments owned or controlled by non-COMESA nations maintaining substantial business activity[9] in the Member State in which it is duly constituted.

In addition, Kondo discussed non-binding investment instruments (e.g. SADC Model BIT, 2012) adopted yet omitted a very important instrument on investment policy development in Africa – the Pan-African Investment Code (PAIC, 2016). PAIC was negotiated and adopted by African Union Member States as a guiding instrument for African government when negotiating investment treaties among themselves or with external trade and investment partners. PAIC contains provides a balanced investment regime seeking to protect investors and investments at the same time safeguarding the regulatory autonomy of host governments to pursue their public policy or sustainable development objectives. PAIC is highly likely to influence the text of the African Continental Free Trade Area Protocol on Investment and should, therefore, not be overlooked in any discussions concerning contemporary developments in investment law and policy in Africa.

6 See UNCITRAL Working Group III: Investor-State Dispute Settlement Reform available at https://uncitral.un.org/en/working_groups/3/investor-state

7 See WTO Investment Facilitation for Development News Archives available at https://www.wto.org/english/news_e/archive_e/infac_arc_e.htm

8 Article 1 of the COMESA CIA stipulates that 'substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (a) the amount of investment brought into the country; (b) the number of jobs created; (c) its effect on the local community; and (d) the length of time the business has been in operation.'

Kondo's (2021: 206) assertion that Zimbabwe is a signatory to the Economic Partnership Agreement (EPA) between SADC and the European Union (EU-SADC EPA) and yet to ratify EU-SADC EPA and the EU-SADC Interim Agreement (ESA) is somewhat misleading. Zimbabwe is not a signatory to the EU-SADC EPA which is concluded between six SADC Member States[10] and the EU Member States. Instead, Zimbabwe belongs to the EPA between six Eastern and Southern Africa countries[11] and EU Member States (EU-ESA EPA). Zimbabwe ratified the EU-ESA EPA in 2012.

Although Kondo notes that the inter-state dispute settlement will be determined by the SADC Tribunal, he did not explain the *status quo* of the SADC Tribunal and the implications for investment dispute settlement under the SADC FIP. The SADC Tribunal is currently suspended and not operational, and the SADC Tribunal Protocol (2014) – to revive the Tribunal – is not yet in force awaiting ratification by member states. This means that the envisaged inter-state investment dispute settlement provided under SADC Tribunal is not possible at the moment; until the SADC Tribunal is revived and operational.

Overall, the book is of use to practitioners, policymakers, negotiators, academics, and government agencies working on investment law and policy or investors seeking to understand recent developments in the investment governance Zimbabwe and investment regimes in SADC and COMESA.

9 Article 1 of the COMESA CIA stipulates that 'substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (a) the amount of investment brought into the country; (b) the number of jobs created; (c) its effect on the local community; and (d) the length of time the business has been in operation.'

10 Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini.

11 Comoros, Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe.

Book Review:
Combating Money Laundering in Africa: Dealing with the Problem of PEPs, Edward Elgar,

by John Hatchard, 2020, pages 277. £100. ISBN 9781789905298

Reviewed by Nkechikwu Valerie Azinge-Egbiri

This extensively researched and coherently written piece of scholarship ought to be widely consulted by scholars and practitioners seeking to combat money laundering (ML) in Africa. The book may not have addressed theoretical issues that emphasize its core arguments. However, its analyses of politically exposed persons (PEPs) and the extent to which national constitutions may aid or forestall money laundering tactics contribute to the understanding of how African countries (ACs) can strategize to combat ML via PEPs.

Existing policy and academic literature recognise PEPs as government officials or royal families, including their close associates or family members. Such recognition is largely due to historical and recent case studies that demonstrate their involvement in high-level ML cases. Hatchard exemplifies this with the *Cashgate Case* where, between 2009–2014, government ministers and senior public officials in Malawi manipulated the government's payment control system and laundered proceeds amounting to over $365 million. *Cashgate* demonstrates the extent to which PEPs can abuse their office to loot funds from state coffers. Similarly, investigation shows that South Africa's former President Jacob Zuma had worked with close associates – the Gupta Family – to launder and divert state funds. Zuma's case, amongst many others, shows that close associates are not exempted from the PEPs classification.

A recurring theme across existing literature is the recognition that historically, PEPs have been uniquely placed to launder government's funds with limited recourse to the law. However, there has been limited focus on PEPs in relation to Africa but for Inge Amudsen's recent edited book, *Political Corruption in Africa: Extraction and Power Preservation*, which considers laundering exploits of PEPs in several ACs. Regardless, a lacuna still exists regarding an in-depth analysis to addressing the issue contextually and the role of national constitutions in combatting ML in ACs. Essentially, Hatchard addresses the lacuna by developing a framework that justifies the ability of ACs to curtail ML via PEPs through a persuasive alignment with the "three-pronged approach". According to Hatchard this requires a multi-layered AML strategy that is implemented domestically, transnationally and at the corporate level. I will come to the "three-pronged approach" later in this review.

The book is distinctive as it arguably chronicles Hatchard's research expertise, personal experience and professional role, in various capacities, including with the Commonwealth. It combines practical and academic perspectives in establishing a solution to a complex problem. The book commences by recognizing that PEPs orchestrate their laundering antics through the co-optation of gatekeepers, such as financial institutions, professionals and multinationals (MNCs), amongst others. Hatchard typifies his assertion with the mass laundering of billions of Ugandan shillings aided by Cairo Bank Ltd through the opening of fictitious bank accounts and forged cash withdrawal slips by 'ghost pensioners'. Similarly, Hatchard posits that MNCs operating in Africa not only pay bribes to PEPs to obtain or retain their businesses but are also complicit in facilitating the laundering of corruption proceeds. These examples illustrate how PEPs are well positioned to destroy the ethical fabric of society by undermining gatekeepers' responsibilities. Such co-optation coupled with constitutional frameworks across many ACs, which grant PEPs control over key AML institutions, immunity from prosecution and possible presidential pardon, inadvertently limit the extent to which PEPs can be held accountable for laundering.

In seeking a pan-African-driven solution to PEPs engagement in laundering, Hatchard starts by examining the international AML instruments and their adaptability to ACs. In particular, he examines the Financial Action Task Force (FATF), a prominent AML policy making body. He correctly points out that the FATF which has global and regional reach plays a key role in evaluating the compliance of countries to its standards. Furthermore, Hatchard recognises that the FATF has enforcement powers to sanction erring states that fall short on compliance. Emphasising the 'teeth' and 'power' of the FATF, Hatchard advances a strong argument that:

"*On the face of it, [the FATF recommendations] are non-mandatory requirement and provides an option for FATF members as to whether or not to implement the particular strategy or action…. However, hidden in the general glossary to the 2012 recommendation is the statement that 'should has the same meaning as must'. In other words, 'recommendation' is the FATF's speak for' requirements'* (pp. 57-58)"

Indeed, this statement availed Hatchard the opportunity to examine deeper, from the global south perspective, the nuances of unreflective transplantation and the evolution of the FATF's African regional bodies (RBs). Superficially, the African RBs appear to have been established to meet homegrown problems. However, critical examination reveals that the RBs simply perpetuate western ideals in ACs. Arguably, RBs represent a hegemonic imposition of a western agenda that sets ACs up to fail, as the 'FATF's teeth' do not necessarily consider the socio-economic challenges of ACs. Hatchard's unwillingness to address these critical challenges does not however undermine the strength of the book. Instead, by taking a practical approach, Hatchard simply brings into limelight the possible implications of the FATF's mandatory requirements on ACs.

Definitely, one of Hatchard's pivotal argument is that despite the existence of global frameworks aimed at correcting the anomaly of PEPs' involvement in laundering, domesticating uniform laws across all ACs is impossible. Hence, he suggests that 'functional equivalence' amongst national systems ought to be the norm. According to Hatchard, this means that '*states must, to the extent possible…develop and harmonise their policies and domestic legislation to combat money laundering according to their particular circumstance and constitutional framework*'. Against this backdrop, Hatchard recommends that ACs adopt a multitrack approach at the national level, which ensures that the constitution and its respective bodies are not undermined by PEPs. In addition, he recommends that AC AML laws, compliance and international obligations are closely aligned. Hatchard's suggestion stems from his proposed 'three-pronged approach' which advocates for domestic, transnational and corporate level strides to checkmate PEPs. An examination of this approach reveals its multipurposed strategy. On one hand, his suggested approach warrants ACs to have sturdy yet persuasive national AML laws and institutions alongside a robust AML investigation, prosecution and asset recovery framework. On the other hand, it includes far reaching attempts at curtailing bribe paying private companies that facilitate the continued cycle of laundering. These seemingly divergent approaches collide to hinder the supply or demand for bribery, corruption and money laundering.

Arguing on the workability of a national framework, Hatchard concentrates on the potential role of national constitutions as sturdy AML instruments. For Hatchard, a relationship exists between constitutional rights of PEPs and AML requirements placed on countries by the FATF. He recognises that the implementation of the FATF's standards at the national level may have unintended consequences, as it can infringe on the constitutional rights of PEPs such as right to privacy, right to consult a lawyer, etc. Hence, Hatchard advocates strongly for a balancing exercise to ensure that constitutional rights do not interfere with effective AML prosecutions and investigations. In particular, Hatchard advances the point that heightened national and international collaborative efforts between AML institutions and civil society organisations remain critical to the constitutional fight against ML. It is imperative to reiterate that Hatchard's core points here are novel, as whilst there is literature relating to PEPs in 'safe havens', there is limited documentation on the relationship between the national constitution and AML efforts in the African context. The richness of Hatchard's arguments is based on the premise that it is a library-based research supplemented by discussions with a wide range of practitioners in and from ACs.

A critical part of this book was Hatchard's considerations of transnational AML initiatives. He explores key thematic areas ranging from how ACs can amplify their beneficial ownership transparency, to the potential of an African Court of Justice and Human and Peoples Rights to facilitate increased prosecution rates. Though the prospects of the court seemed somewhat convincing, Hatchard finds it difficult to accept its workability and effectiveness due to various factors, including the dearth of international cooperation, procedural impediments and the immunity PEPs enjoy.

He states that '*Immunity strengthens the culture of impunity that is already entrenched in most African countries and protects a wide range of PEPs from being accountable for their crimes during their time in offence*'. Acknowledging these challenges, Hatchard does not care to delineate processes that can catalyse the workability of the court beyond the current obstacles. He does not also make a comparison to other regional courts to determine the remit of cases and viability. Instead, Hatchard redirects his focus to the role of the private sector in combatting laundering via PEPs and stresses their critical importance to a holistic AML fight.

Hatchard concludes the book optimistically, reiterating the importance of the "three-pronged approach" to addressing PEPs involvement in laundering. He restates that this approach which is guided by the FATF alongside other instruments is workable when supported by political will. He believes the approach would amplify the fight against PEPs now and in the future. Hatchard contends that whilst Africa's current situation seems daunting, the development of effective strategies remains critical in bringing hope for a better and more prosperous future for the victims of greedy political leaders. In summary, Hatchard, through this book, provides a critical analysis of the strategies required to combat ML through PEPs and recover proceeds of crime – a tool for stakeholders in the field. Hatchard's solution is peculiar to Africa as he discusses them within the context of the continent's economic and developmental problems alongside its sparse political will which continually hinders the adoption of appropriate strategies. Yet he remains resolute that ACs can still navigate the waters to checkmate PEPs. Hatchard's persuasive proposition represents an important step forward towards combatting financial crime through PEPs, who ironically should be custodians of financial integrity.

Hatchard's scholarship deserves a wide readership and consideration by academics and stakeholders in the AML space. The book heralds the dominance of an existing voice, intertwining AML strategies and constitutional law, complex areas of law which the author simplifies. As this review has shown, the book's arguments are compelling. However, the reality remains that certain theoretical underpinnings further highlight the obstacles ACs encounter in combatting ML. The book however alludes to the practical challenges ACs encounter in a manner that is not as radical without a theoretical underscoring of the challenges they face. Whilst not theoretically radical, Hatchard states that this book is a catalyst from '*the need for effective action*' across ACs and this book delivers on this promise. Furthermore, this book does not provide a comprehensive analysis of the constitutional framework and practices in each AC which Hatchard considers an unnecessary exercise. However, the book's selective cross-country focus on particular elements and case studies which the author considers critical to establishing a good governance regime paints a robust picture. Arguably, the pan-Africa approach does not undermine the strength or impact of the book. I can only warmly recommend this book to all interested.

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