Next-Generation Approaches to Trade and Development:

Balancing Economic, Social, and Environmental Sustainability

Katrin Kuhlmann,
Editor

The Center on Inclusive Trade and Development

Georgetown Law's Center on Inclusive Trade and Development (CITD) was established in 2022 to bring together scholars, students, practitioners, policymakers, NGOs, business and labor leaders, and international organizations to find solutions to the challenges facing the international trading system and develop global approaches to making trade rules more inclusive, sustainable, and supportive of development.

Directed by long-time trade practitioners and Georgetown Law professors Jennifer Hillman and Katrin Kuhlmann, the Center serves as the hub and coordinator for research, writing, teaching, events, and clinical work on critical aspects of inclusive trade and development. The CITD also draws on the breadth and depth of over a dozen Georgetown Law faculty formally affiliated with the Center who are focused on international trade, investment, finance, human rights, and development, as well as an Advisory Council that includes global experts with experience across academia, the private sector, NGOs and international organizations. The Center serves as a platform to disseminate cutting-edge research and the results of important field studies and initiatives, along with events showcasing leading thinkers in the trade and development space.

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TABLE OF CONTENTS

PREFACE

I started teaching a seminar course on "International Trade, Development, and the Common Good" at Georgetown University Law Center in 2008, and this course and my amazing students were the inspiration for this book. Over the fifteen years that I have taught the course, it has expanded and evolved significantly. The world has experienced crises of food, finance, debt, health, and climate. There have also been significant challenges to the global system of international trade rules, including through the explosion of regional trade agreements (RTAs) and the expansion of soft law, in particular the Sustainable Development Goals (SDGs). All of these factors have opened up new ways of connecting trade with inclusive and sustainable development. With so much change happening in international trade law, new, creative approaches are badly needed. Nobody seemed better suited to provide this next-generation thinking than the diverse group of students from around the world who took my seminar at Georgetown Law. This book was also inspired by work I have been doing with the United Nations since 2020 on sustainable development and RTAs, and the work of my colleague and Center on Inclusive Trade and Development (CITD) Co-Director, Jennifer Hillman, who has published several books to showcase the work of her students, including two volumes on Brexit and a recent CITD book on trade and climate change.

Historically, the study of trade and development was much narrower and focused primarily on the principle of Special and Differential Treatment (S&DT), which is embedded in a number of World Trade Organization (WTO) provisions, with its roots going back to the 1947 General Agreement on Tariffs and Trade (GATT). S&DT also appears throughout RTAs and provides flexibility and longer time periods for new commitments, capacity building, special treatment for Least Developed Countries (LDCs), and recognition of developing economies' needs, interests, and opportunities. Part of the debate around S&DT has been whether it establishes a right for developing economies or whether it is transitional in nature; the debate has also focused on which countries qualify for S&DT, as "developing country" is not defined under WTO rules.

RTAs have pushed the boundaries of trade and development, extending well beyond S&DT to encompass a number of new substantive commitments in areas that had previously been viewed as "trade and" issues. These include rules on trade and labor, trade and the environment, trade and gender, and trade and small businesses. Issues like food security, which the WTO Agreement on Agriculture refers to as a "non-trade" issue, must also be considered under the larger umbrella of trade and development, as must digital trade, trade and health, and development dimensions of investment and finance. The incorporation of these issues in RTAs is on the rise, and most recent RTAs include some or all of these issues in their provisions, although approaches are quite heterogenous across regions and issues, providing ample material for comparative study.

Alongside these trends, the SDGs and the principle of sustainable development have also had a significant impact on trade law. The Preamble to the WTO incorporates the principle of sustainable development, as do many recent RTAs. The SDGs explicitly refer to trade law in a number of the targets and indicators, with references ranging from S&DT to the Agreement on Fisheries Subsidies, which was concluded at the June 2022 Ministerial Conference. The 2022 Ministerial Conference also resulted in a waiver decision on COVID-19 vaccines under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Both this decision and the Agreement on Fisheries Subsidies carry

important development implications, yet significant gaps and questions remain, some of which are addressed in this volume.

The course covered all of these issues, beginning with the historical evolution of trade and development in the context of international trade rules and then progressing through deep dives into different issues areas related to trade and development. Because of their increasing coverage of sustainable and inclusive development, the course focused in particular on RTAs, concluding with a simulation exercise in which groups of students "negotiated" new RTA sustainable development provisions. Based on this foundation of the rules, context, approaches, and gaps in trade and development law and practice, the students chose topics about which they felt most passionate and channeled their research skills into writing papers focused on some of the most pressing issues in trade and development. Their work was so insightful and creative that I decided that the best of these papers should be shared more broadly in order to spark further research and debate and put the voices of these talented young lawyers into the conversation. Hence the creation of this book, which includes many of the best papers from three seminars taught at Georgetown Law in the spring of 2020, 2022, and 2023.

Each paper is presented in its entirety in this book, with the students acting as their own editors. The papers are grouped based on the pillars of sustainable development – economic, social, and environmental sustainability – depending on the issue. However, each paper covers multiple dimensions of sustainable development, which will be important for future trade and development work, as my introductory chapter highlights. As is true of the course, the papers are all very inter-disciplinary in nature, often incorporating discussion of trade law's overlap with other legal disciplines such as human rights law, environmental law, investment law, intellectual property rules, and finance. Most importantly, the papers delve into some of the most critical issues for the future of trade and development, including international and regional approaches, inclusion and gender, digital trade, food security, labor, climate change, and new approaches in trade and the environment. The students' innovative perspectives and willingness to think outside of the box represent next-generation approaches to trade and development that I hope will find resonance in the academic and policy discussions of the future.

Katrin Kuhlmann

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The author gratefully acknowledges the contributions, feedback, and support from many who helped make this book possible, including those who expanded her understanding of the many ways in which international trade law intersects with sustainable and inclusive development. In particular, I would like to acknowledge my Georgetown Law colleague, Professor Edith Brown Weiss, who has made a significant impact in the field of international law, including through her groundbreaking work to introduce the principle of intergenerational equity and countless contributions to link trade law, environmental law, and human rights. I would also like to thank the members of the Georgetown Law International Economic Law Colloquium, including Professors Robert Thompson, Jennifer Hillman, Gregory Shaffer, Sean Hagan, Kathleen Claussen, Anna Gelpern, Jesse Kreier, and Alvaro Santos, who have been a sounding board for my work on trade and development and provided invaluable feedback on a very early version of the ideas included in the opening chapter.

The driving force for ensuring that the innovative work of Georgetown Law students reach the public domain is deeply embedded in the mission of the book's publisher, the Center on Inclusive Trade and Development (CITD). CITD was founded in April 2022 at Georgetown Law to bring together scholars, students, policymakers, NGOs, business and labor leaders, and international organizations to find solutions to the challenges facing the international trading system and to develop global approaches to making trade rules more inclusive, sustainable and supportive of development. I am incredibly grateful to my colleague and CITD Co-Director, Jennifer Hillman, who was a source of inspiration for this book and a pioneer in bringing student work into the public domain. Her 2023 CITD book, Using Trade Tools to Fight Climate Change, put student work on trade and climate change on the global stage at the September 2023 World Trade Organization Public Forum as part of the discussion on how the global trade community could address the pressing issue of climate change.

This book would not have come together without the exceptional copyediting skills and dedication of Betsy Kuhn, Faculty Manuscript Editor at Georgetown Law. It also would not have its colorful and inspiring cover without the talent and dedication of Ines Hilde, Associate Director of Design in Georgetown Law's Office of Communications. The entire book would not have been possible without the meticulous work of my Research Assistant, Loriane Damian, and the unwavering support for this project from CITD's Program Manager, Valeria Frigeri, and its Senior Fellow, Mario Osorio.

Last but certainly not least, I would like to thank and congratulate the Georgetown Law students whose interest in trade and development led them to take a course focused on innovative solutions in bringing sustainable and inclusive development into trade rules in a way that recognizes the importance of local communities, developing economies, and the global good. Their excellent research and tireless dedication to learning the fundamentals of international trade law in order to apply them in the broader context of development made our classroom a lively, creative, and uniquely enriching environment. I hope that their papers will inspire future thinking and action to harness trade's potential in achieving economic, social, and environmental sustainability and inclusive development.

Katrin Kuhlmann

CHAPTER 1: SUSTAINABLE AND INCLUSIVE TRADE AND DEVELOPMENT: MORE THAN WORDS?

KATRIN KUHLMANN

The body of literature is expanding on the link between sustainable development and trade agreements and rules, yet little focus has been placed on whether trade rules fully measure up to the principle of sustainable development as it is understood in international law more broadly.[1] If fully integrated, sustainable development could provide the framework for a rebalancing of trade law to incorporate not just deeper economic commitments, as has historically been the case, but also substantial social and environmental obligations. It would also require going beyond the current approach to Special and Differential Treatment (S&DT) to ensure that trade rules prioritize both inter- and intra-generational equity. There is also a more recent push to make trade rules more inclusive and ensure that the benefits of trade are more evenly distributed. While inclusive development is not as well defined as sustainable development, it also has implications for the design and implementation of international trade law.

Trade law has both the benefit and the challenge of being an expansive body of law, encompassing all aspects of the 2030 Agenda for Sustainable Development and the United Nations (UN) seventeen Sustainable Development Goals (SDGs) and their targets and indicators, which often reference the role of international trade rules and principles in the context of achieving the SDGs. As this book illustrates, the increased focus on sustainable – and inclusive – trade and development has opened the door for using trade rules to address pressing distributional issues, climate change, global food insecurity, and human rights concerns. It has also provided a new lens through which to assess issues already in the trade rulebook, such as sanitary and phytosanitary measures, standards and technical barriers to trade, and subsidies and agricultural domestic support, as well as digital regulation, regional trade, and sectoral development. Doing so, however, will require going beyond just words to more meaningful, contextual, and precise commitments across all dimensions of sustainable (and inclusive) development.

Historically, with some notable exceptions, social norms have often been viewed as tangential to the economic development focus of trade rules. Across social issues, including protections for workers, women, Indigenous Peoples, and minorities, trade approaches have often been limited to vague affirmations, broad collaboration provisions, and exceptions and qualified reservations. Other social issues, such as food security, have been explicitly referred to as "non-trade" issues. However, as this paper and the papers in this book illustrate, there is significant potential to reassess how social issues are addressed in a trade context, moving

[1] "Sustainable development" is used here to both refer to the 1987 Brundtland Commission Report definition and the broader context laid out in the UN Sustainable Development Goals. 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) and 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]. "Inclusive development" is also referred to throughout as development that represents all voices and takes diverse needs into account (*see, e.g.*, Katrin Kuhlmann, "Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development", 2 African Journal of International Economic Law (2021) [hereinafter Kuhlmann 2021]).

beyond the "trade and" approach that limits deeper commitments to a more contextual, bottom-up approach focused on addressing actual barriers and opportunities.[2]

Sustainable and inclusive trade and development also have cultural and regional dimensions that are important to recognize. To date, sustainable and inclusive development provisions have often been approached in a siloed manner, with certain countries and regions focused on particular issues over others, often taking a more comprehensive approach vis-à-vis trading partners than at home. As a result, these commitments can sometimes be viewed as disguised protectionism or legal imperialism, further fragmenting approaches to integrate certain aspects of sustainable development while largely sidestepping others. Additional considerations include the incorporation of largely aspirational language at the expense of more precise commitments tailored to context and the important role of domestic law in implementing commitments.

On the whole, however, references to sustainable and inclusive development in trade rules are on the rise, and about one-third of regional trade agreements (RTAs) incorporate sustainable development, with the share going up to two-thirds of RTAs since 2005.[3] The concept of sustainable development also appears in the Preamble to the Marrakesh Agreement Establishing the World Trade Organization (WTO),[4] arguably setting the tone for WTO rules. The three pillars of sustainable development – economic, social, and environmental sustainability – are becoming more common in trade law, albeit to varying degrees of legal precision and commitment – calling for deeper research and new approaches, which was the impetus behind this book.

I. Overview and Context of Sustainable and Inclusive Development in International Trade Law

The connection between international law and inclusive and sustainable development highlights evolution in legal application of these concepts but also gives rise to questions of scope and application. Within international law, sustainable development is generally viewed as a normative principle that calls for state action, particularly to achieve an equal balance across economic, social, and environmental priorities. The 1987 Brundtland Commission Report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[5] The Rio Declaration further developed the concept of sustainable development to incorporate both

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[2] For a discussion of the contextual approach, *see* Katrin Kuhlmann, "Gender Approaches in Regional Trade Agreements and a Possible Gender Protocol Under the African Continental Free Trade Area: A Comparative Assessment," forthcoming in *Trade Policy and Gender Equality*, Cambridge University Press (October 2023), available at https://www.cambridge.org/core/books/trade-policy-and-gender-equality/gender-approaches-in-regional-trade-agreements-and-a-possible-gender-protocol-under-the-african-continental-free-trade-area/BC406A9D888E43C3EC51E224221377E5 [hereinafter Kuhlmann 2023] and Katrin Kuhlmann and Amrita Bahri, "Gender Mainstreaming in Trade Agreements: A Potemkin Façade?," *Making Trade Work for Women: Key Learnings*, from the World Trade Congress on Gender (September 2023), available at https://www.wto.org/english/res_e/booksp_e/making_trade_work_for_women_ch12_e.pdf [hereinafter Kuhlmann and Bahri 2023].

[3] Louise Malingrey and Yann Duval, *"*Mainstreaming Sustainable Development in Regional Trade Agreements: Comparative Analysis and Way Forward for RCEP,*"* United Nations Economic and Social Commission for Asia and the Pacific, 2022.

[4] Marrakesh Agreement Establishing the World Trade Organization, preamble, April 15, 1994, 1867 U.N.T.S. 154.

[5] Report of the World Commission on Environment and Development, "Our Common Future" 1987, at 51.

inter-generational equity (preserving the interests of future generations)[6] and intra-generational equity (addressing the interests of different countries – and arguably stakeholders as well – in the present), and its three inter-connected pillars, namely economic development, social development, and environmental protection.[7]

The breadth and precise legal nature of the principle of sustainable development is still subject to debate. Some scholars have held that sustainable development is a "principle" of international law with normative value,[8] while others view it as a "concept" or "policy objective" to guide the design and interpretation of international law.[9] Under the former, it could be considered to part of customary international law, but it is generally regarded as non-justiciable and lacking a standard to connote specific legal rights.[10] It has also been referred to as an overarching or "meta principle" or an "interstitial norm," which carries an important interpretive function.[11] However, most scholars and practitioners emphasize that the obligation it creates is relative and not absolute, giving rise to an "objective of means or of best efforts,"[12] which, even when not entirely binding upon the parties, can serve to guide their actions.

The scope of sustainable development is an important consideration as well. Inter-generational equity is a particularly important dimension of sustainable development needed to build "solidarity with the future."[13] Ideally, it could help avoid inconsistencies in application

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[6] *See* Edith Brown Weiss, "In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity," United Nations (1989) and Edith Brown Weiss, "In Fairness To Future Generations and Sustainable Development." American University International. Law Review 8, no. 1 (1992).

[7] Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (vol. I), which was built upon the Declaration of the United Nations Conference on the Human Environment (1952), "Stockholm Declaration." Principle 3 of the Rio Declaration reiterates and enhances the definition of sustainable development in the Brundtland Report, stating that the "right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" (UN Doc. A/CON. 151/26 Vol. I). *See also*, Report of the World Summit on Sustainable Development, para. 11, *Copenhagen Declaration on Social Development,* U.N. DOC. A/Conf. 166/9 (1995), as reiterated in the 2002 Johannesburg Declaration, World Summit on Sustainable Development, 11, *Johannesburg Declaration on Sustainable Development,* U.N. DOC. A/Conf. 199/L. 6/Rev. 2 (2002), which notably emphasized the importance of poverty eradication, shifts in consumption and production patterns, and management of natural resources for economic and social development as central to sustainable development. Although soft law, these declarations have shaped and guide the legal application of sustainable development.

[8] *See* Gabcikovo-Nagymaros Project case in 1997 between Hungary and Slovenia before the International Court of Justice (dissenting opinion of Judge Gregory Weeramantry, pg. 75 and pp. 89-107).

[9] Jaye Ellis, "Sustainable Development as a Legal Principle: A Rhetorical Analysis" at 2, in Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin, eds, *Select Proceedings of the European Society of International Law*, vol. 2 (Hart, 2008) [hereinafter Ellis]. *See also*, Patricia Birnie and Alan Boyle, International Law and the Environment, 2nd Ed. (Oxford University Press, 2002) at 95-6; Duncan French, International Law and Policy of Sustainable Development (Manchester: Manchester University Press, 2005); Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan Boyle and David Freestone, eds, International Law and Sustainable Development: Past Achievements and Future Challenges (Oxford: Oxford University Press, 1999) 19 at 33 [hereinafter Lowe 1999]; Vaughn Lowe, "The Politics of Law-making: Are the Methods and Character of Norm Creation Changing?" in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 215 (Michael Byers, Ed.; Oxford University Press, 2000) 207 at 216 [hereinafter Lowe 2000]; and Philippe Sands, Principles of International Environmental Law, 2nd ed. (Cambridge: Cambridge University Press, 2003) at 266.

[10] *See* Gunther Handl, "Environmental Security and global Change: The Challenge to International Law," *Yearbook of International Law* (1990) 25.

[11] Lowe 1999.*See also,* Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm," European Journal of International Law, Vol. 23 No. 2 (Oxford University Press, 2012).

[12] Barral, at 377, 391.

[13] Steve Rayner and Elizabeth L. Malone, "Climate Change, Poverty, and Intragenerational Equity: The National Level," *Int. J. Global Environmental Issues*, Vol. 1, No. 2 (2001) at 198, referencing Rayner, S. 1995. 'A Conceptual

of legal and economic development principles in the present,[14] although its balance with intra-generational equity can give rise to some tradeoffs. Expanding on the concept of sustainable development, Duncan French stresses that sustainable development encompasses the environment, economy, equity, and empowerment,[15] while Philippe Sands emphasizes the importance of the integration of environment and development, equity between States, inter-generational equity, and non-exhaustion of renewable natural resources (or sustainable use).[16] Sustainable development also involves other concepts found in international law, such as the precautionary principle, public participation, and access to information, and good governance, alongside interdependence of economic, social, and environmental objectives.[17]

The preamble to the WTO is one of the most widely cited references to sustainable development in international trade law:

> 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* (emphasis added).[18]

Although this language is not binding and does not carry legal weight in terms of clear obligations for the parties to the WTO Agreements, it arguably sets a tone for their interpretation. A number of RTAs contain similar references to sustainable development as well. These provisions would suggest that the parties to trade agreements should incorporate the principles and pillars of sustainable development into all aspects of trade rules. How this is meant to be accomplished, however, is still a very open question.

WTO rules also incorporate aspects of sustainable development under general exceptions contained in Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). These include measures necessary to protect public morals or maintain public order; measures necessary to protect human, animal, or plant life or health; and measures related to the conservation of exhaustible

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Map of Human Values for Climate Change Decision Making', in A. Katama (Ed.) *Equity And Social Considerations Related To Climate Change*, Proceedings of IPCC WG III Workshop, Nairobi 1994, ICIPE Science Press, Nairobi, available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.1806&rep=rep1&type=pdf.

[14] Steve Rayner and Elizabeth L. Malone, "Climate Change, Poverty, and Intragenerational Equity: the National Level," *Int. J. Global Environmental Issues*, Vol. 1, No. 2 (2001) at 198, referencing Lind, R. and Schuler. R. (1998) 'Equity and Discounting in Climate-change Decisions,' in W. Nordhaus (Ed) *Economics And Policy Issues In Climate Change, Resources for the Future*, Washington, DC., available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.1806&rep=rep1&type=pdf.

[15] Duncan French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005) at 14.

[16] Philippe Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge: Cambridge University Press, 2003) at 338.

[17] Peter P. Rogers, Kazi F. Jalal, and John A. Boyd, *An Introduction to Sustainable Development,* Routledge Earthscan (2008) at 196-98, referencing April 2002 Conference of International Law Association, New Delhi, as aligned with the Declaration of the Conference of Rio de Janeiro and Agenda 21.

[18] Marrakesh Agreement Establishing the World Trade Organization, preamble, April 15, 1994, 1867 U.N.T.S. 154.Paragraph 6 of the 2021 Doha Ministerial Declaration reaffirms the commitment to the "objective of sustainable development." Doha Ministerial Declaration, WT/MIN (01)/DEC/1.

natural resources. In order for the exceptions to apply, measures cannot "constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade." Similar language also appears in other WTO agreements, including the WTO Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the WTO Technical Barriers to Trade Agreement (TBT Agreement), and most RTAs incorporate this language, often through identical provisions.

The newer concept of inclusive development is less clearly defined and generally refers to development that is distributed to all members of society and generates opportunities for all individuals and groups. While inclusive development is connected with and sometimes grouped with issues of sustainable development, as evidenced by the SDGs, it is also distinct, and it importantly focuses on the interests of vulnerable individuals and communities. In the sections that follow, inclusive development can be most clearly seen in the social dimension, with approaches on gender, Indigenous Peoples, and small businesses in particular. As inclusive development becomes better defined and more precisely applied, it is likely that questions will arise regarding its legal weight and interpretation as well.

Trade law scholars have argued that the language on sustainable development has, in fact, shaped international trade law in important ways. Multilaterally, it has allowed WTO Member States the policy space to shape domestic law and regulation, flagging an important intersection between the "right to free trade and economic development" and the "right to restrict trade in order to protect life, health, and the environment."[19] International trade law scholars have also asserted that the overarching principle of sustainable development can help reconcile "limitations" and "needs," balancing conflicting values, especially in the context of developing economies.[20]

The principle of sustainable development has also been used to balance priorities in the case of a dispute between parties. Most concretely, the language in the WTO Preamble has been relied upon in WTO jurisprudence, most notably the Shrimp–Turtle case.[21] Although the Appellate Body stopped short of making a recognition of customary international law, reliance on the principle of sustainable development resulted in an important interpretation of Article XX (g) of the GATT to include animals and living organisms within the meaning of "non-exhaustible natural resources."[22]

As a central component of intra-generational equity, which argues for differentiation among stakeholders and nations of differing levels of development,[23] sustainable development incorporates the principle of "Common But Differentiated Responsibilities" (CBDR).[24] CBDR was introduced in the Rio Declaration and later formalized in the UN Framework Convention on Climate Change (UNFCCC) and elaborated upon in the Paris Agreement.[25]

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[19] 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) at 60 [hereinafter Marceau & Morosini].

[20] Marceau & Morosini at 63.

[21] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AV/R, 1998, at paras. 127–131.

[22] Barral, at 386, 395; *see also,* Marceau & Morosini.

[23] *See* Barral, at 380.

[24] Rio Declaration, Principle 7 and UN Framework Convention on Climate Change, preamble and Article 3.1, 1992 United Nations Conference on Environment and Development, and 1997 Kyoto Protocol.

[25] The UNFCCC has been ratified by 198 countries, with the objective of "prevent[ing] dangerous anthropogenic interference with the climate system" (Article 2). The Paris Agreement to the UNFCCC is a legally binding treaty, adopted by 196 Partis at the 2021 Conference of the Parties (COP), with the objective to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the

With the Paris Agreement, the CBDR principle was expanded to include "respective capabilities" (Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC)).[26] CBDR-RC contains several elements combining "common" or shared responsibilities that should be addressed through cooperation between States, as well as differentiation among States[27] and recognition of different capabilities.

CBDR-RC translates into "differential treatment" and "differentiated legal commitments" for developing economies, taking into account that developed economies have played a greater role in causing environmental challenges.[28] Differentiation is based on States' contribution to environmental degradation and resulting responsibility and on States' capacity to act in addressing climate change,[29] drawing out very important aspects of equity. However, although CBDR-RC is incorporated in numerous legal instruments, it has faced challenges with regard to its application and implementation, particularly from developed economies.[30]

Both environmental law and international trade law incorporate the concept of differential treatment.[31] In many ways, the concept of CBDR-RC is aligned with the concept of S&DT in international trade law, which calls for different treatment, rights, and obligations for developing economies. CBDR-RC and S&DT are also related to the principle of progressive realization under human rights law, although there are some variations in the nuances of each concept. The evolution of CBDR-RC into "nationally determined contributions" (NDCs) under Article 3 and Article 4, paragraph 2 of the Paris Agreement[32] while legally distinct, illustrates some parallels with the evolution of S&DT into more nationally tailored, differentiated commitments with varying timelines for implementation. In the trade context, a similar approach applies with respect to commitments made under the WTO Agreement on Trade Facilitation, which contains a structure for differentiated commitments, based on national priorities and capacity under the S&DT provisions for developing countries and least-developed countries.[33]

S&DT is important to the notion of sustainable development, although, in a similar way to CBDR-RC, WTO Member States differ regarding the degree to which S&DT is regarded

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temperature increase to 2°C above pre-industrial levels" (Article 2.1(a)), Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

[26] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC], Article 3.1.

[27] *See* Zuzana Selemontova, "Common But Differentiated Responsibilities for Developed and Developing States: A South African Perspective", in *Law and Development: Balancing Principles and Values* (Piotr Szwedo, Richard Peltz-Steele, and Dai Tamada, eds., Springer, 2019) at 84.

[28] Barral, at 381.

[29] *Ibid.* at 84-85.

[30] *See* Dr. Stellina Jolly and Abhishek Trivedi, "Principle of CBDR-RC: Its Interpretation and Implementation Through NDCS in the Context of Sustainable Development," 11 *Wash. J. Env't L. & Pol'y* 309 (2021), available at https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1135&context=wjelp.

[31] Katrin Kuhlmann, *Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements,* United Nations (2023) at 2 [hereinafter Kuhlmann UN Handbook], available at https://www.unescap.org/kp/2023/handbook-provisions-and-options-inclusive-and-sustainable-development-trade-agreements; *See also* Marcela Dias Varella, "The Principle of Special and Differential Treatment for Developing Countries," May 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437782.

[32] Paris Agreement, Article 3 and Article 4, paragraph 2, 2015, available at https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[33] WTO Trade Facilitation Agreement (Feb. 22, 2017) [hereinafter TFA], available at https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm, Articles 13 and 14.

as a permanent right versus a temporary set of measures and flexibilities.[34] Part IV of the GATT was a significant step in establishing S&DT, since it solidifies the principle of non-reciprocity (Art. XXXVI:8) that is central to S&DT, carving out a fundamental exception to the principle of non-discrimination that underpins international trade rules. GATT Article XXVIII bis importantly stresses that multilateral trade negotiations should take into account "the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and … all other relevant circumstances, *including the fiscal, developmental, strategic and other needs of the contracting parties concerned*" (emphasis added),[35] presenting a range of relevant circumstances and context. S&DT was further advanced and codified through the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause),[36] which solidifies the principle of S&DT and makes aspects of it a permanent exception. S&DT is now incorporated throughout WTO Agreements, mainly in the form of non-reciprocal treatment, special safeguards, longer transition periods to implement legal requirements, preferential trade arrangements with developed markets, and aid for trade, with over 180 references to S&DT overall.[37]

In addition to these multilateral provisions, SD&T provisions have been included in different RTAs such as the African Continental Free Trade Area (AfCFTA) Agreement,[38] ratified by fifty-four African States, and the Regional Comprehensive Economic Partnership Agreement (RCEP) agreement among China, Japan, Australia, New Zealand, South Korea, and the Association of Southeast Asian Nations (ASEAN) members.[39]

II. Connection Between Trade and UN Sustainable Development Goals

The nexus between trade and sustainable development also rests heavily on soft law, especially the UN SDGs.[40] The SDGs can be a guide on how to link sustainable development

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[34] 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* 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). *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; Alexander Keck & Patrick Low, "Special and Differential Treatment in the WTO: Why, When, and How?," at 3-4 (World Trade Org. Econ. Research & Stat. Div., Working Paper No. ERSD-2004-03, 2004); and 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).

[35] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994], Article XXVII 3 (a)(b)(c).

[36] 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.).

[37] World Trade Organization, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc. WT/COMTD/W/239 (2018).

[38] Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, 58 I.L.M. 1028, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [hereinafter AfCFTA].

[39] Regional Comprehensive Economic Partnership Agreement, Preamble, November 15, 2020, available at https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf [hereinafter RCEP].

[40] *See* Katrin Kuhlmann, Chantal Line Carpentier, Tara Francis, and Malou Le Graet, "Trade Policy for Resilient, Inclusive, and Sustainable Development in a New International Economic Order (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4126680; *See also* Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Raman, Fabiola Madrigal, Maya Cohen, and Ata Nalbantoglu,

with issues that appear in trade instruments, such as food security (SDG2 on zero hunger), health (SDG3 on good health and well-being), gender (SDG5 on gender equality), energy (SDG7 on affordable and clean energy), labor (SDG 8 on decent work and economic growth), infrastructure (SDG 9 on industry, innovation, and infrastructure), climate change (SDG 13 on climate action), and fisheries subsidies (SDG 14 on life below water). A number of other SDGs also relate to trade, particularly SDG 1 (no poverty), SDG 10 (reduced inequalities), SDG 12 (responsible consumption and production), SDG 15 (life on land), SDG 16 (peace, justice and strong institutions), and SDG 17 (partnership for the goals). Several SDG targets and indicators also explicitly reference international trade law instruments (Box 1). SDG Target 10.a contains an explicit reference to S&DT: "Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements."[41]

Table 1: References to Trade Rules in the SDGs

SDG Goal	Reference to Trade Rules
SDG 2 End Hunger	2.b Correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round.
SDG 3 Good Health & Well-Being	3.b Support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights regarding flexibilities to protect public health, and, in particular, provide access to medicines for all.
SDG 8 Decent Work and Economic Growth	8.1 Increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-related Technical Assistance to Least Developed Countries.
SDG 10 Reduced Inequalities	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.
SDG 12 Responsible Consumption and Production	12.4 By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment.

"Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723995.

[41] 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].

	12.4.1 Number of parties to international multilateral environmental agreements on hazardous waste, and other chemicals that meet their commitments and obligations in transmitting information as required by each relevant agreement.
	12.c Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.
SDG 14 Life Below Water	14.4 By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time possible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics.

Source: Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development. (A/RES/71/313, E/CN.3/2022/2), available at https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202022%20refinement_Eng.pdf.

The EFTA-Indonesia Comprehensive Economic Partnership Agreement and the Preamble to the Digital Economy Partnership Agreement (Singapore, New Zealand, and Chile) use specific language to reinforce the commitment to upholding the SDGs. Other RTAs include provisions that directly relate to the SDGs, including in chapters on labor, the environment, and gender, as well as in the form of more general development provisions.

While it is too soon to tell how this trend on trade and SDGs will evolve, the increase in incorporation of sustainable development into trade law instruments points to an important trend and common application through trade rules.

III. Sustainable and Inclusive Development in Regional Trade Agreements

Sustainable development provisions also appear in an ever-growing number of RTAs. The UN estimates that over one-third of trade agreements contain references to sustainable development, while about two-thirds of RTAs since 2005 include at least one mention of sustainable development.[42] In mapping sustainable development in RTAs, the UN categorizes provisions in the following categories, several of which overlap with inclusive development as well:

(1) Sustainable development as a concept;
(2) Labor rights and standards;
(3) Environment;

[42] Louise Malingrey and Yann Duval, *"*Mainstreaming Sustainable Development in Regional Trade Agreements: Comparative Analysis and Way Forward for RCEP,*"* United Nations Economic and Social Commission for Asia and the Pacific, 2022.

(4) Human Rights;
(5) Small- and Medium-sized Enterprises (or Micro-, Small- and Medium-Sized Enterprises (MSMEs));
(6) Gender; and
(7) Health.[43]

These seven categories track well with the papers in this volume, although additional development issues are relevant, including food security, inclusive digital trade, anti-corruption, natural resources and infrastructure, and Indigenous Peoples.

References to sustainable and inclusive development can appear in different parts of an agreement (preamble, objectives, provisions, or even a stand-alone chapter) and their scope and scale varies. In general, these provisions are couched in aspirational or guiding terms. By and large, most of these references tend to be in the form of goals, objectives, or softer commitments that fall outside of the scope of enforceable legal provisions; however, there are notable exceptions, such as binding labor and environmental provisions and even minimum legal standards on gender in some RTAs.

Across issues, as outlined in the UN *Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements* (Kuhlmann), common approaches to inclusive and sustainable trade and development tend to include the following:[44]

- *Cooperation Provisions* related to engagement between the Parties, which are often difficult provisions to fully implement and enforce.
- *Reaffirmations of Existing Commitments* focused on acknowledgement of other relevant treaties, such as International Labour Organization (ILO) Conventions, human rights treaties (such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)), or Multilateral Environmental Agreements (MEAs).
- *Capacity Building Provisions* that incorporate S&DT and highlight the importance of addressing capacity gaps, albeit often in an aspirational manner.
- *Reservations or Exceptions* that grant governments policy space to address important issues, such as environmental concerns, which are often a rearticulation of Article XX of the GATT.
- *Minimum Legal Standards*, which, although less common than other approaches, create actionable rights and obligations in areas like gender and labor, often in line with human rights obligations.

Overall, inclusive and sustainable development provisions in RTAs are largely heterogeneous across countries and regions, with notable differences in terms of precision, language, and issue coverage.[45] Some RTAs, including more recent European Union (EU) RTAs, include separate sustainable development chapters. Beginning with the EU–Republic of Korea Free Trade Agreement, Europe's RTAs have included separate chapters that cover: (1) promoting effective implementation of international labor conventions and Multilateral Environmental Agreements, (2) establishing a level playing field by not lowering environmental and labor standards to attract investment, and (3) advocating for the sustainable management of natural resources. Although additional provisions on gender are also included in these chapters, the EU's approach highlights how certain economies have incorporated a

[43] *Id.*
[44] Kuhlmann UN Handbook at 2, *supra* note 21.
[45] *Id.*

preference for specific issues (here labor and environment, which are covered under more detailed chapters as well) over others in their sustainable development strategies.

Other countries and regions do not use sustainable development chapters but instead integrate issues related to sustainable development into trade agreements in various ways. Some use dedicated chapters, such as labor and environment chapters in the United States-Mexico-Canada Agreement (USMCA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or gender chapters in agreements including the Canada-Chile, Chile-Argentina, Chile-Brazil, and Chile-Uruguay Free Trade Agreements (FTAs). Others incorporate sustainable development into preambles and objectives (e.g., RCEP and AfCFTA) or incorporate provisions related to sustainable development throughout agreement provisions.

Given the heterogeneity of commitments, it can be difficult to compare approaches to sustainable and inclusive development and even more difficult to assess their impact. The UN *Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements* (Kuhlmann) also outlines categories that can help benchmark obligations and compare them across instruments:[46]

- Commonality of approach (e.g., affirmations, cooperation provisions, exceptions, minimum legal standards, etc.). In general, affirmations and cooperation provisions are more common within the context of sustainable development, with provisions on minimum legal standards, for example, less common. Exceptions, like the general exceptions discussed above, have also historically been more common than affirmative provisions. This does vary across issue areas, as discussed below.
- Specificity and precision of obligations (i.e., whether obligations lead to a clear right or obligation that could be enforced, provided that the means are established to do so). Often, with sustainable development provisions, obligations tend to be more open-ended and ambiguous rather than precise and actionable. In some cases, more aspirational language can be a starting point for including development considerations in trade instruments, with evolution in precisions of obligations occurring over time.
- Existence of binding dispute settlement is another important consideration, and inclusive and sustainable development provisions are often exempt from binding dispute settlement, with some notable exceptions (e.g., labor and environment provisions in U.S. and EU agreements and gender provisions in African RTAs).
- Alignment between WTO law and bilateral and regional trade law is another factor to consider, although, this can be both a net positive in the context of sustainable development (e.g., incorporation of sustainable development in an agreement preamble) or a net negative (e.g., silence on specific sustainable development issues that do not appear in WTO law).
- Flexibility is also an important consideration to ensure that economies have the possibility of incorporating sustainable development considerations into future trade agreements and domestic law and the ability, sometimes referred to as policy space, to implement rules in a manner that takes into account sustainable development.[47]

[46] Indicators for each of these areas will be developed to make comparison more precise.

[47] For a more comprehensive discussion of flexibility, equity, inclusion, and other principles, see Kuhlmann 2021, *supra* note 1.

- Development priorities and historical and cultural differences will also influence how inclusive and sustainable development provisions are crafted and applied.[48]

Overall, it is difficult to fully assess the impact of inclusive and sustainable development provisions without better tools for measuring their impact on the distribution of trade's benefits. As a starting point, however, the pillars of sustainable development provide a mechanism for ensuring that trade rules are designed not only to favor economic gains but also social and environmental development.

IV. Trade Rules and the Pillars of Sustainable Development

The three pillars of sustainable development are meant to be inseparable. Provisions in some RTAs recognize this; for example, the preamble to the RCEP notes that the "three pillars of sustainable development are interdependent and mutually reinforcing."[49] The pillars must also be viewed in the context of inter- and intra-generational equity, taking a holistic approach to sustainable development in a trade context. However, despite the comprehensive nature of the principle of sustainable development, no trade agreement exists that takes a holistic approach. The sections below briefly discuss each pillar and its connection with current trade law, including both multilateral and regional trade agreements. While comparative examples are provided, this research is ongoing and will be advanced through follow-up projects to this book.

A. Economic Pillar

Within the framework of sustainable development, the economic pillar has historically and thematically been most closely connected with international trade law. The Preamble to the WTO enumerates several different aspects of economic development in the context of sustainable development, including increased standards of living, full employment, a large and steadily growing volume of real income and effective demand, and expansion of the production of and trade in goods and services.[50] Other, earlier, multilateral trade provisions also include specific references to economic development. For example, Article XXXVI of the GATT, one of the three articles that make up Part IV of the GATT, refers to raising standards of living, increasing export earnings, enhancing economic diversification, and "progressive development of the economies of all contracting parties."[51] Also within Part IV, GATT Article XXXVII states that developed countries shall afford priority to reducing and eliminating barriers (including customs duties and non-tariff barriers, and fiscal measures) to products of interest to less-developed countries and refrain from imposing fiscal measures that would hamper trade in primary products from less-developed countries; however, this language is qualified significantly, noting that developed countries shall only do so "to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible."[52] GATT Article XXXVIII provides for collaboration to improve market access for primary products of interest to less-developed countries with "stable,

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[48] Kuhlmann UN Handbook at 6, *supra* note 31.

[49] RCEP, Preamble, November 15, 2020, available at https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf.

[50] Marrakesh Agreement Establishing the World Trade Organization, preamble, April 15, 1994, 1867 U.N.T.S. 154.

[51] 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], Art. XXXVI.XXXVI

[52] GATT Art. XXXVII.

equitable and remunerative prices for exports of such products," collaboration with the UN and United Nations Conference on Trade and Development (UNCTAD), trade and aid, increasing growth rates, and appropriate institutional arrangements. Article XXXVIII also calls for collaboration:

> to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and development of market research.[53]

Economic development objectives are also incorporated in RTAs, although some agreements integrate social aspects more fully. For example, the Preamble to the AfCFTA, referencing African Union Agenda 2063, includes the aspiration to build a "continental market with the free movement of persons, capital, goods and services, which are crucial for deepening economic integration, and promoting agricultural development, food security, industrialisation and structural economic transformation."[54] The Preamble to the RCEP Agreement references the desire to "broaden and deepen economic integration in the region, strengthen economic growth and equitable economic development, and advance economic cooperation" and the aspiration to "create new employment opportunities, raise living standards, and improve the general welfare of their peoples."[55] The Preamble to the USMCA is slightly more lean on economic goals, but it does reference "fairer markets" and "robust economic growth."[56] Notably, both the AfCFTA and RCEP preambles go beyond purely economic issues, refencing food security and equitable economic development, respectively.

All aspects of international trade law have a connection with the economic pillar, ranging from rules on trade in goods and trade in services to newer issues like regulation of the digital economy. The economic pillar also includes provisions on trade facilitation, standards, and sanitary and phytosanitary (SPS) measures. While less common, other issues such as infrastructure development, natural resource management, anti-corruption, and even national security also fall within the economic development pillar.

S&DT provisions apply across all three pillars of sustainable development. S&DT is designed to address intra-generational equity across a number of the economic aspects referenced above, including unequal economic diversification and export earnings, infant industry and balance of payments issues, trade protectionism (particularly in sectors such as agriculture), and lack of capacity to engage in trade.[57] S&DT provisions also exist to address difficulties that developing countries may face when formulating and complying with SPS

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[53] GATT Art. XXXVIII (e).

[54] AfCFTA, Preamble, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

[55] Regional Comprehensive Economic Partnership Agreement, November 15, 2020, available at https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf.

[56] Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[57] Kuhlmann 2021 at 7, *supra* note 1. *See also* 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), at 3-4.

measures,[58] technical regulations, standards, and conformity assessment procedures,[59] and infant industry and balance of payments issues (Art. XVIII of the GATT). However, while S&DT applies in certain circumstances, its application in the context of economic development has been limited, due in part to the limitations inherent in S&DT. More recent approaches to S&DT, such as the WTO Agreement on Trade Facilitation, further differentiate between trading partners and bring to mind similarities with CBDR-RC by recognizing "the particular needs of developing countries and especially least-developed country members" and allowing countries to tailor commitments and capacity requirements to address these needs. However, S&DT does have shortcomings, including its temporary nature in many cases and the lack of specificity around a number of S&DT provisions.[60]

Beyond S&DT, intra- and inter-generational equity are largely absent within the economic sphere of trade rules. Inter-generational equity in this context would require a deeper assessment of how resources, including raw materials, could be traded in a way that brings benefit to all, particularly communities within developing markets. Applying inter-generational equity under this pillar would also require asking whether the choices of today, sometimes in the form of the exportation of raw materials, advance the needs of tomorrow. This would necessitate a more sustainable and balanced approach to global supply chains, arguing for more processing and value addition within developing markets, as developing economies have advocated for over the years and are now pressing for again in the context of critical minerals. The critical minerals discussions currently underway are central to decarbonization efforts, but they call into question the precise balance between economic, social, and environmental sustainability. Inter-generational equity would also call for a more equal distribution of wealth, bringing in the social issues discussed in the next section and better aligning the economic dimension with the principle of inclusive development. Overall, there is not a consistent mechanism for ensuring that the economic aspirations embedded in multilateral and regional trade rules are applied in a way that would uphold the principles of inter-generational and intra-generational equity in the application of the rules; however, building a set of measurement tools and indicators in this area could be very beneficial.

Table 2: Illustrative Trade Approaches Under the Economic Pillar

Trade Approaches	Substantive Law	Equity – S&DT (intra-generational equity)
Objectives to increase standards of living, real income, and effective demand; expansion of the production of and trade in goods and services	Article XXXVI of the GATT	"[P]rogressive development of the economies of all contracting parties" and "developed countries **shall** afford priority to reducing and eliminating barriers … to

[58] Agreement on the Application of Sanitary and Phytosanitary Measures, available at https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

[59] Agreement on Technical Barriers to Trade, available at https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

[60] 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). As discussed in Kuhlmann 2021, *supra* note 1, the authors conclude that 86 percent of S&DT provisions (195 out of 227) establish legally binding obligations, although many of these are not fully enforceable. *Id.* at 51. Among these obligations, 115 amount to duties (57 of these apply to developed country members, and 16 of them apply to developing country members, including duties to inform or notify), 39 are privileges, and 41 are rights.

		products of interest to less-developed countries…"
Objective to establish a continental market with the free movement of persons, capital, goods, and services	Preamble to the AfCFTA	The language in the AfCFTA is notable, since it integrates issues of inclusive and sustainable development. For example, the AfCFTA Preamble states: "deepening economic integration, and promoting agricultural development, food security, industrialization and structural economic transformation."
Objective to broaden and deepen economic integration in the region	Preamble to the RCEP	"[S]trengthen economic growth and equitable economic development."
Objective to achieve fairer markets and robust economic growth	Preamble to the USMCA	Intra-generational goals and economic growth
Trade provisions across a range of disciplines, including goods and services market access, SPS and TBT measures, IP rules, agricultural provisions	GATT, GATS, SPS Agreement, TBT Agreements, TRIPS Agreement, Agreement on Agriculture	S&DT provisions across agreements
Trade facilitation	WTO Agreement on Trade Facilitation	Differentiation between trading partners and recognition of the needs of developing countries and least-developed countries

B. Social Pillar

Centered around human rights, the social pillar focuses on a number of interconnected issues, including labor issues, gender equality, food security, health, and Indigenous Peoples' rights. It encompasses internationally recognized human rights, such as non-discrimination in employment and broader elimination of discrimination (including for race and gender), freedom of association, elimination of all forms of forced or compulsory labor,[61] and the effective abolition of child labor. It also encompasses both individual rights and community rights, such as the right to food and food security, traditional knowledge, and biodiversity. This pillar includes a number of issues that are central to inclusive development, namely gender, Indigenous Peoples' rights, and trade provisions to support MSMEs. Notably, this

[61] There is a growing trend to take legal action at the regional (in the case of the EU), national, or sub-national/state level (in the case of California) to ban products made with forced labour. *See* European Commission, Commission moves to ban products made with forced labour on the EU market, Press Release (Sept. 14, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5415.

pillar is also viewed as one that gives rise to obligations of the private sector alongside those of the State,[62] with important implications for future trade measures.

This pillar does appear across trade instruments, although it is much less pronounced than the economic pillar, which essentially underpins all trade rules. References to increased standards of living, for example, link with international human rights instruments, such as Article 25 (1) of the Universal Declaration on Human Rights (UDHR), Article 11 of the International Covenant on Economic, Social, and Cultural Rights (IESCR), and Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Based on this connection, an argument could be made that international trade law intentionally incorporates human rights and the social dimension of sustainable development. However, given the fact that trade rules related to the economic dimension tend to create more precise and enforceable obligations, in contrast to the often hortatory language used for social provisions, the social aspect is still much weaker both de jure and de facto.

While the social pillar does not arise as much in multilateral trade law, and is often deferred to other international legal bodies and instruments, it is increasingly prevalent in bilateral and regional trade agreements. WTO instruments, for example, explicitly refer labor matters to the ILO, with language to this effect in the Singapore Ministerial Declaration and the Doha Ministerial Declaration.[63] In the WTO Agreement on Agriculture (AoA), food security is referred to as a "non-trade" issue, despite its importance to many countries that are party to that Agreement. However, RTAs deal with labor issues much more expansively, and food security is at least noted as a goal of some RTAs, even if the provisions in this area are much less robust. Provisions on health are an exception here, where multilateral and regional trade rules encompass important provisions on access to medicines and other mechanisms for addressing global health concerns.[64]

Like the economic pillar, guiding language for the social pillar often appears in agreement preambles and objectives. While, as noted above, many trade agreement provisions explicitly refer to economic objectives, integration of the social pillar is often done separately and with less legal weight. However, in some cases, economic and social goals are prioritized in tandem. In the AfCFTA, for example, the agreement's general objectives contain the affirmation to

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[62] The UN Global Compact, which is based on the Universal Declaration of Human Rights, ILO Declaration on Fundamental Principles and Rights at work, the Rio Declaration on Rights and Development, and the United Nations Convention Against Corruption, defines social sustainability as "identifying and managing business impacts, both positive and negative, on people."

[63] Paragraph 4 of the Singapore Ministerial Declaration of 18 December 1996 states: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration," Singapore Ministerial Declaration, WT/MIN (96)/DEC. Paragraph 8 of the Doha Ministerial Declaration of 20 November 2001, states: "We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization." Doha Ministerial Declaration, WT/MIN (01)/DEC/1.

[64] Katrin Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic,* United Nations (2021), available at https://repository.unescap.org/handle/20.500.12870/3848.

"promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties."[65]

Overall, obligations within the social pillar tend to be less binding than economic commitments, with affirmations and provisions on cooperation and collaboration among the most common approaches across social issues. Within the social pillar, labor and health provisions have perhaps the longest history of social issues covered in RTAs,[66] although other social issues are becoming more prevalent in RTAs as well, including gender. In some cases, social issues are subject to binding dispute settlement, although often these issues are carved out of enforcement provisions. While social issues were historically more common in separate side agreements or stand-alone provisions, they are now increasingly showcased in focused RTA chapters, such as those on labor, gender, and even sustainable development.

Labor rights are fundamental to the social pillar of sustainable development, and these often take the form of provisions on cooperation and capacity building, promotion of labour standards, minimum legal standards, compliance with ILO Conventions and other international commitments, and, as an emerging area, business and human rights. Some RTAs contain entire chapters on labor, while others combine labor and other substantive issues of sustainable development. Compared with other social provisions, labor provisions tend to be more precise and binding.

The USMCA is often cited as an example in the area of labor and trade,[67] since it contains quite substantial and comprehensive labor provisions, building upon the foundation of the North American Free Trade Agreement (NAFTA). Protections include those contained in the ILO Declaration on Rights at Work as well as newly-added protections for migrant workers. The labor chapter of the CPTPP[68] also contains minimum legal standards and requires each party to "adopt and maintain" statutes, regulations, and practices with acceptable conditions to work, including the elimination of child labor and forced and compulsory labor (Article 19.3). The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU (Chapter 8) calls for "high levels of labour protections," linking labor law commitments to the ILO's Decent Work Agenda (Article 23.3, 2).[69]

Some RTAs contain enforceable provisions on labor, although implementation of these provisions can be a challenge. The labor provisions in the USMCA are binding and subject to dispute settlement, with an innovative (albeit asymmetrical) enforcement mechanism, the Rapid Response Labor Mechanism, designed to more quickly resolve labor disputes related to issues of collective bargaining and freedom of association in Mexican factories. While innovative, however, this mechanism is one-sided in its design, raising issues with intra-generational equity as defined in the context of sustainable development.

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[65] AfCFTA, Article 3(e), available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

[66] Social issues are sometimes grouped as "trade plus" or "deep" trade issues, even though they are central to trade law. For a comprehensive resource on "deep" trade issues in RTAs, see Aaditya Mattoo et al., *Handbook of Deep Trade Agreements,* World Bank 58 (2020), *https://openknowledge.worldbank.org/handle/10986/34055*.

[67] This agreement is often referred to as the United States-Mexico-Canada Agreement, or USMCA, but it is also known as the Canada-Mexico-United States Agreement (CEMAC) or Tratado entre México, Estados Unidos y Canadá (T-MEC).

[68] Trans-Pacific Partnership Agreement, 2015, available at https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents.

[69] Comprehensive Economic and Trade Agreement, 2017, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:011:FULL&from=EN.

Among social issues, gender is not as common as labor in RTAs, but there is a growing trend to incorporate gender provisions. Gender references tend to appear in agreements' preambles and objectives but are sometimes the subject of side agreements or standalone chapters. Some agreements, such as the Chile-Uruguay , Canada-Chile , and Canada-Israel FTAs include entire chapters devoted to gender. Gender is also related to other RTA social issues, such as labor and MSMEs.[70] Alongside the EU, however, African RTAs have the longest history of incorporating gender provisions in trade agreements.[71] In several cases, notably the 1993 Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) and the 2008 Southern African Development Community (SADC) Protocol on Gender and Development, these agreements contain binding minimum legal standards. A new AfCFTA protocol on trade, gender, and youth is under negotiation, which holds significant potential in terms of the social pillar.[72] However, this new protocol should also be viewed in light of existing economic disparities.[73]

Assessing social provisions is context-critical and requires consideration of actual challenges and opportunities, along with important regional and cultural differences.[74] Context underpins some RTA provisions on MSMEs, for example. These provisions may include tailored rules on trade facilitation, government procurement, and electronic commerce that are designed to address challenges that small companies face in the market. Some provisions related to Indigenous Peoples also context into account, with particular rules for products from Indigenous Communities or provisions recognizing traditional knowledge.

Across gender provisions, RTAs show quite a bit of variation in considering women's roles, with some taking a more economic approach and others a more social approach.[75] However, some of the more important context-specific elements of integrating gender, as is true of other social issues in trade instruments, tend to be overlooked.[76] New models are emerging, such as the Global Trade and Gender Arrangement (GTAGA) initially signed by Chile, Canada, and New Zealand (2020) (and later by Mexico (2021), Colombia (2022), and Peru (2023)). These models address challenges faced by women-owned businesses, such as gender-based discrimination during licensing and certification in the services sector. They also highlight cooperation activities to share knowledge and good practices across different topics, including the elimination of discrimination in employment and occupation.[77] These models may point to an emerging context-specific trend, but it is too soon to tell whether new agreements will mark a significant change.

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[70] These include the Chile-Uruguay FTA (Chapter 11.9/6 on Labour) and USMCA (Article 14.17 on corporate social responsibility, Article 23.9 on sex-based discrimination in the workplace and Article 25.2 on investment and SMEs), as well as the Canada-Colombia and Canada-Costa Rica FTAs, as referenced in Bahri 2019, at 5.

[71] *See* Clair Gammage & Mariam Momodu, 'The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies' (2020) 1 AF. J. INT'L. ECON. L.

[72] *See* Kuhlmann 2023, *supra* note 2; *see also* Nadira Bayat, *A Whole Agreement Approach – Towards Gender Mainstreaming in the AfCFTA* (Friedrich-Ebert Stifting, Mar. 22, 2022).

[73] Andrew Karamagi and Sodfa Daaji, "Is the Protocol on Gender and Youth in Trade a Bridge Too Far?," Afronomicslaw (October 2023), available at https://www.afronomicslaw.org/category/analysis/protocol-women-and-youth-trade-bridge-too-far.

[74] Kuhlmann 2023, *supra* note 2; *see also* Kuhlmann and Bahri 2023, *supra* note 2.

[75] *See* Kuhlmann and Bahri (2023), *supra* note 2; *see also* Amrita Bahr, "Making Trade Agreements Work for Women Empowerment: How Does It Help, What Has Been Done, and What Remains Undone?" *Latin American Journal of Trade Policy*, *4*(11), 6–24 (2021). https://doi.org/10.5354/0719-9368.2021.65667.

[76] Kuhlmann 2023, *supra* note 2.

[77] Global Trade and Gender Arrangement (Aug. 4, 2020) available at https://www.international.gc.ca/trade-commerce/inclusive_trade-commerce_inclusif/itag-gaci/arrangement.aspx?lang=eng#fn1.

The main trade tool for intra-generational equity, S&DT, does not provide as much assistance under the social pillar as it does under the economic pillar. This is mainly because, in the first instance, S&DT provisions are usually applied to economic obligations and, second, because social provisions are particularly heterogenous. However, elements of differential application and enforcement do exist, and capacity building, which is part of S&DT, is the focus of a number of RTA provisions within the social dimension.[78] It is possible to envision application of S&DT in areas beyond economic rules, perhaps drawing from the example of the WTO TFA.

As is the case within the economic pillar, inter-generational equity deserves greater focus. In the social context, inter-generational equity could take the form of more balanced approaches to trade law and policy that create a better foundation for the future and give greater shape to inclusive development provisions. For example, leaving women out of trade opportunities could be viewed as contrary to future possibilities, as could neglecting labor issues, including forced labor or trafficking or overlooking the important role of MSMEs. Treating food security as a non-trade issue, when distributional challenges related to the market lie at the heart of addressing food insecurity, could also be reassessed through the lens of inter-generational equity. Across the board, applying inter-generational equity to trade rules under this pillar would necessitate a closer link between trade and human rights.

The balance between inter-generational equity and intra-generational equity will be very important in the social context. Given how some social issues are approached, such as the asymmetrical labor provisions referenced above, it is not surprising that labor and other social issues are sometimes viewed as a form of disguised protectionism. Here there may be a contradiction between inter-generational and intra-generational equity that should be carefully considered.

Table 3: Illustrative Trade Approaches Under the Social Pillar

Trade Approaches	**Substantive Law**	**Equity: S&DT (intra-generational equity) could be strengthened; inter-generational equity would press for better trade balance to secure a better future**
Labor	RTAs (e.g., USMCA, CPTPP, CETA); GATT Article XX; Singapore Ministerial Declaration and Doha Ministerial Declaration	Individual equity inherent in provisions; capacity building provisions; intra-generational and inter-generational equity require greater focus. Multilaterally, labor matters are explicitly referred to the ILO; RTAs reference labor and ILO conventions, with various enforcement measures in place, such as the rapid response labor mechanism (USMCA);

[78] *See, e.g.,* United States-Peru Free Trade Agreement Article 17.5 (labor-focused capacity building), EU-VietNam Trade Agreement Art. 16.1 (focused on labor capacity building), Canada-Israel FTA Art. 3.3 (gender-focused capacity building), AfCFTA Art. 29 (general capacity building), and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Art. 24.2 (SME-focused capacity building).

		requirements to adopt and maintain statutes, regulations; and practices with acceptable conditions to work (CPTPP).
Food security	Agreement on Agriculture, although treatment is limited; some RTAs	Intra-generational and inter-generational equity require greater focus. Referred to in AoA as a non-trade issue; S&DT provisions in AoA, which could be enhanced.
Gender	COMESA Treaty; SADC Protocol on Gender and Development; among newer RTAs, the Chile-Uruguay FTA, Canada-Chile FTA, and Canada-Israel FTA; and new AfCFTA protocol on trade, gender, and youth	Individual equity inherent in provisions; capacity building provisions; intra-generational and inter-generational equity require greater focus. Side agreements or standalone chapters on gender, economic or social view of women's role, or provisions to address challenges faced by women-owned businesses.

C. Environmental Pillar

The environmental pillar of sustainable development intersects with both the economic and social dimensions,[79] and it is increasingly prevalent in trade instruments. Drawing connections with the broader body of international law, the International Court of Justice (ICJ) has expressly incorporated a social dimension into the definition of "environment," noting that environment incorporates quality of life and human health,[80] which should have implications for trade law in the future.

Under this pillar, WTO law contains relevant disciplines as noted, but they are limited to exceptions (defensive provisions). Environmental provisions are contained in Article XX (b) and (g) of the GATT on the protection of human, animal, or plant life or health and the conservation of exhaustible natural resources, respectively.[81] Article XIV of the GATS, Article III of the WTO Agreement on Government Procurement, and Article 2.2 of the TBT Agreement also contain similar references. These are among the most common environmental provisions in RTA provisions as well, although some RTAs go well beyond defensive provisions.

Right-to-regulate provisions relating to the environment can also arise in the context of standards and investment. With regard to standards, a number of RTAs note that parties can act in furtherance of "legitimate objectives," including the protection of human, animal or plant life or health, and the environment. Notably, the NAFTA also includes sustainable

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[79] For example, Principle 20 of the Rio Declaration, supra note [FILL IN], notes that "Women have a vital role in environmental management and development" and "Their full participation is therefore essential to achieve sustainable development."

[80] ICJ, opinion on Legality of the Threat of Use of Nuclear Weapons (1966), pp. 241-2, para. 29.

[81] Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)) [hereinafter GATT 1994], Art. XX (b) and (g).

development among the list of legitimate objectives,[82] a trend that is now appearing in investment chapters and protocols, such as the AfCFTA Investment Protocol, which not only includes the right to regulate but frames covered investments within a definition centered on sustainable development.[83]

RTAs have expanded the scope of the relationship between trade and the environment considerably, with a number of approaches that are much more affirmative in nature. These include incorporation of MEAs, the oldest one being the UNFCCC, which explicitly references sustainable development,[84] along with the Kyoto Protocol and the more recent Paris Agreement, which brings in CBDR-RC. Other RTAs that reference these MEAs, such as the Georgia-UK Partnership and Cooperation Agreement (Article 223), Economic Community of West African States (ECOWAS) Investment Code (Article 27), and the Zero Draft of the AfCFTA Protocol on Investment (Article 7),[85] reinforce the commitment to sustainable development as contained in these MEAs. RTAs also reference the Convention on Biological Diversity, [86] the Convention on International Trade in Endangered Species of Wild Fauna and Flore (CITES),[87] the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal,[88] and the Montreal Protocol on Substances that Deplete the Ozone Layer,[89] among other agreements, linking trade to important environmental issues such as biodiversity, protection of endangered species, and containment of hazardous waste. Circular economy issues are becoming increasingly prevalent in RTAs as well.

Substantively, RTAs also incorporate adherence to domestic environmental laws and policies, environmental goods and services, cooperation, capacity building, and information sharing, among other issues. However, important aspects of environmental development tend to be less of a focus, such as environmental adaptation. Recently, a comprehensive environmental agreement – the Agreement on Climate Change, Trade and Sustainability (currently under negotiation between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland) – has emerged to establish rules to remove tariffs on environmental goods and include binding commitments on environmental services, among other substantive provisions.

As with social provisions, environmental provisions tend to appear with the greatest frequency in trade agreement preambles or objectives, although they can also be the subject of environment-specific articles, side-agreements, or stand-alone environmental chapters, as well as sustainable development chapters. Environmental provisions can also appear in other RTA chapters, such as investment chapters and services schedules (environmental services). While agreements like the USMCA and EU RTAs stand out for containing binding

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[82] José-Antonio Monteiro, "Typology of Environment-Related Provisions in Regional Trade Agreements," World Trade Organization, (2016), available at https://www.wto.org/english/res_e/reser_e/ersd 201613_e.pdf.

[83] Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA].

[84] UN Framework Convention on Climate Change, Art. 3 para. 4 states that "[t]he Parties have a right to, and should, promote sustainable development."

[85] Kuhlmann UN Handbook at 2, *supra* note 38.

[86] Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992).

[87] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243 [hereinafter CITES].

[88] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 5, 28 ILM 657 (1989) [hereinafter Basel Convention].

[89] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3, 26 ILM 1541, 1550 (1987) [hereinafter Montreal Protocol].

environmental protection provisions, other examples exist, such as the Agreement Establishing the East African Community (EAC).[90]

Environmental provisions in RTAs have become deeper and stronger over time, particularly since the late 2000s.[91] As noted with respect to some social issues, like labor, some RTAs contain enforceable provisions on the environment, although these provisions are not always legally binding. The USMCA is a notable exception, and, as with the agreement's labor provisions, the environmental provisions are part of a separate chapter subject to dispute settlement, which marks an evolution since the side-agreement approach under NAFTA.

As is true with the social pillar, the main trade tool for intra-generational equity, S&DT, does not always appear in trade and environment provisions, even though MEAs, such as the Paris Agreement, incorporate intra-generational equity. The 2022 WTO Agreement on Fisheries Subsidies also incorporates S&DT, in furtherance of SDG Target 14.6. Capacity building, which is part of S&DT, is the focus of some RTA provisions under the environmental pillar as well.[92] The lack of systemic S&DT in trade and environment provisions may be due to the evolving nature of environmental provisions. It is likely also due to some asymmetry in applying these provisions, where developed economies tend to press for their insertion in RTAs. However, differential application in addition to and beyond capacity building is very relevant and linked with CBDR-RC, and should have considerable application in the trade context.

Inter-generational equity, while central to sustainable development, is also not an emphasis in trade instruments. However, this principle could take on additional dimensions in a trade context. It is also important to consider how inter-generational equity under the environmental pillar balances with inter-generational equity under the economic and social pillars, where considerations may be different. As noted above, this could be a way of linking sustainable and inclusive development considerations in trade instruments, and it deserves greater focus with this consideration in mind.

Table 4: Illustrative Trade Approaches Under the Environmental Pillar

Trade Approaches	**Substantive Law**	**Equity: Enhanced S&DT and inter-generational equity needed, putting the protection of the environment and natural resources alongside economic growth**
General exceptions	Article XX (b) and (g) of the GATT, Article XIV of the GATS, Article 2.2 of the TBT Agreement, and Article XXIII of the WTO Agreement on Government Procurement	Defensive measures to protect human, animal, or plant life or health and the conservation of exhaustible natural resources

[90] José-Antonio Monteiro, "Typology of Environment-Related Provisions in Regional Trade Agreements," World Trade Organization, (2016), available at https://www.wto.org/english/res_e/reser_e/ersd 201613_e.pdf; Agreement Establishing the East African Community (Nov. 30, 1999), [hereinafter EAC Agreement] available at https://www.eala.org/documents/view/the-treaty-for-the-establishment-of-the-east-africa-community-1999-2006.

[91] José-Antonio Monteiro, "Typology of Environment-Related Provisions in Regional Trade Agreements," World Trade Organization, (2016), available at https://www.wto.org/english/res_e/reser_e/ersd 201613_e.pdf.

[92] *See, e.g.,* U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) Chapter 17, Annex 17.9.

Standards, technical regulations, and investment provisions	TBT Agreement; AfCFTA Investment Protocol; Agreement on Climate Change, Trade and Sustainability (currently under negotiation)	Some references to intra-generational equity in the form of S&DT and capacity building; inter-generational equity requires greater focus. Inclusion of legitimate objectives, such as protection of human, animal or plant life, or health; the environment; and sustainable development; sustainable development incorporated into definition of investment; removal of tariffs on environmental goods and services.
Climate change	UNFCCC and Paris Agreement incorporated into RTAs	Capacity building provisions; intra-generational and inter-generational equity require greater focus. Intra-generational treatment in UNFCCC and Paris Agreement. Reference to sustainable development and recognition of common but differentiated responsibilities.
Biodiversity and protection of endangered species	Convention on Biological Diversity incorporated into RTAs, such as U.S.-Peru Trade Promotion Agreement, etc.	Intra-generational and inter-generational equity require greater focus. Commitment to promote and encourage "the conservation and sustainable use of biological diversity."
Hazardous waste	Basel Convention incorporated into RTAs; ECOWAS Investment Code (Article 37)	Intra-generational and inter-generational equity require greater focus. Requiring the implementation of hazardous waste-related management/ standard, with the objective of promoting sustainable development
Fisheries subsidies	2022 Agreement on Fisheries Subsidies; RTA provisions on fisheries subsidies	S&DT in WTO Agreement on Fisheries Subsidies; intra-generational and inter-generational equity require greater focus. Intra-generational equity in form of S&DT reference in the Fisheries Subsidies Agreement and SDG Target 14.6.

V. Conclusion

More so than ever before, governments are reiterating the fundamental importance of ensuring that trade rules and multilateral cooperation support the pursuit of sustainable and, more recently, inclusive development. As these commitments take shape and unfold, a deeper understanding of how sustainable and inclusive development can be substantively and operationally linked with trade law will be increasingly important as questions of development, environment and climate change, and inclusion and human rights become central to trade law and policy.

Despite the increasing acceptance of the link between trade and sustainable and inclusive development, open questions remain with regard to interpretation, implementation, and ability to address issues of distribution and equity. An assessment of international trade rules on the basis of the three pillars of sustainable development, all of which must necessarily incorporate inter- and intra-generational equity, leads to the ultimate question of how trade rules could be designed to more fully incorporate these pillars and principles. Inclusive development should also be considered as a related but distinct principle, which would call for more deeper, more contextual approaches to trade rules that address the needs of vulnerable stakeholders, both now and in the future, reinforcing inter- and intra-generational equity. In all cases, it will be important to keep in mind that sustainable and inclusive development do not always carry the same meaning or set of priorities for all, particularly developing economies and vulnerable communities.

This book provides a first step in presenting and answering some of these questions. Approaches include deeper commitments, more context- and problem-based approaches, ways in which to address asymmetry in trade rules and their application, and methods for enhancing transparency and public participation in trade rulemaking. Future courses will continue to delve deeper into some of these areas, including more precise approaches for integrating inclusive development.

The papers that follow are organized based on whether they fall primarily within the economic, social, or environmental pillars. While each paper focuses on an issue that would be traditionally considered more economic, social, or environmental, all of the papers attempt to bridge the pillars to varying degrees, bringing a social dimension to economic growth or environmental sustainability, linking environmental development with economic tools such as investment, and applying trade law and tools to social issues in new ways. These papers represent the views of the next generation of legal experts in trade, social issues, and environmental law, and each of them presents novel approaches that could be further developed as law in these areas evolves and becomes more integrated to advance sustainable and inclusive development.

PART I

ECONOMIC GROWTH

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ECONOMIC GROWTH

Part I of the book covers issues that are often approached in the context of economic growth and development under multilateral and regional trade rules; however, the papers do so in an innovative, sustainable, and inclusive way. The papers in this section focus on issues of special and differential treatment, national security, anti-corruption, and digital trade. These issues would fall under a number of the SDGs, including SDG 1 (No Poverty), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation, and Infrastructure), SDG 10 (Reduced Inequalities), and SDG 17 (Partnership for the Goals), among others.

The first sub-section of Part I explores issues related to multilateral and regional trade agreements. The first and second chapters in this section assess different aspects of Special and Differential Treatment (S&DT). Chapter 2, "Technical Assistance and Capacity Building Relief in the Dispute Settlement Understanding," approaches trade capacity building in the context of the WTO Dispute Settlement Understanding (DSU) and proposes a new take on S&DT in order to ensure that developing economies can more fully use the WTO's dispute settlement system. Chapter 3, "Reimagining AGOA in the Era of AfCFTA: Opportunities for Sustainable Economic Growth in Africa," discusses another aspect of S&DT, trade preference programs, presenting recommendations for promoting regional integration, sustainable development, and economic growth in Africa by linking the African Growth and Opportunity Act with the African Continental Free Trade Area Agreement (AfCFTA).

Other chapters explore the intersection between economic growth and national security, corruption, and regional trade agreements. Chapter 4, "Making Room for Sustainable Development in the Growing Nexus Between Trade and National Security" proposes to apply a sustainable development lens in the application of the national security exception in order to advance the broader goals included in the SDGs. Several other chapters, Chapter 5, "The Inclusion of Anti-Corruption Chapters in Free Trade Agreements: A Comparative Analysis of the USMCA and EU–Mexico Agreement in Principle," and Chapter 6, "Corruption Reform in Frontier Economies: How Enhancing Rule of Law Provisions in the Dominican Republic-Central American Free Trade Agreement Can Support Foreign Investment in El Salvador and Honduras," explore how rule of law and anti-corruption provisions in free trade agreements could have an impact on trade and development. The final paper in the sub-section, Chapter 7, "Building Infrastructure as a Means to Participate in Trade Opportunities," examines the important issue of infrastructure development in the context of Regional Trade Agreements (RTA) provisions to promote trade and achieve regional economic integration.

The second sub-section of Part I focuses on the issue of digital trade and its relationship to development. Chapter 8, "Drafting Cybersecurity Articles into Trade Agreements for Developing Nations," addresses the development implications of enforcement action against cybercrimes, with recommendations for addressing these issues through trade agreements in the form of global cybersecurity standards, compliance mechanisms, and access to data and information sharing. Also in the cybersecurity context, Chapter 9, "Enabling Trustworthy Digital Trade for Sustainable Development: Cybersecurity is Essential for Inclusive Trade and Investment," proposes to incorporate state-responsibility and cyber provisions into trade and investment agreements to safeguard and facilitate trade and investment.

At a regional level, Chapter 10, "Africa's Digital Dawn: Toward an African Continental Free 'Tech' Agreement," explores how the AfCFTA could incorporate provisions on data privacy, technology, and intellectual property to promote the growth of domestic media and technology companies continent-wide. The final chapter in Part I, Chapter 11, "Closing the Digital Gender Divide in International Trade Agreement Provisions," addresses the digital gender gap and proposes options for adapting digital provisions in trade agreements to make them more gender-responsive.

PART I

ECONOMIC GROWTH

Multilateral and Regional Agreements

CHAPTER 2: TECHNICAL ASSISTANCE AND CAPACITY BUILDING RELIEF IN THE DISPUTE SETTLEMENT UNDERSTANDING

TERESA GRIEGO*

Abstract

Much research to date has been conducted regarding developing countries' use of the dispute settlement system at the World Trade Organization (WTO). It is widely accepted that developing countries (and least developed countries (LDCs) in particular) have historically underutilized the dispute settlement system. Extensive empirical and qualitative research has been conducted on what factors contribute to this underutilization. Reforms to the Dispute Settlement Understanding (DSU) have been proposed, both by WTO member states through a formal review mechanism at the WTO and by trade scholars, regarding how to fix the gap in utilization of the WTO dispute settlement system. However, these reform proposals do little to fulfill the development goal of the WTO and the needs of developing economies.

Another line of international trade scholarship explores the WTO's technical assistance and capacity building programs. This research assesses the different aid for trade programs offered by the WTO and its developed member states and points out many of their shortcomings and challenges. This paper draws from both of these lines of research, proposing a new Special and Differential Treatment (S&DT) provision to the DSU that would provide for technical assistance and capacity building relief for developing countries that prevail in a dispute against a developed country. This proposal could both resolve the challenges with WTO capacity building while increasing developing country involvement in the dispute settlement system.

I. Introduction

When the General Agreement on Tariffs and Trade (GATT) was created, it was equipped with a relatively rudimentary dispute settlement system.[93] At the Uruguay Round of multilateral trade negotiations, which culminated in the founding of the WTO, the DSU was drafted.[94] The WTO's DSU is commonly referred to as the WTO's "crown jewel." It provides for state-to-state dispute settlement for disputes under any of the WTO covered agreements.[95] The DSU allows for appeals of panel decisions to an Appellate Body (AB).[96] In 1994, in recognition that the DSU was imperfect, WTO members adopted a decision at the Ministerial Conference to complete a review of the dispute settlement system within four years (DSU Review).[97] In founding the WTO, the members had emphasized the development goal of the institution and committed to take into account the special needs of developing countries. In the Marrakesh Agreement Establishing the WTO, the parties referred to the "objective of sustainable development" and acknowledged that the goals of the WTO should be achieved "in a manner

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[93] General Agreement on Tariffs and Trade art. XXII-XXIII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[94] *Historic Development of the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm (last visited Oct. 5, 2023).

[95] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S 401 [hereinafter DSU].

[96] DSU art. 17.

[97] *Negotiations to Improve Dispute Settlement Procedures*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm (last visited Oct. 5, 2023).

consistent with [the parties'] respective needs and concerns at different levels of economic development."[98] However, the reform proposals from the DSU Review made clear that dispute settlement was one area where the WTO was not living up to its development objective. Developing countries pointed out key flaws in the DSU that were preventing their full participation and suggested reforms to alleviate some of these concerns. However, these reform proposals were never adopted, and the DSU Review appears to have been abandoned.

In 2017, DSU reform resurfaced, as the United States began vetoing the nominations of new AB members. In December of 2019, two of the remaining three AB members' terms expired, leaving the AB without a quorum and unable to hear cases.[99] Members who lose a case at the panel stage can effectively appeal the case into the void. Without an AB to hear their appeal, their loss is never enforced. The DSU reform proposals that have surfaced in response to the collapse of the AB tend to focus on ways to fix the AB's lack of a quorum and many of the issues that caused the United States to block AB appointments in the first place. For example, one common proposal has been to change the transitional rules for AB members so that the WTO would never find itself without an active AB, such as by requiring AB members to continue to discharge their duties until their positions have been filled.[100] As the AB is still without a quorum, and members are continuing to put forth proposals to fix the DSU, it is as of yet unknown what will become of many of these proposals. While the crisis at the AB brought DSU reform back to center stage, the reform proposals do nothing to close the access gap at the DSU or improve the trade capacity of developing country members. Developing country members need to use this renewed interest in DSU reform as an opportunity to remind their developed country counterparts of their commitment to development. While resurfacing some of the proposals that got pushed under the rug during the DSU Review may be somewhat effective in closing the access gap, creative solutions need to be promoted that, while short of overhauling the litigation-style system, balance the playing field in the dispute settlement system.

II. Developing Countries Have Been Left Out of the Dispute Settlement System

A. Creation of the DSU

Developing countries' opinions were overlooked during the creation of the DSU because a large portion of the developing country membership had not yet acceded to the WTO. Of the 23 states that have acceded to the WTO since its founding, 16 are developing countries.[101] In other words, approximately 16 percent of the current developing country membership had no say in the text of the DSU.[102] Moreover, even those developing countries that were founding members of the WTO had their views overlooked during negotiations. Under the GATT, countries effectively had a veto on any dispute settlement decisions rendered against

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[98] Marrakesh Agreement Establishing the World Trade Organization ¶ 1, Apr. 15, 1994, 1867 U.N.T.S 154 [hereinafter Marrakesh Agreement].

[99] *US Forces Standstill of WTO Appeals Body*, NIKKEI ASIA (Dec. 12, 2019), https://asia.nikkei.com/Economy/Trade/US-forces-standstill-of-WTO-appeals-body; DSU art. 17.1.

[100] Communication from the European Union, China, and India to the General Council, WTO Doc. WT/GC/W/753 (Nov. 26, 2018); Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WTO Doc. WT/GC/W/752 (Nov. 26, 2018); Appellate Body Impasse: Communication from the African Group, WTO Doc. WT/GC/W/776 (June 26, 2019).

[101] *Accession in Perspective*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm (last visited Oct. 5, 2023).

[102] *Id.*

them, because a consensus was required to adopt the report of a panel.[103] The DSU, instead, employed the reverse-consensus rule, whereby every member, including the member that prevailed in the dispute, would have to agree not to adopt the decision of the panel or the AB in order for it not to be adopted.[104] Effectively, panel and AB reports are automatically adopted. During negotiations for the DSU, it was the United States, with support from other small wealthy countries, that demanded an end to the GATT's 'veto.'[105] Developing countries, on the other hand, liked the emphasis on diplomacy rather than litigation that the dispute settlement system under the GATT fostered.[106] Developed countries prevailed, and the 'veto' was abandoned.[107]

B. Underutilization of Dispute Settlement

In addition to being left out in the creation of the DSU, developing countries are underutilizing the DSU as complainants. As of 2013, just 33 of the 117 developing country members of the WTO had enforced their rights under the DSU as complainants.[108] Conversely, 84 developing country members, or 71.8 percent of developing country members, had never brought an action under the DSU.[109] In other words, developing countries "making up 76.5 percent of members initiated [just] 41.2 percent of cases."[110] Even worse, among the 35 LDC members, as of today only Bangladesh has used the DSU as a complainant.[111] While some developing countries are actively involved in the DSU, such as Brazil, India, Argentina, Chile, Mexico and Thailand, these members form the "upper-middle income group of developing countries."[112]

Developing countries' underutilization of the DSU as complainants is not just a factor of their relative predominance in trade. A study conducted by Antoine Bouet and Jeanne Metivier assessed which factors would affect the probability of a country (country *i*) filing a dispute against another (country *j*).[113] They found that, while "country *i*'s structure of trade with *j* plays an important role in explaining the probability," both legal capacity and retaliatory capacity of the complainant have a positive and statistically significant relationship with probability of dispute initiation.[114] This suggests that both lack of legal capacity and retaliatory capacity are factors contributing to developing country's reticence toward the DSU.

C. Lack of Legal Capacity

Legal capacity can reflect both the legal expertise and the sizeable financial investment required to pursue a case at the WTO. Many of the "legal issues underlying the WTO

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[103] GATT art. XXII-XXIII.
[104] DSU art. 16.4, 17.14.
[105] James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. INT'L POLITICAL ECON. 542, 547 (2004).
[106] *Id.*
[107] See Section III.A for a more detailed discussion of the different style of dispute settlement preferred by many developing countries.
[108] MERVYN MARTIN, WTO DISPUTE SETTLEMENT UNDERSTANDING AND DEVELOPMENT 102 (2013).
[109] *Id.* at 102.
[110] *Id.* at 101.
[111] Request for Consultations by Bangladesh, *India—Anti-Dumping Measure on Batteries from Bangladesh*, WTO Doc. WT/DS306/1 (Feb. 2, 2004).
[112] MARTIN, *supra* note 16, at 105.
[113] Antoine Bouët & Jeanne Métivier, *Is the dispute settlement system, "jewel in the WTO's crown," beyond reach of developing countries?,* 156 REV. WORLD ECON. 1, 1 (2020).
[114] *Id.* at 25-30.

agreements are complex and require specialist legal expertise in international trade law which in most developing countries is absent in [both] the private sector and the government."[115] The United States Trade Representative, for example, "employs more than 30 lawyers specialized in international trade disputes and adds other lawyers specialized in specific areas for specific disputes."[116] The costs of litigation at the WTO are large, and legal proceedings at the WTO can last years. In addition to the costs at the litigation stage, there are added ongoing costs to the domestic businesses of a potential complainant country to monitor for potential violations by trading partners and lobby their government to pursue disputes.[117] Many developing countries lack the financial resources required to effectively pursue cases at the WTO.

While there are institutions available to developing countries to help fill the legal capacity gap, these institutions have shortcomings. The Advisory Center on WTO Law (ACWL) is "an organization independent of the WTO" whose "mission is to provide developing countries and [least developed countries (LDCs)] with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO."[118] However, the ACWL does not provide aid to developing countries at the investigatory stage to help them determine whether they should pursue litigation.[119] Likewise, only governments (and not private companies) can initiate contact with the ACWL.[120] This means that private firms in developing countries must monitor and lobby their countries to take a case without any legal assistance.[121] Moreover, the cost of ACWL membership "still prohibits some developing countries from accessing its facilities."[122] The WTO Secretariat also provides technical legal aid to developing country members.[123] However, when doing so, they must remain impartial rather than acting as an advocate for the member they are assisting.[124] Moreover, the legal consultants in the Secretariat only provide services on a part-time basis and only provide legal advice but do not help members in preparing arguments and documents for litigation.[125]

D. Lack of Retaliatory Capacity

Even when developing countries win disputes at the DSU, they often lack the retaliatory capacity to get proper relief. Relief under the WTO has the primary goal of inducing the offending member to bring their measures back into conformity with their WTO obligations. Once a panel or the AB find an inconsistency, they are to recommend that the measure be brought into conformity with the offending member's WTO obligations.[126] In the event an offending measure is not brought into compliance within a reasonable time, the members

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[115] Constantine Michalopoulos, *The Developing Countries in the WTO*, 22 WORLD ECON. 117, 136 (1999).
[116] Bouet & Metivier, *supra* note 21, at 2.
[117] CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT 118-27 (2009).
[118] *The ACWL's Mission*, ACWL, https://www.acwl.ch/acwl-mission/ (last visited Oct. 5, 2023).
[119] Navneet Sandhu, *Member Participation in the WTO Dispute Settlement System: Can Developing Countries Afford Not to Participate*, 5 UCL J.L. JURIS. 146, 159 (2016).
[120] BOWN, *supra* note 25, at 146.
[121] BOWN, *supra* note 25, at 146.
[122] Special Session of the Dispute Settlement Body, *Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding (DSU)*, WTO Doc. TN/DS/W/21 (Oct. 10, 2002) [hereinafter *Jamaica DSU Review*].
[123] DSU art. 27.2.
[124] DSU art. 27.2; Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group*, WTO Doc. TN/DS/W/17 (Oct. 9, 2002) [hereinafter *LDC Group DSU Review*].
[125] *Jamaica DSU Review, supra* note 30.
[126] DSU art. 19.

involved attempt to negotiate an agreement regarding mutually acceptable compensation.[127] Compensation is purely voluntary, and if no agreement on compensation is reached, the complainant can request authorization from the Dispute Settlement Body (DSB) to suspend concessions against the offending member.[128] The level of suspension is to be equivalent to the level of the nullification or impairment, and is only to be applied until the inconsistent measure is removed.[129]

Implicit in these rules is the notion that relief is not retroactive, meaning that a complainant can only retaliate to the extent the offending measure is continuing to impair their rights after the ruling of the panel or AB, but complainants receive no compensation or right to retaliate for the harm done to them prior to the ruling. This issue was the focus of many developing country reform proposals during the DSU Review circa 2001. Many developing countries complained that no relief was available if the measure allegedly in violation was withdrawn before the DSU proceedings finished or if the measure was withdrawn directly after the proceedings.[130] Moreover, given that the dispute settlement system is backlogged, and cases often take much longer than promised by the DSU, members get a 'free pass' to maintain offending measures for even longer.[131] However, it cannot be ignored that developing countries themselves have also "taken advantage of this de facto flexibility mechanism."[132]

Developing countries have also pointed out that when a prevailing complainant with a smaller economy suspends concessions against a larger well-developed economy, it does not hurt the large economy, and thus there is little incentive for them to bring the measure into conformity or to not violate WTO obligations in the first place.[133] In fact, it may adversely affect the developing country complainant to withdraw concessions more than it affects the developed country they are retaliating against, because their small economy relies on imports from their developed country counterpart.[134] Developing countries have begun to explore the possibility of retaliating by suspending concessions under the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), that is by not enforcing the respondent country's firm's intellectual property rights.[135] This was authorized in the *US-Gambling* case, where the United States refused to follow the ruling in a dispute against Antigua and

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[127] DSU art. 22.2.
[128] DSU art. 22.1.
[129] DSU art. 22.4, 22.8.
[130] Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposal by the African Group*, WTO Doc. TN/DS/W/15 (Sept. 25, 2002) [hereinafter *African Group DSU Review*].
[131] The period from the composition of the panel to the time their report is issued should not ordinarily exceed 6 months. DSU art. 12.8. In no case shall this period exceed 9 months. DSU art. 12.9. AB proceedings shall generally not exceed 60 days, and in no case shall they exceed 90 days. DSU art. 17.5. There have been significant delays at all stages, with five panel proceedings having taken more than two years and the average panel decision is increasing from around eight months in 1995 to over fourteen months in 2008. Matthew Kennedy, *Why are WTO Panels Taking Longer? And What Can Be Done About It?*, 45 J. WORLD TRADE 221, 221-22 (2011).
[132] SONIA E. ROLLAND & DAVID M. TRUBEK, EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER 6 (2019).
[133] Bouet & Metivier, *supra* note 21, at 3.
[134] *African Group DSU Review, supra* note 38; Special Session of the Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding: Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe*, WTO Doc. TN/DS/W/19 (Oct. 9, 2002) [hereinafter *Cuba et al. DSU Review*]; Special Session of the Dispute Settlement Body, *Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO*, WTO Doc. TN/DS/W/9 (July 8, 2002).
[135] BOWN, *supra* note 25, at 135.

Barbuda.[136] However, this approach, too, comes with challenges, as there are many hoops a complainant country has to jump through to get cross-retaliation, or "suspending concessions or other obligations under another covered agreement," authorized by the DSB.[137]

In addition to lack of legal and retaliatory capacity, developing countries are also wary of using the WTO dispute settlement system because they are concerned that retaliation by the respondent may result. This could take the form of the developed country respondent reciprocating by filing a WTO dispute against the developing country complainant.[138] Alternatively, this could take the form of extra-WTO retaliation: "industrial countries… withdraw[ing] benefits they provide to developing countries, such as development aid or unilateral trade preferences."[139] Even implicit threats of such action can deter developing countries from filing disputes against important trade partners.

E. S&DT Provisions in the DSU

While the DSU contains a variety of S&DT provisions to help enhance developing country participation in the WTO dispute settlement system and balance the playing field, many of these provisions are not binding, but are merely declaratory in nature. In addition to the legal technical assistance from the Secretariat, discussed above, many of these provisions simply recognize the special needs of developing countries,[140] or they set out special procedures and time frames applicable to developing countries.[141] Additionally, special procedures are in place for disputes involving an LDC.[142] While Mervyn Martin points out that some authors believe "developing countries do not avail themselves to these privileges out of a sense of fairness," he argues they do not use these provisions because "in practice they are virtually non-existent" and are treated merely as "best endeavor obligations."[143]

III. Importance of Developing Country Participation in Dispute Settlement

A. Litigation-Style Dispute Settlement May Not Be Ideal for Developing Countries

To justify reforms to increase developing country participation in the WTO dispute settlement system and make relief under the system more conducive to achieving their development goals, it is important to acknowledge that litigation-style dispute settlement altogether may not be ideal for developing countries. As previously mentioned, when the DSU was under negotiation, developing countries voiced a preference for maintaining the emphasis on diplomacy rather than litigation that the dispute settlement system under the GATT had fostered. Moreover, many developing countries have expressed, through the flexibility inherent in the regional trade agreements (RTAs) they adopt, a preference toward a less litigious trade regime. A study by James Thuo Gathii finds that African RTAs tend to be

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[136] Article 22.6 Arbitration Decision, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/ARB (circulated Dec. 21, 2007).
[137] DSU art. 22.3.
[138] Sandhu, *supra* note 27, at 163; Although, Sandhu points out that some scholars have rejected this as a substantial factor in developing countries' lack of participation in WTO dispute settlement. *Id.* at 164.
[139] Smith, *supra* note 13, at 548.
[140] DSU art. 4.10, 21.2.
[141] DSU art. 3.12, 8.10, 12.10, 12.11.
[142] DSU art. 24.
[143] MARTIN, *supra* note 16, at 116-120.

designed as flexible regimes which,[144] while "not necessarily incompatible with assuming legally binding commitments," are often entered into under the assumption that "compliance will not be stringently enforced."[145] This preference toward flexibility as opposed to binding measures backed by litigation-style dispute settlement is also shared by developing countries in other regions of the world. However, this paper does not advocate for a large-scale shift toward a more diplomatic style of dispute resolution. In the current multilateral system, consultation followed by litigation is the agreed upon method to resolve disputes and, within that system, it is important that the developing country majority can participate effectively.

B. Benefits of Developing Country Participation

There are benefits to developing country participation in dispute settlement. First, a prevailing developing country will receive a beneficial economic outcome regarding the specific case, either in the form of their counterpart removing the offending measure or in the form of suspending concessions or compensation,[146] although there are shortcomings to compensation and retaliation, which have been explored. Moreover, if members know a developing country is likely to self-enforce, then less WTO-inconsistent measures are likely to be imposed against them.[147] Additionally, litigation can be viewed as a "public good" because it creates clarity and certainty in interpretation of the rules for other WTO members and "[w]ith greater certainty follows more investment and international transactions to the benefit of all trading nations."[148]

C. Shaping Jurisprudence

Moreover, developing country involvement in dispute settlement could allow them to shape WTO jurisprudence and bring development concerns to the table.[149] It is well established that the AB does not create formal precedent.[150] Nevertheless, "its reasoning in past cases serves informally to create expectations as to the meaning of the WTO agreements" and becomes a part of the WTO *acquis*.[151] The AB and panels have been criticized for their "lack of emphasis on developmental objectives of the covered agreements" and their "excessive legalism" in their reasoning which is "against the notion of development friendly jurisprudence."[152] In order for developing countries to change this jurisprudence, they must bring cases to push back on this style of interpretation. Thus, members taking part in the dispute settlement system are "not solely arguing for or against specific interpretation of WTO law but are also 'playing for the rules': how the law should be interpreted and with what purpose."[153] This is especially important now as the "system is still relatively new and thus malleable to the purpose with which its agreements are interpreted."[154] Moreover, given the impasse at the Doha Development Round, the dispute settlement system appears to be a more

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[144] James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 571, 573 (2010).
[145] *Id.* at 577.
[146] Sandhu, *supra* note 27, at 147.
[147] BOWN, *supra* note 25, at 93.
[148] Sandhu, *supra* note 27, at 149.
[149] Sandhu, *supra* note 27, at 148.
[150] James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54 J. WORLD TRADE 183, 183 (2020).
[151] *Id.*
[152] MARTIN, *supra* note 16, at 45, 82.
[153] Sandhu, *supra* note 27, at 148.
[154] Sandhu, *supra* note 27, at 148.

fruitful means of enacting change in the multilateral trading system than the negotiating arm of the WTO.

One area in which developing countries could use the dispute settlement system to shift the jurisprudence in their favor is regarding regulatory autonomy. Alvaro Santos argues that developing countries that are repeat players in the dispute settlement system can use dispute settlement and the inherent flexibility in the WTO agreements to "expand [their] regulatory autonomy beyond what is currently recognized."[155] Regulatory autonomy, or policy space, refers to "the flexibility governments have within trade rules to put in place polices that will best achieve equitable and sustainable development and other policy objectives."[156] For example, the United States engaged in a years-long campaign at the WTO that spanned four separate disputes[157] to expand "the scope of Article XX of the GATT so that it could ban the importation of products originating in countries that did not adopt its environmental standards."[158] Developing countries could pursue a similar procedure to carve out policy space for themselves with regard to, for example, intellectual property, an area where many developing countries believe the rules as currently interpreted are not in their development interest. TRIPS was a concession given by developing countries as a part of the trade-off at the Uruguay Round of negotiations. Many developing country members believe they are "subject to [intellectual property] laws that are far more conducive to the demands of western societies instead of the socioeconomic conditions representative of developing countries."[159] Santos explains that, while TRIPS has many bright line rules, it also has "many vague standards, such as the requirement to engage in 'reasonable efforts' to negotiate with patent holders before overriding a patent."[160] A developing country could "interpret these terms in their favor during the implementation and administration of their domestic regulations"[161] and argue for an expansive reading in any ensuing litigation.

An area in which developing countries could use the dispute settlement system as complainants to shift the WTO jurisprudence to be more development friendly is with regard to measures brought under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[162] and the Agreement on Technical Barriers to Trade (TBT Agreement).[163] Since the enactment of the SPS and TBT Agreements in 1995, "a number of developing countries have suggested that developed countries are using SPS and TBT measures for protectionist purposes by prescribing overly stringent trade restrictive standards."[164] Like tariffs, such non-tariff barriers can prevent developing countries from

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[155] Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries*, 52 VA. J. INT'L L. 551, 553 (2012).

[156] Katrin Kuhlmann, *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, 2 AFR. J. INT'L ECON. L. 48, 54 (2021).

[157] Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R (circulated Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1991); Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (circulated June 16, 1994); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

[158] Santos, *supra* note 63, at 577.

[159] Naomi A. Bass, *Implications of the TRIPs Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 GEO. WASH. INT'L L. REV. 191, 193 (2002).

[160] Santos, *supra* note 63, at 590.

[161] Santos, *supra* note 63, at 590.

[162] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

[163] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[164] BIBEK DEBROY, THE SPS AND TBT AGREEMENTS–IMPLICATIONS FOR INDIAN POLICY (2005).

getting the access to developed country markets that they have negotiated. In order to limit the use of these measures in trade restrictive ways, developing countries could begin to challenge the measures of developed countries and argue that they are "more trade restrictive than necessary," in violation of the governing agreements.[165] Over time, developing countries could move the WTO jurisprudence toward a broader interpretation of that language, such that fewer overly restrictive SPS and TBT measures would be permitted.

IV. DSU Review Reform Proposals and Why They Are Lacking

The reform proposals that were submitted by developing countries during the DSU Review circa 2001 expressed concern over their lack of access to the DSU, primarily centered on their lack of legal and retaliatory capacity. Regarding enhancing legal capacity, the LDC group proposed that when the Secretariat provides legal assistance to developing countries, they should not have to remain impartial but should be able to "assume the full role of counsel."[166] Similarly, it has been proposed that legal technical assistance should be provided to developing countries not only in the form of advice but also assistance with the preparation of arguments and submissions for litigation.[167] Finally, developing countries have proposed a fee shifting regime, whereby, when a developing country wins a dispute against a developed country or a developed country fails to prove a WTO violation in a dispute they brought against a developing country, the developed country pays the attorney's fees of the developing country.[168] These proposals would reduce the costs of WTO disputes and would provide developing country members with the expert legal counsel needed for specific disputes.

Some of the proposals that centered on retaliatory capacity were to allow retroactive retaliation[169] and to make compensation mandatory and retroactive.[170] Similarly, many proposals were made to speed up the system. Additionally, proposals have been made to allow preventive measures while the DSU dispute is ongoing for alleged WTO violations that would cause irreparable harm, by allowing the panel to request that the respondent remove the offending measure temporarily throughout the duration of the dispute or, if the respondent refuses, by allowing provisional retaliation.[171] Such proposals would alleviate the problem of countries getting a free pass to violate their obligations under the WTO agreements throughout the duration of the dispute. Other proposals called for allowing collective retaliation when a developing country wins a dispute,[172] or providing tradeable retaliation rights.[173] Likewise, as retaliation by refusing to enforce a respondent country's domestic companies' intellectual property rights has been explored by developing countries,[174] some proposals have surfaced to ease the requirements for cross-retaliation.[175] These amendments would ensure that when a small economy wins a dispute, the retaliation inflicted on the respondent is enough to compel them to remove the inconsistent measure and to

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[165] TBT Agreement art. 2.2; SPS Agreement art. 5.6.
[166] *LDC Group DSU Review, supra* note 32.
[167] *Jamaica DSU Review, supra* note 30.
[168] *Cuba et al. DSU Review, supra* note 42.
[169] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Proposal by Mexico*, WTO Doc. TN/DS/W/23 (Nov. 4, 2002) [hereinafter *Mexico DSU Review*].
[170] *African Group DSU Review, supra* note 38; *LDC Group DSU Review, supra* note 32.
[171] *Mexico DSU Review, supra* note 77.
[172] *LDC Group DSU Review, supra* note 32; *African Group DSU Review, supra* note 38.
[173] *Mexico DSU Review, supra* note 77.
[174] BOWN, *supra* note 27, at 135-36; Article 22.6 Arbitration Decision, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/ARB (circulated Dec. 21, 2007).
[175] *Cuba et al. DSU Review, supra* note 42.

disincentivize future retaliations. Tradeable retaliation rights would also help small economies avoid damage to their own economy that would come from inflicting trade barriers on one of their key trading partners.

The reform proposals from the DSU Review, however, are not sufficient to fulfill the development goal of the WTO, as detailed in the preamble to the Marrakesh Agreement. The proposed reforms focused on legal capacity simply shift legal costs to opposing parties or provide developing country members with legal counsel for a specific dispute. They do not build the legal capacity of the government to pursue future disputes on their own, nor do they build the capacity of the private sector of a potential complainant to monitor for potential violations by trading partners and lobby their government to pursue disputes. Likewise, reforms centered on building retaliatory capacity simply enhance the deterrence placed on opposing parties but do nothing to build the trade capacity of the developing country complainant.

V. Technical Assistance and Capacity Building Relief

A. The Proposed Provision

As the WTO has noted, "[d]eveloping countries face special difficulties in benefiting as they should from the multilateral trading system."[176] Technical assistance and capacity building describe "the efforts made by [the] WTO to meet their special needs… to enable them to trade more effectively."[177] This paper proposes the addition of the following provision to the DSU:

> When a developing country complainant prevails in a dispute against a developed country respondent, the developing country is entitled to receive technical assistance or capacity building relief funded by the developed country. The developing country complainant shall choose one of the WTO's current technical assistance and capacity building programs through which the aid will be provided or shall propose an alternative like use of the funds. The amount of the relief shall equal the amount of the nullification or impairment of benefits under the covered agreement from the time the offending measure was implemented until such time as the measure is brought back into conformity with WTO obligations.

There are a variety of different technical assistance and capacity building programs that the WTO currently offers, any of which a developing country complainant could choose as a means of relief.[178] If the developing country complainant opts to have the assistance provided through one of the WTO's current technical assistance or capacity building programs, the funds would not go into a general trust fund for use by all recipient countries but would go only to the complainant. An example of an "alternative like use of the funds" would be using the relief to pay the salary of a new trade representative in Geneva. Unlike the retaliation provided for under DSU Article 22, which is not retroactive, under the proposed provision the relief would be owed to the developing country for the period during which the offending measure was in place, even if the offending country brings their measure back into conformity while the dispute is ongoing or directly after the panel or AB report is adopted. So as not to diminish the retaliatory capacity of developing countries, the technical assistance and capacity

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[176] *Building Trade Capacity*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm (last visited Oct. 5, 2023).

[177] *Id.*

[178] *E.g.* Trade Related Technical Assistance, *Factsheet on Trade Related Technical Assistance*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/teccop_e/ta_factsheet_e.htm (last visited Oct. 5, 2023).

building relief would not be in lieu of the current retaliation measures available under the DSU, but would be additional. This proposal alleviates the concerns of developing countries that respondents under the DSU get a 'free pass' to implement WTO inconsistent measures prior to and throughout the duration of the dispute. However, this approach would strike a middle ground by not allowing the suspension of trade concessions against a member that timely complies with the ruling of a panel or AB.

B. Why Technical Assistance and Capacity Building Relief is Appropriate

This provision is appropriate because WTO members have committed in multiple fora to provide technical assistance and capacity building to developing country members to ensure that they can fully participate in the global trading system. In the Preamble of the Marrakesh Agreement, the drafters recognized that different member countries have varying "needs and concerns at different levels of economic development," and that "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[179] When developing countries agreed to enter into the Doha Development Round negotiations, "they obtained a commitment that they would receive capacity-building assistance to facilitate their participation in the negotiations and the eventual integration of their economies into the international trading system."[180] The Doha Ministerial Declaration, in reference to the Preamble to the Marrakesh Agreement, states that "well targeted, sustainably financed technical assistance and capacity-building [programs] have important roles to play."[181] Finally, most WTO members have committed to the Sustainable Development Goals,[182] which include references to capacity building assistance throughout their targets and indicators. Goal 17, in particular, provides for a "global partnership for sustainable development," for which capacity building is a target.[183]

Additionally, this provision is appropriate because the WTO's current technical assistance and capacity building regime has shortcomings, many of which could be alleviated by providing technical assistance and capacity building as relief for prevailing in a dispute. First, aid flows have been unstable, and the WTO considers increasing the stability of aid financing to be one of their key challenges.[184] Requiring developed countries who lose a dispute against a developing country to fund a technical assistance or capacity building program would help make aid more predictable and would contribute to alleviating the funding shortage. Additionally, the current technical assistance and capacity building regime is often accused of being donor-driven, meaning the aid is being used as a tool to serve "donor-defined interests" rather than the interests of the recipient country.[185] However, with the proposed provision in place, the developed country could not use the threat of revoking the aid as a means of controlling its use, given that the aid would be required to be provided because the developing

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[179] Marrakesh Agreement ¶ 1-2.

[180] Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT'L L.J. 643, 646 (2005).

[181] World Trade Organization, Ministerial Declaration of 20 November 2001, WTO Doc. MIN(01)/DEC/1, 41 ILM 746 (2002).

[182] *States Members of the United Nations and States Members of Specialized Agencies*, SUSTAINABLE DEV. GOALS KNOWLEDGE PLATFORM, https://sustainabledevelopment.un.org/memberstates (last visited Oct. 5, 2023).

[183] *Goal 17*, UNITED NATIONS DEP'T OF ECON. AND SOC. AFFAIRS, https://sdgs.un.org/goals/goal17 (last visited Oct. 5, 2023).

[184] *WTO Technical Assistance and Training*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (last visited Oct. 5, 2023).

[185] Shaffer, *supra* note 89, at 650.

country prevailed in a dispute. Additionally, the developing country complainant would be in control of the type of technical assistance and capacity building program being funded, so recipient countries could ensure that the assistance serves their development interests rather than the political or diplomatic interests of the donor.

Technical assistance and capacity building relief could help close the access gap under the dispute settlement system. This is possible both because developing countries would have an increased incentive to bring disputes with technical assistance and capacity building relief available, and because a developing country could choose to have their relief provided in the form of legal technical assistance so that they could successfully bring future disputes. Moreover, technical assistance could help developing countries have more success in the negotiating and rule-making processes at the WTO. A developing country member that prevailed in a dispute could request that their relief be provided in the form of training to their trade negotiators or funds to be used toward employing more trade representatives in Geneva. Many WTO members do not have a single trade representative in Geneva, while many others have only a few.[186] Because of this, many developing countries have been unable to advance their trade interests in WTO negotiations and before WTO committees and thus face considerable trade barriers on the products most important to them.[187] Developing countries could leverage this added negotiating skill and manpower to more effectively advocate for increased access to developed country markets for their key domestic industries.

Technical assistance and capacity building could also help developing country members with internal implementation of their WTO commitments, which they historically have been less able to do in a manner that serves their development interests as compared to their developed country counterparts.[188] Finally, technical assistance and capacity building could enhance a developing country's trade capacity more generally, such as by addressing supply side constraints.

C. Counterarguments

One problem with this proposal is the concern that the provision could be circumvented by the respondent country simply reducing other aid funding provided either to the developing country specifically or generally to the WTO programs, given that such aid is unilateral. Therefore, the provision must be written in such a way as to prevent such conduct by requiring that "the total amount of aid provided by the respondent country shall not be lower than that which was provided prior to the filing of this dispute."[189]

Another problem with technical assistance and capacity building generally is the concern that developing countries will become dependent on aid. "When developing countries become dependent on external funding…technical assistance programs could actually undermine the development of local capacity."[190] However, it is not universally agreed that those providing aid need to be concerned about the recipient's dependence on such aid. Moreover, the fact that the technical assistance and capacity building are being supplied as relief for prevailing in a dispute would seem to cut against such an argument, because such aid would not be regular and expected, but would instead be a one-off occurrence, perhaps to kickstart a domestic development plan.

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[186] Shaffer, *supra* note 89, at 649.
[187] Shaffer, *supra* note 89, at 649.
[188] Shaffer, *supra* note 89, at 650.
[189] Borrowing language from GATT art. XXIV.5.
[190] Shaffer, *supra* note 89, at 675-76.

VI. Conclusion

As the WTO 13th Ministerial Conference approaches[191] with the AB lacking a quorum and the dispute settlement system still at a standstill, DSU reform remains at the center of the discussion. Developing countries should leverage this opportunity to push for DSU reform that will both close the access gap and level the playing field in dispute settlement. A look back at the reform proposals offered during the DSU Review demonstrates that lack of legal and retaliatory capacity has been a concern of developing countries since the founding of the WTO and resurfacing many of these proposals now, in a climate where DSU reform is a priority for all member states, may prove fruitful. These proposals would provide developing countries with easier access to legal counsel for specific disputes and would enhance the deterrent placed on their trade counterparts through suspension of concessions. However, in addition to these reform proposals, creative solutions need to be promoted that, while short of overhauling the litigation-style system, build the legal capacity of governments and private sector within member countries to pursue future disputes on their own. Through technical assistance and capacity building relief, developing countries that prevail in a dispute could use their relief to fund a bottom-up capacity building program of their own design. Such relief would increase the retaliatory capacity of developing countries in a way that doesn't close off their markets to developed country imports, on which they may rely heavily. Developed countries should not be so quick to strike down such a proposal because it would not be nearly as costly for them as some of the other DSU Review proposals, such as providing for tradeable retaliation rights. Moreover, it is in a developed country's own self-interest to build the trade capacity of their trading partners. By tying the WTO's technical assistance and capacity building programs with the dispute settlement system, the proposed reform alleviates the shortcomings of both systems.

[191] *13th WTO Ministerial Conference*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc13_e/mc13_e.htm (last visited Sept. 24, 2023).

CHAPTER 3: REIMAGINING AGOA IN THE ERA OF AFCFTA: OPPORTUNITIES FOR SUSTAINABLE ECONOMIC GROWTH IN AFRICA

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Abstract

As the African Growth and Opportunity Act (AGOA) expires in 2025, this paper examines Africa's unique opportunity for economic transformation through strategic reforms and synergies with the African Continental Free Trade Area (AfCFTA). By adopting a broader strategy and implementing key recommendations such as expanding AGOA's reach, amending eligibility rules, and intensifying capacity building, the study contends that AGOA can play a pivotal role in driving sustainable economic development and fostering economic inclusiveness and sustainability across the continent. Realizing these goals demands strong political commitment and collaborative efforts between the United States and African nations. The paper concludes with a clarion call for the AfCFTA to lead this transformation, underscoring the importance of revitalizing AGOA for the collective benefit of all African nations and the future prosperity of the African continent.

I. Charting a New Course: The Intersection of AGOA and AfCFTA

In her vision of Africa in 50 years, Dr. Nkosazana Dlamini Zuma, the then Chairperson of the AU Commission, underscored the imperative of unity and integration as the linchpin for Africa to leverage its competitive advantage.[192] This resonates with the wisdom of His Imperial Majesty Haile Selassie I, who also emphasized the imperative for Africans to work and cooperate if the continent's economic development is to be furthered.[193]

In the evolving landscape of international trade, Africa finds itself at a pivotal crossroads, where the decisions made today have the potential to shape the continent's economic destiny for decades to come. To elevate the economic well-being of all African peoples to a standard comparable to that enjoyed in the most highly developed regions of the world, a united front marked by concerted action, cooperation, and coordinated policies is indispensable.[194]

As Africa continues to position itself for increased global economic integration, the African Continental Free Trade Area (AfCFTA) stands as a beacon of potential, fostering dialogues for mutually beneficial and sustainable trade partnerships. It is a testament to Africa's long-standing economic and political integration aspiration.[195] It builds upon the foundations

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192 Nkosazana Zuma, 'AUC Chairperson's E-Mail from the Future' (26 January 2014) <https://au.int/sites/default/files/documents/33126-doc-02_email_from_the_future.pdf> accessed 12 May 2023.

193 'CREATING A UNIFIED REGIONAL MARKET TOWARDS THE IMPLEMENTATION OF THE AFRICAN CONTINENTAL FREE TRADE AREA IN EAST AFRICA' (United Nations Economic Commission for Africa 27 April 2022) 1.

194 ibid.

195 'READ: Kwame Nkrumah's Iconic 1963 Speech on African Unity' (24 May 2019) <https://face2faceafrica.com/article/read-kwame-nkrumahs-iconic-1963-speech-on-african-unity> accessed 9

laid by the Abuja Treaty[196] and is a crucial step in fulfilling the African Union's Agenda 2063.[197] These initiatives aim to create a single continental market,[198] ensure free movement of goods and services, facilitate investments, and lay the groundwork for a Continental Customs Union(CCU).[199] This initiative lays the foundation for a novel economic framework that deepens trade ties and fortifies the economic relationship between Africa and its global trading partners.

This presents a unique opportunity for revitalizing the once robust U.S.-Africa trade relations, which have been declining in recent years due to changes in global trade dynamics. China has surpassed the United States as Africa's largest bilateral trade partner since 2009, and U.S.-Africa trade has decreased significantly, from a peak of $142 billion in 2008 to just $64 billion in 2021.[200]

In light of the ongoing trade tensions between the U.S. and China, this potential partnership not only provides the United States with a viable alternative for economic engagement but also nurtures the growth of African businesses, ultimately contributing to balanced trade relations and sustainable development in Africa.

Meanwhile, the U.S.'s commitment to supporting the AfCFTA is evident in its Sub-Saharan African(SSA) strategy[201] and the pronouncements of the United States Trade Representative (USTR).[202] A key element of this commitment is the Africa Growth Opportunity Act (AGOA),[203] a preferential trade program initiated in 2000 to stimulate trade between the U.S. and SSA.[204] Despite its initial success,[205] AGOA has lost momentum over time,[206] and with its expiration looming in 2025,[207] there is an urgent need to rethink and revitalize the U.S.-Africa trade relationship.

This paper argues that, despite the dwindling momentum of AGOA over time, the AfCFTA can use the renewal to effect reforms that would promote regional integration, sustainable development, and economic growth in Africa.

May 2023. See also, Landry Signé, 'Testimony before the United States House Foreign Affairs Committee: Subcommittee on Africa, Global Health, and Global Human Rights' (27 April 2022) 6 <https://www.brookings.edu/wp-content/uploads/2022/05/Landry-Signe-Testimony-April-27-2022.pdf> accessed 9 May 2023.

196 Katherine Tai, '2022 BIENNIAL REPORT ON THE IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT' (United States Trade Representative June 2022) 80.

197 Agreement Establishing the African Continental Free Trade Area, Preamble (2018). See also, 'CREATING A UNIFIED REGIONAL MARKET TOWARDS THE IMPLEMENTATION OF THE AFRICAN CONTINENTAL FREE TRADE AREA IN EAST AFRICA' (n 3) 1.

198 Agreement Establishing the African Continental Free Trade Area, Preamble (2018).

199 Agreement Establishing the African Continental Free Trade Area, Art. 1(j) (2018). 'CREATING A UNIFIED REGIONAL MARKET TOWARDS THE IMPLEMENTATION OF THE AFRICAN CONTINENTAL FREE TRADE AREA IN EAST AFRICA' (n 3) 6.

200 'The Three Issues That Will Make or Break the Prosper Africa Initiative - Carnegie Endowment for International Peace' [2023] 1.

201'U.S. STRATEGY TOWARD SUB-SAHARAN AFRICA' (August 2022) 15.

202 Emmanuel Amoah, *Tai: US can boost trade with Africa by improving on AGOA, innovating on policy | InsideTrade*.

203 An Act To authorize a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries in the Caribbean Basin, renew the generalized system of preferences, and reauthorize the trade adjustment assistance programs. https://agoa.info/images/documents/2/AGOA_legal_text.pdf (last visited May 10, 2023).

204 'Deepening the United States-Africa Trade and Investment Relationship' [2023] 2.

205 'AGOAs Reauthorization-Beyond 2015.' (Leadership Africa USA and New Markets Lab January 2015) 1.

206 'AGOA: The U.S.-Africa Trade Program' (*Council on Foreign Relations*,18 March 2022) 4 <https://www.cfr.org/backgrounder/agoa-us-africa-trade-program> accessed 23 February 2023.

207 'About AGOA - Agoa.Info - African Growth and Opportunity Act' <https://agoa.info/about-agoa.html> accessed 14 May 2023.

The paper addresses the primary research question: how can the renewal of AGOA catalyze economic integration within the African continent? The urgency of this question lies in its potential to inform policies and initiatives that foster a more balanced trade relationship, support the growth of African businesses, and contribute to the region's economic development.

Following a roadmap that commences with an overview of AGOA through conducting a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis of the program, the paper makes recommendations for AfCFTA's proactive leadership in advocating for the renewal of AGOA come 2025 when it expires and recommends other changes, that would lead to an integrated and economically thriving Africa.

II. AGOA: Assessing the Strengths, Weaknesses, Opportunities, and Threats

The African Growth and Opportunity Act (AGOA), enacted on May 18, 2000,[208] is a United States Trade Act that has since been renewed until 2025.[209] It is a one-way Trade Preference Program(TPP) that has significantly enhanced market access to the U.S. for qualifying SSA countries.[210] AGOA preferences are granted to countries based on specific conditions outlined in the legislation, which include improvements in the rule of law, human rights, and core labor standards.[211]

Since its enactment, it has been the cornerstone of U.S. trade and investment policy with SSA.[212] It provides eligible countries with duty-free access to the vast U.S. economy, encompassing over 1,800 products.[213]

This section aims to conduct a Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis of AGOA to gain a comprehensive understanding of its current state and identify potential ways to improve its effectiveness in promoting economic integration, sustainable development, and balanced trade relationships between the United States and Africa.

The following subsection will discuss the strengths of AGOA, which have been critical in its success.

A. Strengths

AGOA has been instrumental in strengthening economic relations between SSA and the United States, creating a substantial upswing in trade volumes across several sectors.[214] Horticulture, apparel, automobiles, ferroalloys, cocoa, chocolate, and confectionary products have all seen notable successes under AGOA.[215] In 2021 alone, leading AGOA import categories included crude oil ($1.7 billion), apparel ($1.4 billion), transportation equipment ($949 million), minerals and metals ($897 million), and agricultural products ($715 million).[216]

AGOA's impact extends beyond merely boosting export numbers. The Act has driven significant improvements in beneficiary countries' business and investment climates, leading

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[208] 'Deepening the United States-Africa trade and investment relationship' (n 14) 2.
[209] 'About AGOA - Agoa.info—African Growth and Opportunity Act' (n 17).
[210] *ibid.*
[211] 'Deepening the United States-Africa trade and investment relationship' (n 14) 3.
[212] 'AGOA' (n 16) 1.
[213] Stephen Lande and Dennis Matanda, 'Defining and Redefining U.S.-Africa Trade Relations During the Trump Presidency' (2017) 111 AJIL Unbound 389, 392.
[214] 'AGOAs Reauthorization-Beyond 2015' (n 15) 1.
[215] *ibid.*
[216] TAI (N 6) 11.

to a near quadrupling of U.S. foreign direct investment (FDI) in these nations.[217] This economic stimulus has fostered the diversification of SSA economies, with non-oil, non-mineral exports to the United States increasing almost four-fold since 2001.[218]

A key aspect of AGOA's success lies in its role in enhancing supply chain integration within Africa.[219] The apparel sector offers a striking example of this. Beneficiary countries such as Kenya, Lesotho, and Mauritius have witnessed significant job creation and economic growth, partly due to AGOA's Third Country Fabric (TCF) Provision.[220] This provision, which allows preferential treatment for goods made with fabric or yarn from non-AGOA countries, has supported the growth of a vibrant textile and apparel sector across the continent.[221] This provision has been critical in fostering an interconnected supply chain that enhances regional trade, boosts economic growth, and creates jobs.[222]

The heavy machinery manufacturing sector, particularly in South Africa, is another testament to AGOA's impact on supply chain integration. South Africa's auto exports to the U.S. under AGOA have facilitated the creation of several hundred thousand jobs, both directly and indirectly.[223] This has benefited South Africa and positively impacted the auto supply chain within neighboring countries, demonstrating AGOA's role in enhancing regional integration and fostering a more interconnected and robust African supply chain.[224]

Through these achievements, AGOA underscores its crucial role in promoting economic growth, enhancing supply chain integration, and fostering strong trade relations between the U.S. and SSA.

Despite the numerous successes of the AGOA, it is also confronted with many weaknesses and challenges. The following subsection discusses these hurdles, which have manifested across various aspects of the program, impeding the realization of its aspirational objectives.

B. Weaknesses

The first significant issue lies in the inadequate capacity of many African nations to fully capitalize on the program's benefits. Though some countries have successfully utilized AGOA to their advantage, others have struggled due to insufficient technical expertise, lack of concrete utilization strategies, and inadequate support networks.[225] This has caused a massive imbalance of the impact and benefits of the program between countries. While South Africa benefits from 75% of all non-oil exports under AGOA,[226] other beneficiaries are still struggling to feel the impact. Kenya and Lesotho have significantly grown their apparel sectors under AGOA,[227] a success story that other countries have found challenging to replicate due

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[217] 'AGOAs Reauthorization-Beyond 2015' (n 15) 1.
[218] *ibid.*
[219] 'State Department Official: Link between AGOA, AfCFTA Could Be "Win-Win" | InsideTrade' (18 November 2022) 1.
[220] *ibid.*
[221] 'AGOAs Reauthorization-Beyond 2015' (n 15) 5.
[222] Katrin Kuhlmann, 'African Growth and Opportunity Act (AGOA): Program Usage, Trends, and Sectorial Highlights' (9 June 2022) 3.
[223] 'How the Biden Administration Can Make AGOA More Effective' [2021] 2.
[224] *ibid.*
[225] KUHLMANN (N 32) 2.
[226] 'Building a Strategy for Workers' Rights and Inclusive GrowthA New Vision for the African Growth and Opportunity Act (AGOA)' (July 2014) 2 <https://aflcio.org/sites/default/files/2017-03/AGOA%2Bno%2Bbug.pdf> accessed 9 May 2023.
[227] 'How the Biden administration can make AGOA more effective' (n 33) 2.

to capacity-building limitations and lack of support. AGOA has struggled to promote significant trade diversification beyond traditional sectors like oil and gas. The agricultural sector's relatively low share of total exports under AGOA, less than 3%, provides evidence of this issue.[228] Also, Micro, Small, and Medium Enterprises (MSMEs) have weak support networks and capacity constraints.[229] Many entities lack the knowledge and resources to navigate AGOA's complex requirements, limiting their ability to exploit its benefits fully.

Another weakness lies in AGOA's country eligibility rules, particularly the provision granting the U.S. president discretionary authority to assess beneficiary eligibility annually.[230] This rule causes disruptions in the beneficiaries' supply chain and raises unpredictability issues.[231] Though unintended,[232] these suspensions punish not only the country involved but also its trading partners who rely on the supply chain. Madagascar's suspension, for instance, had a massive impact on its five trading partners.[233] This generates a sense of uncertainty that hinders long-term planning and investment.[234] Investors are, therefore, skeptical of investing in AGOA-driven cross-border supply chains when they know that a review of a beneficiary's eligibility may disrupt the success of their investments. The recent suspension of Ethiopia has caused a lot of uncertainty around the program.[235] Also, AGOA's limitation to SSA and graduation policies, which phase out member benefits upon meeting specific indicators, have constrained its potential impact on integrating the continent's supply chain. AGOA would have made a more significant impact if North Africa, suspended beneficiaries, and graduated countries were all part of the program.

AGOA's market access limitations present significant barriers. Although AGOA offers duty-free and largely quota-free market access for many beneficiary products, high tariffs on some excluded products, particularly in the agricultural sector, prevent African exports from gaining smooth entry into the U.S. market.[236] The existence of tariff rate quotas (TRQs) on commodities such as sugar and tobacco exemplifies this challenge.[237] It is estimated that if the duty-free and quota-free treatment is extended to 100 percent, African producers will generate $105 million, while U.S. producers would lose only $9.6 million.[238]

Other challenges include the administrative burdens placed by the complexity and overlapping obligations presented by AGOA in conjunction with other trade programs involving the African continent, the United States, and the European Union[239] and a need for coherent policy strategies linking AGOA to investments in manufacturing and infrastructure.[240]

Addressing these challenges calls for a concerted effort from African nations and the United States. It requires capacity-building initiatives, streamlined regulations, improved

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[228] 'Deepening the United States-Africa trade and investment relationship' (n 14) 6.
[229] KUHLMANN (N 32) 4.
[230] 'AGOA' (n 16) 2.
[231] *Id.* at 4.
[232] 'AGOA Time: As 2025 Approaches, Opportunities for Improvements Eyed | InsideTrade' [2023] 2.
[233] Nelipher Moyo and John Page, 'AGOA AND REGIONAL I NTEGRATION I N AFRICA' 3.
[234] 'The Three Issues That Will Make or Break the Prosper Africa Initiative—Carnegie Endowment for International Peace' (n 10) 1.
[235] 'AGOA' (n 16) 1.
[236] Lande and Matanda (n 23) 392.
[237] *ibid.*
[238] *ibid.*
[239] KUHLMANN (N 32) 2.
[240] 'Building a Strategy for Workers' Rights and Inclusive Growth A New Vision for the African Growth and Opportunity Act (AGOA)' (n 36) 1.

market access, stable eligibility rules, and long-term investment and supply chain development commitments. By tackling these challenges head-on, AGOA can evolve into a more effective tool to foster economic growth, diversify trade, and create jobs across Africa.

C. Opportunities

The impending expiration of AGOA in 2025 presents a crucial opportunity to explore and advocate for substantive changes that align with sustainable development and regional integration objectives.[241] African states, using the AfCFTA as a vehicle, are well positioned to take a leading role in shaping the continent's future by leveraging their influence to advocate for changes in AGOA that align with AfCFTA's vision and objectives. This includes advocating for the harmonization of AGOA's rules of origin and implementation plans with that of AfCFTA to promote the development of regional value chains, facilitate trade diversification, and enhance market access for African products within the continent.

The Memorandum of Understanding (MOU) between the USTR and AfCFTA[242] is promising.[243] It provides a medium for collaboration and implementation, offering the opportunity to discuss and support the shared goals of AfCFTA and AGOA. It fosters dialogue, shared responsibility, and inclusive partnership and provides for the creation of technical groups as a tool for discussing such issues.

During the renewal process of AGOA, it is essential to revisit and reinforce the program's original objectives, such as promoting economic growth, poverty reduction, good governance, and improved labor rights.[244] These objectives can be realigned to reflect the principles and goals of the AfCFTA, which seek to establish a single market in Africa, boost intra-African trade, and drive economic transformation.

Though these opportunities discussed show a glimpse of a bright future, some threats may undermine its progress and hinder mutually beneficial outcomes. These threats are discussed in the following subsection.

D. Threats

One major threat is a possible non-renewal of AGOA. The impending expiration of AGOA poses a significant risk to the U.S.-Africa trade relationship. Congress has expressed concerns about extending AGOA beyond its 2025 expiration date, and uncertainties in U.S. foreign policy exacerbate this threat.[245] Failing to renew AGOA would disrupt preferential trade benefits for African countries, stalling economic growth and impeding progress in trade and investment promotion. All the strengths and benefits are discussed in this section.

Another threat would be a renewal of AGOA without resolution of the weaknesses discussed in this section. Specific provisions such as complex and limiting rules of origin, limited product coverage, and eligibility rules contribute to limited impact and underutilization. Revising and improving these provisions is essential for promoting sustainable development, diversification, and inclusive growth and ensuring AGOA remains relevant and effective.

Also, pursuing separate bilateral FTAs between the United States and specific countries or regional blocs can jeopardize the AfCFTA's harmonization and integration goals. While

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[241] 'State Department official: Link between AGOA, AfCFTA could be "win-win" | InsideTrade' (n 29) 1.
[242] 'MEMORANDUM OF UNDERSTANDING ON COOPERATION FOR TRADE AND INVESTMENT BETWEEN THE AFRICAN CONTINENTAL FREE TRADE AREA SECRETARIAT AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA' (14 December 2022).
[243] 'AGOA time: As 2025 approaches, opportunities for improvements eyed | InsideTrade' (n 42) 2.
[244] KUHLMANN (N 32) 5.
[245] How the US pulled out of TPP.

some FTAs, like the ongoing U.S.-Kenya negotiations, seek to strengthen economic ties between the countries, such side agreements could impede regional trade[246] and divert focus and resources from broader continental integration efforts.

AGOA's significant impact and potential for Africa's economy through this SWOT analysis has been highlighted, yet it also underlines the necessity for strategic improvements. The following section discusses the pressing need for the renewal and reform of AGOA, precisely how AfCFTA can seize this moment to advocate for aligning its own goals with those of AGOA, effectively proposing a blueprint for AGOA's evolution that best serves the mutual interests of Africa and the U.S.

III. Renewal and Reform of AGOA: Leveraging AfCFTA for a Strong Case

The analysis in the preceding section brings to light the urgent need for comprehensive reforms to AGOA as the heavy dependence on tariff reduction has proven to be inadequate for the purpose of broad-based economic development. The call of the hour is for AGOA to shift towards a more all-encompassing strategy that fosters economic growth. Some experts propose leveraging AfCFTA as a starting point for discussions towards a bilateral strategic economic partnership as an alternative to renewing AGOA. Though the writer agrees with the point, the complexities in negotiating a new FTA of that caliber make a phased approach more ideal. This would be to temporarily renew AGOA in a more reformed and progressive manner, which will serve as a stepping stone for the proposed U.S.-Africa FTA. This section will recommend that the AfCFTA propose establishing a technical working group[247] under the MOU to engage in AGOA reform discussions. It should submit a robust blueprint for the new AGOA, outlining the case for the reform and mutual benefits to be derived, its own role in supporting the initiative, and the specific changes suggested.

The AfCFTA could effectively articulate the immense opportunities presented by AGOA reform. This reform, it could emphasize, not only stimulates Africa's economic growth and integration but also strengthens U.S. economic and political ties with Africa's rapidly growing economies. The AfCFTA could underscore that this reform would drive Africa towards sustainable economic growth, robust industrial development, and substantial job creation.

Concurrently, it could highlight that the United States would have the opportunity to deepen its economic involvement, balance competing influences, cultivate mutually beneficial partnerships, and access Africa's enormous economic potential.[248] Given the projection that Africa's combined consumer and business spending will reach a staggering $16.12 trillion by 2050, the AfCFTA could point out the unique opportunity presented to U.S. businesses to penetrate this emerging market and secure future growth and profitability.[249] This point is particularly critical as the United States currently lags behind other significant trading partners in capitalizing on opportunities in Africa.[250] As of 2021, the European Union and China accounted for 23% and 22% of Africa's total trade, respectively, while the United States

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[246] 'AGOA time: As 2025 approaches, opportunities for improvements eyed | InsideTrade' (n 42) 2.
[247] 'US AfCFTA Secretariat MOU December 14 2022.pdf' (n 53) s 3.
[248] Signé (n 5) 3.
[249] *ibid.*
[250] 'AfCFTA Secretary-General: U.S. Must Take "Whole of Africa" Approach to Trade | InsideTrade.Com' (1 August 2022) 1 <https://insidetrade.com/daily-news/afcfta-secretary-general-us-must-take-%E2%80%98whole-africa%E2%80%99-approach-trade> accessed 12 May 2023.

constituted a mere 4%.[251] This statistic underscores the urgency and potential for the United States to enhance its trade relations with Africa.

By advocating for AGOA reform, the AfCFTA could stress how the United States could reposition itself as a pivotal player in Africa's economic transformation. This could lead to shared prosperity and long-term economic security for both continents. The initiative could also stimulate Africa's industrial revolution, providing the U.S. with a diversified and alternative supply chain, a much-needed solution, especially considering the unstable economic relationship and trade war it currently has with China,[252] its leading trading partner.[253] Through the reformation of AGOA, the AfCFTA could argue that the United States can navigate the landscape of global trade more effectively, securing its economic future while simultaneously contributing to Africa's economic ascendance.

The following discussion will focus on the proposed modifications to AGOA. It will explore the necessary adjustments to ensure the program is in harmony with the goals of the AfCFTA.

Addressing AGOA's current shortcomings calls for significant amendments. While the AfCFTA cannot directly alter AGOA,[254] it can propose changes to the United States. This section will highlight AGOA's weaknesses and address questions posed by various stakeholders.

The AGOA community, comprised of businesses, civil society organizations, and governments, stresses the need to renew and revise AGOA's provisions. Key issues identified include AGOA's lifespan, product coverage, country eligibility criteria, export diversification strategies, agricultural trade enhancement, rules of origin simplification, investment opportunities in SSA, linking preferences with trade capacity building, and inclusion in global supply chains.[255] With AfCFTA now able to provide representation, contributing ideas to shape AGOA's future is critical.

A. Increasing Program Coverage

Enhancing the coverage of both nations and products under the AGOA is crucial. This section will first address the inclusion of more countries, followed by product coverage.

1. Country Coverage: Adopt a Whole of African Approach

Currently, AGOA's reach is limited to SSA, excluding North Africa. To foster a more comprehensive relationship between the U.S. and the entire African continent, AfCFTA should recommend the extension of AGOA to the whole of Africa[256] instead of the status quo, which is just Sub-Saharan. This could be achieved by modifying the eligibility criteria to incorporate all African countries, potentially facilitating more rapid integration of the continent's supply chains.

2. Product Coverage: Broadening Market Access

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[251] 'Africa: Main Trade Partners' (*Statista*) <https://www.statista.com/statistics/1234977/main-trade-partners-of-africa/> accessed 23 February 2023.

[252] 'US-China Trade War | PIIE' (19 July 2022) <https://www.piie.com/research/trade-investment/us-china-trade-war> accessed 16 May 2023.

[253] 'Countries & Regions' (*United States Trade Representative*) <http://ustr.gov/countries-regions> accessed 16 May 2023.

[254] See KUHLMANN (N 32) 5.

[255] 'AGOAs Reauthorization-Beyond 2015.Pdf' (January 2015) 2.

[256] 'AfCFTA secretary-general: US must take "whole of Africa" approach to trade | InsideTrade.com' (n 61) 1.

Although AGOA provides preferential market access to over 6,000 products,[257] its non-oil impact remains low,[258] save some inroads made in the garments industry.[259] This lack of diversity has caused an imbalance where only a few countries benefit.[260] AfCFTA should recommend reforms to open market access for a diverse range of products that would make the needed economic impact. For example, certain agricultural products subjected to tariff-rate quotas remain excluded. It's important to consider offering all products 100 percent duty-free quota-free (DFQF) treatment to boost trade and development further. This could bring $105 million to African producers while causing only a $9.6 million loss for U.S. producers.[261]

There should also be a review mechanism that would constantly evaluate the impact of products given market access and amend the list when appropriate.

B. Harmonizing AGOA and AfCFTA Rules of Origin

AfCFTA should recommend harmonizing AGOA's rules of origin with that of AfCFTA to support regional integration and resolve potential disruptions from constant eligibility criteria reviews. It would also reduce the impact suspensions have on disruption to the supply chains of countries that are not targeted and reduce the uncertainty investors face when making decisions on AGOA-dependent supply chains. The impact of the TCF on AGOA is evidence of what flexible rules of origin can offer.

C. Strengthening Capacity Building and Technical Assistance Programs

AfCFTA should recommend that the United States create a centralized coordination mechanism to consolidate and streamline existing capacity-building and technical assistance programs. This dedicated entity would serve as a hub for collaboration, promoting coherence, avoiding duplication, and leveraging the expertise and resources of various initiatives. Integrating programs such as the Millennium Challenge Corporation (MCC), Prosper Africa, and other relevant stakeholders under a single umbrella would enable a more comprehensive and coordinated approach.

This coordinating body should conduct comprehensive capacity assessments in partnership with African entities, identifying gaps in trade facilitation, infrastructure, digitalization, and entrepreneurial skills. Collaboratively designed, tailored training programs should address these gaps while fostering innovation and digital literacy. Institutional support for African trade organizations, knowledge sharing among African countries, and improved financial access for SMEs are also essential. Moreover, a robust monitoring framework should be established to assess program effectiveness. The body should work towards merging and aligning existing AGOA policies, ensuring alignment with AfCFTA goals, and providing ongoing support for AGOA's institutional development.

The body should support AfCFTA to help all the countries; regional blocs draft an AGOA utilization strategy, then later harmonize all the strategies into an AfCFTA AGOA utilization strategy, which would be used to implement and monitor goals.

By implementing these recommended changes, AGOA can undergo comprehensive reforms to align with the goals of the AfCFTA. These changes would enhance program coverage, expand market access, harmonize rules of origin, and strengthen capacity-building

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[257] 'AGOAs Reauthorization-Beyond 2015' (n 15) 8.
[258] *ibid 1*.
[259] 'How the Biden administration can make AGOA more effective' (n 33) 2.
[260] 'AGOAs Reauthorization-Beyond 2015' (n 15) 1.
[261] Lande and Matanda (n 23) 392.

efforts. Leveraging the synergies between AGOA and AfCFTA would foster economic growth, promote regional integration, and deepen the economic ties between the United States and Africa.

IV. The Way Forward for AGOA

This paper emphasizes the urgent need for strategic reforms to AGOA aimed at bolstering the continent's economic growth. AGOA could play a crucial role in propelling sustainable economic development, industrial progression, and employment opportunities across the continent by adopting a more inclusive strategy. The recommendations outlined in this analysis, which include expanding AGOA's reach through amending the eligibility rules, coordinating and intensifying capacity building, and harmonizing the rules of origin, pave a promising path for these essential changes. The successful implementation of these suggestions will demand strong political commitment and collective efforts. It is imperative that the United States and African nations collaboratively and transparently work towards this goal. As AGOA approaches a new stage of its development, the aspiration should be to transform it into a more effective tool for fostering economic inclusiveness and sustainability in Africa.

I call on AfCFTA to rise to the occasion and spearhead this transformation, ensuring that AGOA is reformed for the greater good of all African nations. This is not merely a task, but a duty, a commitment to the future prosperity of the African continent.

CHAPTER 4: MAKING ROOM FOR SUSTAINABLE DEVELOPMENT IN THE GROWING NEXUS BETWEEN TRADE AND NATIONAL SECURITY

ZOE TOPAZ[*]

Abstract

What started as an exercise of mutual restraint has given way to indulgence – countries are, with increasing incidence, using the national security exception in Article XXI of the GATT to justify violations of prior trade commitments. It is somewhat unclear whether countries are invoking the exception in good faith or rather using it as a loophole to abandon trade commitments that no longer serve national interests. Either way, unilateral trade restrictions are being imposed on countries in the name of national security. There is plenty of academic commentary on the need to link trade and sustainable development and on how free trade is affected by Article XXI of the GATT, but there is little discussion of how sustainable development is affected by unilateral measures justified as necessary for national security. If states continue imposing discriminatory trade measures under the national security exception without considering the effects these trade barriers have on sustainable development, we risk undermining years of effort to bring sustainable development to center stage. After discussing the growing nexus between trade and national security, the text of Article XXI, and how it is currently being used – this paper will take a closer look at how trade measures, including sanctions, "justified" under the national security exception, have consequences for sustainable development. Before concluding, the paper will recommend a path forward by discussing potential ways to bring sustainable development into the fold. There is not one clear path forward, but I hope this paper sparks a discussion about how we can make sure unilateral measures justified, formally or informally, under the national security exception are implemented with sustainable development goals in mind.

I. Introduction: The Growing Nexus between Trade and National Security

More than ever before, national security and the global economic system are inextricably linked. The multilateral trading system agreed to by members of the World Trade Organization (WTO) is confronted with challenges in the wake of this tug-of-war between trade and national security. The clash between trade and security interests is, in fact, not new. In *The Wealth of Nations (1776)*, Adam Smith noted the only justified exception to free trade is national defense.[262] More recently, national security was embedded in the WTO framework through Article XXI of the General Agreement on Tariffs and Trade (GATT).[263] Article XXI is a national security exception that recognizes that governments may implement measures to address security concerns that would otherwise be in violation of their WTO trade commitments under international law.[264] While the exception may give countries a legal

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[262] Adam Smith, *The Wealth of Nations* (1776).

[263] Marrakesh Agreement Establishing the World Trade Organization (WTO), Article XXI, April 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement Establishing the WTO].

[264] J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L.J. 1020, 1026 (2020) [hereinafter Heath 2020].

justification for their actions, states imposing harsh trade measures still need to be willing to accept the political and economic costs of their decision to invoke Article XXI.[265]

Even though the national security exception is not new, in recent years, it has moved to center stage in trade. States are no longer exercising mutual restraint; instead, there is an increasing incidence of countries using the national security exception to justify violations of prior trade commitments.[266] This result seems almost inevitable, given how drastically the concept of what constitutes a national security interest is expanding. The United States, for example, has imposed trade barriers to deal with security threats stemming from terrorism to human rights violations to metal imports.[267] Now, the meaning of national security as a concept is "stable only at an extremely high level of generality."[268] As trade liberalization gives way to national security interests, the opportunity for open, non-discriminatory trade will shrink—even more so if states invoke the national security exception without limitations.[269]

There has been much discussion about the relationship between security interests and trade interests, but an important element is being left out of the discussion. How is all of this affecting sustainable development? It has become increasingly clear that trade law and policy can be reimagined to contribute to achieving the Sustainable Development Goals (SDGs), but is the national security exception undermining the potential for growth in this positive relationship? Even if restrictive trade measures implemented in the name of national security are legally justified, it appears they do not advance the broader goals of development. In fact, nothing in the national security exception requires (or even encourages) states to consider how breaking trade commitments and imposing unilateral measures could cause harm to sustainable development efforts.

In this paper, I open the discussion on trade and national security to sustainable development in the hope that it will spark a dialogue about the incompleteness of the current picture. With the growing tendency to use discriminatory trade measures to achieve geopolitical goals, it is increasingly important that sustainable development joins trade and national security at center stage. I hope this piece will serve as a springboard to start a discussion about the nexus between trade, national security, *and* sustainable development.

II. The Legal Framework

What is the National Security Exception in Article XXI of the GATT?

Treaties are filled with exceptions. These exceptions enable governments to lawfully pursue regulatory objectives that conflict with substantive treaty obligations.[270] Article XXI of the GATT grants WTO members the legal authority to abandon trade commitments to safeguard their national security interests.[271] The exact text is as follows:

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[265] *Id.*

[266] James Bacchus, *The Black Hole of National Security: Striking the Right Balance for the National Security Exception in International Trade*, Cato Institute Policy Analysis no. 936 (November 9, 2022), available at https://www.cato.org/policy-analysis/black-hole-national-security [hereinafter Bacchus 2022].

[267] Heath 2020, *supra* note 3, at 1036.

[268] *Id.*

[269] Mona Pinchis-Paulsen, "Let's Agree to Disagree: A Strategy for Trade-Security", *Journal of International Economic Law*, Volume 25, Issue 4, 527–47 (2022), https://doi.org/10.1093/jiel/jgac048.

[270] Caroline Henckels, "Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict", *European Yearbook of International Economic Law*, pp. 2 (2018), available at SSRN: https://ssrn.com/abstract=3136191.

[271] Chao Wang, "Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review", *Chinese Journal of International Law*, Volume 18, Issue 3, 695-712 (2019), https://doi.org/10.1093/chinesejil/jmz029 [hereinafter Wang 2019].

Article XXI Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[272]

Is Article XXI a Limited Exception or Loophole?

At the conception of Article XXI, it would have been almost impossible to imagine how broad the concept of national security would become. When it came to invoking the national security exception, mutual restraint was the norm for decades, but we are seeing an increasing incidence of states relying on the exception to justify implementing trade restrictions.[273] So much so that it begs the question of whether the exception is swallowing the rule. The critical language in Article XXI is the phrase "which it considers necessary."[274] There are various interpretations of the meaning of this phrase. According to one interpretation, the Article is completely "self-judging," meaning that a state can decide for itself – not another state or judicial body – whether a measure is essential to its security interests and relates to one of the enumerated conditions.[275] Another interpretation would "recognize a Member State's prerogative to determine for itself whether a security exception is applicable, but would impose a good faith standard that is subject to judicial review."[276] Under a third interpretation, a Member State can "decide for itself whether 'it considers' a measure to be 'necessary for the protection of its essential security interests,' but the enumerated conditions are subject to judicial review."[277]

The WTO took a step towards addressing the scope of Article XXI in *Russia—Traffic in Transit*. In that case, the Panel determined that the invocation of the national security exception under Article XXI is subject to judicial review.[278] The Panel there asserted WTO jurisdiction to determine whether the objective requirements of Article XXI(b) have been satisfied and explained how a Member must adhere to the obligation of good faith as a general principle of international law when taking "action which it considers necessary for the protection of its essential security interests."[279] When all the objective requirements and good faith standards

[272] GATT 1994, Article XXI, *supra* note 2.
[273] Bacchus 2022, *supra* note 5, at 4.
[274] Heath 2020, *supra* note 3, at 1052.
[275] Wang 2019, *supra* note 10, at 698.
[276] *Id.*
[277] *Id.*
[278] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, circulated April 5, 2019.
[279] Dylan Geraets, *WTO Issues Ruling in Russia – Traffic in Transit: Measures Justified on National Security Grounds Are Justiciable*, MAYER BROWN (Apr. 8, 2019), https://www.mayerbrown.com/en/perspectives-

are satisfied, it would be up to the invoking Member to define both its specific "essential security interests" and the "necessity" of the measures for the protection of such interests.[280]

The Panel's findings in *Russia—Traffic and Transit* contradicts the United States' historic position that Article XXI is "self-judging" and, therefore, not subject to review.[281] As cases against states invoking this exception pile up, there is clearly much that remains to be seen about how much discretion countries will ultimately be given in this space.

Existing Commitment to Sustainable Development: The WTO Preamble

Bringing sustainable development into the discussion on trade and Article XXI may not require starting completely anew. There is already a legal anchor in place: the WTO preamble. The preamble recognizes sustainable development as a central principle. The preamble reads,

> The Parties to this Agreement,
>
> 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.[282]

With the preamble as a starting point, it is essential that the legal framework becomes more deeply embedded in every aspect of international trade. The Appellate Body in the *"Shrimp-Turtle"* case focused on how the preamble of the WTO Agreement informs the GATT 1994 and other covered agreements.[283] Following this logic, Article XXI should reflect the commitment to sustainable development promulgated in the preamble. Trade is a crucial ally of sustainable development. As national security concerns result in more and more trade restrictions; it is essential that the commitment to sustainable development, as laid out in the WTO preamble, guide *all* action in the field of international trade.

III. Unilateral Measures "Justified" under the National Security Exception Have Consequences for Sustainable Development

There is tension between national security and free trade. One way countries sidestep trade commitments is by imposing unilateral trade restrictions, such as sanctions, on adversaries.

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events/publications/2019/04/wto-issues-ruling-in-russia-traffic-in-transit-measures-justified-on-national-security-grounds-are-justiciable#_edn1.

[280] *Id.*

[281] *Id.*

[282] Marrakesh Agreement Establishing the WTO, Preamble, *supra* note 2.

[283] Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted 1998) [hereinafter *Shrimp-Turtle* case].

Countries are, with increasing incidence, looking to Article XXI as the legal justification for these discriminatory measures.[284]

The Council on Foreign Relations defines economic sanctions as "the withdrawal of customary trade and financial relations for foreign and security policy purposes."[285] They can be used by states to deter, coerce, punish, or shame actors that jeopardize national interests or violate international norms of behavior.[286] Sanctions can be comprehensive, prohibiting trade with an entire country, or they can be targeted, blocking transactions by and with particular individuals or groups.[287]

Sanctions are, by their very nature, discriminatory measures that present a *prima facie* conflict with GATT obligations.[288] Depending on their composition and breadth, sanctions may conflict with various GATT Articles, including, for example, GATT Articles I(1), III(4), and XI(1).[289] These Articles address, most-favored nation treatment, national treatment, and the general elimination of quantitative restrictions, respectively. Conflict may be avoided if sanctions fall within the terms of a GATT exception (i.e., Article XXI).[290]

But how far can these exceptions go? It seems that Article XXI is being increasingly used as a blanket justification for various types of unilateral measures.[291] Whether or not these actions are permissible under the WTO and international law is debatable, but states are still imposing them in the name of national security. They are doing so outside of any soft or hard law requirements that would call for considering how discriminatory trade regimes affect sustainable development. Legality aside, unilateral trade measures, whether directly or indirectly, are posing great challenges for achieving sustainable development goals.[292] More specifically, unilateral measures, including sanctions, cause severe negative externalities to innocent civilians in sanctioned countries in the areas of health, food security, clean water, labor, gender equality, and the environment, among other areas – all of which are embedded in the SDGs.

Trade Restrictions Affecting Health

"Health is crucial for sustainable development, both as an inalienable human right and an acceleration of the economic growth of countries."[293] While most countries technically exempt food and medicine from sanction regimes, the secondary effects of the sanctions imposed on industries like banking, shipping, and insurance affect imports of food and medicine.[294] In the

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[284] Michael Brzoska, *International Sanctions: A Useful but Increasingly Misused Policy Instrument*, ECONOMISTS ON PEACE (2022), https://www.visionofhumanity.org/international-sanctions-a-useful-but-increasingly-misused-policy-instrument/ [hereinafter Brzoska 2022].

[285] Johnathan Masters, "What Are Economic Sanctions?", *Council on Foreign Relations* (2019), https://www.cfr.org/backgrounder/what-are-economic-sanctions [hereinafter Masters 2019].

[286] *Id.*

[287] *Id.*

[288] Andrew D. Mitchell, "Sanctions and the World Trade Organization", Research Handbook on UN Sanctions and International Law, 283 (2017), https://doi.org/10.4337/9781784713034.00021 [hereinafter Mitchell 2017].

[289] *Id.*

[290] *Id.*

[291] Wang 2019, *supra* note 10.

[292] Charlie Westbrook, "How US Sanctions Are Hindering Sustainable Development", August 10, 2020, available at https://impakter.com/how-us-sanctions-are-hindering-sustainable-development/ [hereinafter Westbrook 2020].

[293] Narges Akbarpour Roshan, Shirin Mehrbod, Mohsen Abbassi, "The Impacts of Economic Sanctions on Sustainable Development: Focusing on Labor," Science Journal (CSJ), Vol. 36, No: 3 Special Issue, pp. 3458 (2015), available at https://dergipark.org.tr/tr/download/article-file/714142 [hereinafter Akbarpour Roshan et al.].

[294] *Id.* at 3464.

face of punitive restrictions, banks and financial institutions – including those based in non-sanctioned countries – tend to lean towards over-compliance out of an abundance of "institutional caution."[295] This caution results in an unwillingness to transfer funds to sanctioned countries which can make it extremely difficult for the country to get basic food items, health-care equipment, and other forms of humanitarian aid.[296] In addition to sanctioning financial institutions, unilateral sanction regimes oftentimes include fuel embargoes and other restrictions on the flow of goods.[297] The lack of fuel and the inability to get necessary spare parts disrupts electric power generation, preventing pumps from supplying water for drinking and sanitation.[298] The fact that sanctions are affecting people through water is completely inconsistent with the sixth SDG, Clean Water and Sanitation. Without the ability to sanitize, access to clean water is limited and people may resort to drinking dirty water, which causes outbreaks of disease.[299] Sustainable development requires a healthy and productive workforce, so any trade restrictions that negatively affect food security, access to clean water, and medical advancement are particularly concerning. Not only do sanctioned countries struggle to obtain necessary materials, but these discriminatory trade regimes can also impact the transfer of knowledge needed to support humanitarian efforts.[300] For example, when sanctions block activities such as teleconferencing and data services in countries, people are not only cut off from the ability to conduct business online, they are also limited from using the internet for education and training.[301] Sustainable development must be a consideration when trade restrictions are imposed in order to avoid these devastating effects.

Trade Restrictions Affecting Equality

Unilateral economic sanctions are "not just broad, but they are also gender blind."[302] Further, they do not account for other vulnerable groups, including children and the disabled, who ultimately suffer the most.[303] Economic sanctions affect women disproportionately for various reasons. First, sanctions often more severely disrupt export-oriented industries (including textiles, apparel, leather goods, and electronic assemblies) and women tend to comprise a larger portion of the labor force in these industries – often up to 80% of the employees.[304] If export-oriented businesses are forced to shut down or significantly reduce their operations, more women will lose their jobs.[305] These unilateral trade measures also hurt access to social welfare programs as governments become less able to provide them.[306] Social welfare programs that tend to be pulled back in the face of economic sanctions include services

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[295] 48th Regular Session of the Human Rights Council Biennial Panel Discussion on Unilateral Coercive Measures and Human Rights: "Unilateral Sanctions: Jurisdiction and Extraterritoriality," September 16, 2021 (Statement of Michelle Bachelet, UN High Commissioner for Human Rights).
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] Akbarpour Roshan et al., *supra* note 32, at 3459.
[300] *Id.* at 3460.
[301] OHCHR Press Release, "Unilateral Sanctions Impinge on Right to Development", (August 11, 2021), available at https://www.ohchr.org/en/press-releases/2021/08/unilateral-sanctions-impinge-right-development-un-experts?LangID=E&NewsID=27373 [hereinafter OHCHR]
[302] Westbrook 2020, *supra* note 31.
[303] *Id.*
[304] A. Cooper Drury & Dursun Peksen, "Women and Economic Statecraft: The Negative Impact International Economic Sanctions Visit on Women," *European Journal of International Relations*, Volume 2, Issue 2, 467, (2012), https://doi.org/10.1177/1354066112448200 [hereinafter Dursun & Peksen 2012].
[305] *Id.*
[306] *Id.* at 468.

like state-supported education, health care, childcare, maternity leave, and other social policies.[307] Women and other vulnerable groups tend to benefit most from welfare policies, so any decline in social services caused by trade barriers will disproportionately deteriorate their status.[308]

It is "naive to imagine that measures which are focusing on creating deep frustration or anger would bypass the vulnerable members of society and go straight to the top."[309] When trade restrictions cause negative economic effects in a targeted country, the hardship is not evenly distributed across the population. Vulnerable groups, who are least protected, suffer the most, and oftentimes the actual targets "perversely benefit through gaming sanctions regimes and profiteering from the economic distortions and incentives introduced by them."[310]

Trade Restrictions Affecting the Environment

Discriminatory trade measures also hamper sustainable development in the environmental space, which impedes the goals set for a number of SDGs, including Sustainable Cities and Responsible Consumption and Production by 2030.[311] Notably, while sanctions themselves are not intended to cause environmental damage, the trade restrictions can often act as a catalyst in furthering environmental degradation.[312] Unilateral trade measures can limit the ability of a sanctioned government to "acquire foreign goods and services that could reduce environmental harm; they block international funding from lending agencies, banks and investors for environmental improvement projects; and they cause authorities to focus on addressing acute social problems associated with the sanctions, such as greater poverty, at the expense of environmental sustainability programs and efforts to reduce the economy's reliance on the traditional energy industry."[313]

Air pollution is a growing consequence of sanctioning.[314] Because of trade restrictions, countries are unable to receive new technological know-how and are forced to use outdated machinery that contributes to air pollution.[315] Unilateral trade measures blocking the flow of goods may also prolong the use of other outmoded technology, including vehicles that burn gasoline and diesel fuel less efficiently.[316] Nations around the world have, time and time again, affirmed that everyone has the right to a clean, healthy, and sustainable environment, but, at the same time, they are undermining efforts to achieve this.[317]

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[307] Dursun & Peksen 2012, *supra* note 43, at 468.
[308] *Id.*
[309] Westbrook 2020, *supra* note 31.
[310] *Id.*
[311] *Id.*
[312] Barney Bartlett & Shirin Hakim, "Economic Sanctions are Triggering Environmental Damage", February 15, 2021, available at https://www.aljazeera.com/opinions/2021/2/15/economic-sanctions-are-triggering-environmental-damage#:~:text=Moreover%2C%20economic%20sanctions%20also%20damage,in%20an%20effort%20to%20survive.
[313] Mandates of the Special Rapporteurs, Ref.: AL USA 17/2022, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27571 [hereinafter AL USA 17/2022]
[314] Westbrook 2020, *supra* note 31.
[315] Akbarpour Roshan et al., *supra* note 32, at 3460.
[316] *Id.*
[317] AL USA 17/2022, *supra* note 52.

"Sanctions make it harder for entire populations to stay healthy and hamper the transportation of goods needed for economic development."[318] This ultimately undermines the achievability of the SDGs. The notion that imposing trade restrictions can have unintended consequences is not new. The past two decades have seen widespread acknowledgement by scholars and policy-makers alike that "the civilian pain caused by comprehensive sanctions outweighs any political gain that may be achieved."[319] If these unilateral measures are contributing to poor health conditions, increasing hunger and poverty, perpetuating inequality, and harming the environment, maybe something needs to change. When GATT Article XXI was crafted in the middle of the last century, the purpose could not possibly have been to justify dramatic and detrimental impacts on economic, social, environmental, and cultural rights. With the wellbeing of the civilian populations in sanctioned states becoming severely compromised, it is of utmost importance to bring sustainable development into the discussion on trade, and consequently into the application of the national security exception, because that is increasingly being used to justify violations of trade commitments.

IV. Path Forward: Bringing Sustainable Development into the Fold

It is unrealistic that countries will simply stop imposing trade restrictions – instead, my hope is that countries will consider how their unilateral measures are undermining sustainable development efforts. The following recommendations are not meant to be all encompassing, and there are challenges to carrying them out. However, they can hopefully serve as a starting point.

Since countries are increasingly relying on GATT Article XXI to justify the implementation of discriminatory trade measures, a good place to start is with the language of the exception itself. Right now, there is nothing in the exception that clearly defines what "security interests" are. As previously stated, when Article XXI was originally drafted, it would have been almost impossible to imagine how broad the concept of security would become. As the meaning of the term expands, it appears that countries can fit almost anything into "security interests." This broadens the national security exception and risks that it will become so large that it will "swallow" the rule. States may resist anything that pigeonholes them, but even a slight narrowing of the exception could do plenty good.

In addition to, or instead of, narrowing the meaning of national security, incorporating sustainable development objectives into the exception itself could prove useful. For example, language could be added to Article XXI along the lines of, "If this exception is exercised, it will not be done in a way that will jeopardize existing sustainable development commitments to the extent feasible." The addition of this language would probably garner more support from states because it resembles a "best endeavor" commitment and would not be absolutely binding. Still, this could prove especially useful if the exception remains justiciable, because it would give states and dispute settlement panels something to grasp onto. At the very least it may require countries to articulate how their actions are narrowly tailored to achieve their legitimate national security interests without overly burdening sustainable development.

The preambular language to the Agreement establishing the WTO could also play a more considerable role. The preamble to the WTO clearly shows that, at the time of signing, parties were fully aware of the importance and legitimacy of sustainable development as a goal of national and international policy. In the *"Shrimp—Turtle"* case, the WTO Appellate Body

[318] OHCHR, *supra* note 40.
[319] Westbrook 2020, *supra* note 31.

referred, multiple times, to the objective of "sustainable development" in the preamble to the WTO Agreement when interpreting the terms in GATT Article XX.[320] More specifically, the Panel wrote,

> We must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the WTO Agreement, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the WTO Agreement, generally, and under the GATT 1994, in particular.[321]

Like Article XXI, Article XX provides a defense for certain measures that would otherwise be considered trade violations. If countries invoking Article XX must take a commitment to sustainable development into account, then why would Article XXI not need to be compatible with the objects and purposes of the preamble to the WTO? As national security concerns give rise to the implementation of harsh trade restrictions, it appears even more essential that the commitment to sustainable development, as laid out in the WTO preamble, guide *all* action in trade. The WTO preamble should be more thoughtfully linked with GATT Article XXI.

I also recommend establishing a National Security Committee or Working Group at the WTO.[322] A proposal by Lester and Manak would task a National Security Committee in the WTO with the following:

> Creating a forum for regular discussion and coordination of approaches on trade-related aspects of national security matters; a monitoring mechanism to increase transparency on the use and application of national security measures; a Technical Group for developing recommendations and guidelines; and a process for immediate rebalancing, either through compensation or retaliation, where such measures have been imposed and their impact on trade can be demonstrated.[323]

In addition to these functions, I propose that a National Security Committee could more explicitly raise awareness on the relationship between national security and sustainable development. A committee on National Security at the WTO could be tasked with, among other things, reviewing application of the national security exception and requiring increased transparency. In the case of the latter, transparency could be strengthened by asking countries to articulate how they are maintaining a commitment to sustainable development in sanctioned countries. A Committee on National Security could also monitor and report the unintended harmful effects of trade restrictions in a particular country. Any or all of these functions would be a very positive step forward.

Another option would be to create a Working Group on National Security. There are plenty of formal and informal Working Groups operating in the WTO. For example, there is a Working Group on Trade, Debt and Finance which aims to study how trade can best

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[320] *Shrimp-Turtle* case, *supra* note 22.
[321] *Id.* at 60.
[322] Simon Lester & Inu Manak, A Proposal for a Committee on National Security at the WTO, 30 *Duke Journal of Comparative & International Law* 267-281 (2020), available at: https://scholarship.law.duke.edu/djcil/vol30/iss2/3.
[323] *Id.*

contribute to solving debt challenges.[324] A Working Group on National Security could be instrumental by studying how trade, national security, and sustainable development could more positively interact with one another.

Globally, a push for a greater shift towards targeted or "smart" sanctions could ensure that sanctions are more in line with international trade law and sustainable development. When sanctions target an entire country, or address entire economic sectors, it is the most vulnerable people in that country, innocent civilians, who are likely to face the harshest consequences.[325] Smart sanctions offer the chance to limit the negative consequences of sanctions on the broader population and instead directly hurt only the political decision makers.[326] While there could still be negative externalities, targeted sanctions may result in fewer spillover effects so they are less likely to undermine sustainable development efforts.

It would be ideal for sustainable development purposes if Article XXI were applied much more narrowly, instead of being used so broadly to justify any action taken by a country that can "fit" into security interests. There are steps that can be taken to make sure the exception is narrowed, but it does not seem that states will stop invoking Article XXI anytime soon. It is imperative that sustainable development be brought into the discussion so that the increasing incidence of trade restrictions applied in the name of national security are not implemented without any thought towards sustainability concerns and the SDGs that need to be achieved by 2030.

To summarize, the following steps could help bring sustainable development into the application of the national security exception:

1. Establish a more explicit definition of "security interests" under Article XXI.[327]
2. Add additional language to Article XXI along the lines of, "If this exception is exercised, it will not be done in a way that will jeopardize existing sustainable development commitments to the extent feasible."
3. Apply the WTO preamble in the context of Article XXI. The Appellate Body in the *"Shrimp-Turtle"* case focused on how the preamble of the WTO Agreement informs the GATT 1994 and other covered agreements, including the General Exceptions in GATT Article XX. [328] Article XXI must also reflect the commitment to sustainable development incorporated into the preamble.
4. Create a Committee or Working Group on National Security at the WTO that will be tasked with, among other things, reviewing invocations of the national security exception and increasing transparency by asking countries to articulate how they are maintaining a commitment to sustainable development in the sanctioned countries. A Committee or Working Group on National Security could also monitor and report the unintended harmful effects of unilateral measures in a particular country. [329]

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[324] More information about the Working Group on Trade, Debt and Finance is available at https://www.wto.org/english/tratop_e/devel_e/dev_wkgp_trade_debt_finance_e.htm.

[325] Masters 2019, *supra* note 25.

[326] Brzoska 2022, *supra* note 24.

[327] While my general suggestion would be to narrow the definition, that there is potential for unilateral action, under a broadened understanding of security, to be a positive change for the multilateral trading system in exceptional cases (i.e., climate security). *See* Kent Hughes Butts & Brent C. Bankus, *Sustainability: A Lens for National Security*, (2012) for a more detailed discussion.

[328] *Shrimp-Turtle* case, *supra* note 22.

[329] I do not take credit for creating this proposal, I simply want to build off it and suggest sustainable development take a more explicit front seat in the tasks of such a committee or working group.

5. Encourage countries to adopt "targeted / smart sanctions," rather than broad sanctions on entire countries, to minimize the harm on innocent civilian populations.

V. Conclusion

Countries are increasingly invoking the national security exception in Article XXI of the GATT. If nations continue down this path – imposing discriminatory trade restrictions in the name of national security – without examining the effects of doing so on sustainable development, it could jeopardize years of effort to bring sustainable development to the forefront of the international system.

WTO members often talk about trade and the GATT national security exception, and trade and sustainable development has become such an important topic that it was the focus of the 2023 WTO Public Forum. But what about linking the GATT national security exception and sustainable development? Addressing the interconnectedness of trade, national security, *and* sustainable development needs to happen, because if we do not bring these considerations into focus, we may undermine years of effort to establish and prioritize sustainable development.

There is ample room for improvement. The national security exception, if not abused, can be a powerful tool for advancing security interests and sustainable development. But this cannot be done unless states are forced to think about how trade restrictions could cause more harm than good. Hopefully this paper will help push forward a discussion that ultimately leads to striking the right balance for the national security exception in international trade by considering sustainable development objectives.

CHAPTER 5: THE INCLUSION OF ANTI-CORRUPTION CHAPTERS IN FREE TRADE AGREEMENTS: A COMPARATIVE ANALYSIS OF THE USMCA AND THE EU–MEXICO AGREEMENT IN PRINCIPLE

MARÍA CALDERÓN ESCOBEDO*

Abstract

The flourishing of trade came alongside another phenomenon: corruption. The international community started to realize the existing interrelation during the past decades, but it wasn´t until the early 2000s that explicit acknowledgement of the need to formulate an agenda and framework on anti-corruption emerged. Since the WTO has not provided such framework in terms of trade, policy space has been left for Free Trade Agreements (FTAs) to create and include anti-corruption measures. Good examples of this are the United States, Mexico, and Canada Agreement (USMCA) and the European Union and Mexico Agreement in principle (EUMA), which have included entire anti-corruption chapters. Nevertheless, free trade and anti-corruption efforts share reciprocal interests but still maintain, in a way, distinctive agendas, which leave room for skeptics to question the effectiveness of such efforts. This Article intends to analyze whether the inclusion of the new anti-corruption chapters in the USMCA and the EUMA can effectively become an instrument in the fight against corruption. A proper understanding of this new trend in FTAs will enable negotiators, policymakers, and researchers to evaluate whether anti-corruption provisions prove helpful on curbing corruption, or, if instead, they are to be considered as another formalistic attempt to include shallow anti-corruption commitments.

Introduction

International trade and global exports have dramatically increased over the last two centuries. Unfortunately, like other trade effects, this growth has not occurred without some spillovers, corruption being only one example. During the last two decades corruption has been identified as a significant hindrance to free trade. With such recognition, major efforts have been implemented to build a legal framework to confront corruption on a national and international level.[330]

Within this framework, free trade agreements (FTAs) have proven to be an excellent factor in helping to break the vicious cycle of corruption in economies based on privileged connections, instead of fair competition. Such legal instruments contribute to a fairer business environment thanks to their red tape reduction, transparency provisions, and the elimination of non-tariff barriers that are generally used to the advantage of domestically connected companies.[331]

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330 Alina Mungiu-Pippidi, European Research Center on Anti-Corruption and State-Building (ERCAS), Hertie School of Governance, Berlin, ´Anti-corruption provisions in EU free trade and investment agreements: Delivering on clean trade´ (2018)

331 *Ibid.*

Nevertheless, free trade and anti-corruption efforts share reciprocal interests but still maintain, in a way, distinctive agendas. Skeptics question whether the efforts to include anti-corruption provisions in FTAs are to prove helpful, or are instead, one more formalistic attempt to be included and recognized in the international anti-corruption agenda.[332]

This article intends to analyze whether the inclusion of the new anti-corruption chapters of the United States-Mexico-Canada Agreement (USMCA) and the EU–Mexico Agreement in principle (EUMA) can indeed become an effective legal instrument in the fight against corruption.

As such, the paper's first section analyzes the debate and measures taken around anti-corruption measures in FTAs, followed by a brief introduction to the USMCA and the EUMA. The second section lays out a comparative analysis between the USMCA and the EUMA´s anti-corruption chapters. The following section analyzes the essential findings and gaps of both agreements, followed by a set of recommendations derived from the comparative analysis results. Finally, some conclusions are proposed.

I. FTAs and the Debate Around the Inclusion of Anti-Corruption Measures

As the world´s trade development continues to grow and the removal of tariff barriers persists, world economies have set up measures that provide privileged status, which in turn have bred the risk of corruption.[333] Corruption damages private enterprises by functioning as a hidden tariff that distorts resource allocation and generates inefficiencies, severely undermining the benefits of negotiated trade agreements. Where tariffs are hidden or unpredictable, enterprises cannot account for them in investment decisions or profitability calculations, such uncertainty being a considerable deterrent to trade. The World Customs Organization estimates that its 180 member countries annually lose at least $2 billion dollars in customs revenues due to corruption.[334] Consequently, as countries have learned that corruption is a clear impediment to free trade and investment, the need to create anti-corruption initiatives, especially in the last two decades, has been acknowledged.

Historically, the lack of attention paid to corruption stems from the fact that negotiations are complex, not always transparent, and time-consuming. However, this attempt was followed by more specific anti-corruption measures in bilateral and regional trade agreements (RTAs) to improve non-discrimination and transparency regimes. The now-defunct Transatlantic Trade and Investment Partnership (TTIP) led the way by including anti-corruption measures in the early stages of negotiation. From this attempt, the definition of the first anti-corruption standards and provisions in international trade and investment agreements was finally set.[335]

The former is a clear example of going beyond WTO norms to address a range of policy areas not traditionally within the scope of trade deals. Such an opportunity was reinforced by the fact that a more recent generation of trade agreements has sought to harmonize regulations set out by national governments. This trend has built some consensus around anti-corruption and transparency provisions and best practices to include in trade deals, such as explicit

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[332] *Ibid.*

[333] Michael Rosenberger, 'Anti-Corruption Provisions in Free Trade Agreements' (*Tax & Accounting Blog Posts by Thomson Reuters*, 1 August 2018) <https://tax.thomsonreuters.com/blog/anti-corruption-provisions-in-free-trade-agreements/> accessed 12 April 2023.

[334] Matthew Jenkins, ´Anti-Corruption and Transparency Provisions in Trade Agreements´ (*Transparency International*, 20 July 2018) <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption-and-transparency-provisions-in-trade-agreements-2018.pdf> accessed 12 April 2023.

[335] Rosenberger (n 4).

references to international anti-corruption conventions, commitments to criminalize active and passive bribery, non-criminal sanctions when there are no criminal liability provisions, and whistleblower protection, among others.[336]

FTAs are expected to help address and combat corruption in several ways. By removing non-tariff barriers, there's a direct competition increase between companies that influence regulation in their favor, and as a consequence, a diminishment of power occurs, which in turn generates an advantage for domestic companies. Also, through transparency provisions, FTAs create a fairer business environment and increase the possibilities for detecting corruption practices.[337]

Following this trend, the opportunity to discuss accountability and transparency issues has finally emerged and the international community has seized it. On the one hand, countries are trying to curb their high incidences of corruption to establish trade relations. And on the other hand, they are using trade negotiations to improve their market access and reduce market opacity. The outcome: over 40% of RTAs concluded since the millennium have incorporated anti-corruption and anti-bribery commitments with no precedent under the WTO regime.[338]

These attempts have led companies to operate and compete in foreign markets with a greater confidence that they will receive fair treatment from public officials and agencies. Improving the transparency of the trading environment is thus, an essential complement to traditional means of reducing barriers to trade, such as lowering tariffs.[339]

However, many distortions exist around the anti-corruption and trade debate. Pressure is growing to engage countries that are perceived as the most corrupt, mostly the poorest. Such countries are recipients of foreign aid, which brings significant procurement of interest for international companies. Still, the poorer countries must develop and seek foreign investment and lower tariffs. Excluding them to avoid temptation is increasingly considered morally problematic and practically challenging.[340]

The paradox deepened by international trade is that exchanges between countries perceived as corrupt and non-corrupt lead to increased corruption and negative spillover. Companies working in economies perceived as clean pay bribes to enter the markets of countries perceived as corrupt, ending in a trend that blames local "corrupt" cultures but that is also fueled by foreign "clean" countries. At present, a more balanced language emerged around the topic as the "supply and demand" sides are both to blame.[341]

While headway has been made on mainstreaming anti-corruption principles into trade agreements, the effectiveness of anti-corruption provisions remains open to question. Implementation and enforcement of a state's anti-corruption obligations relies on robust measures taken at the national level, which have not always been proven to be implemented or effective, especially in regional trade agreements lacking an established mechanism such as

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[336] Jenkins (n 5).

[337] Mungiu-Pippidi (n 1).

[338] Jenkins (n 5) "Until very recently, the apparent political capital invested in robust anti-corruption commitments in mega-trade deals was interpreted by some observers as part of a more general trend towards global action on corruption leveraged through trade policies, with some even speculating that the WTO could adopt anti-corruption provisions enforceable through the WTO Dispute Settlement Body. However, analysis by the OECD suggests that while the kinds of transparency provisions included in recent RTAs clearly lend themselves to adoption by the multilateral WTO regime, such a "multilateralisation" of anticorruption provisions is more problematic due to the lack of coherence with existing WTO agreements and the absence of a critical mass of support for these measures among WTO members."

[339] *Ibid.*

[340] Mungiu-Pippidi (n 1).

[341] *Ibid.*

the WTO's Dispute Settlement Body.[342] Still, a global anti-corruption awareness is essential. While many countries are fighting for better transparency, this issue will continue to be a talking point for current and future FTAs.[343]

A. USMCA brief

Without measures at the WTO level to improve transparency and reduce bribery in international trade, the U.S. has pioneered the embedding of anti-corruption and transparency provisions into its bilateral trade agreements over the last 15 years; the USMCA is the primordial example.[344]

The USMCA, signed into law by Presidents Trump, Trudeau, and López Obrador on January 29, 2020, includes an entire chapter on anti-corruption (Chapter 27). Such a topic was not formally addressed in the precursor agreement to the USMCA, the North American Free Trade Agreement (NAFTA), making Chapter 27 the first in the North American trade region. This new anti-corruption chapter represents an official commitment by the three countries to support each nation's efforts to combat bribery and corruption. Although each country currently imposes domestic laws to combat corruption and bribery, they must align their domestic rules with the terms of Chapter 27 and the USMCA.[345]

Including an anti-corruption chapter in the USMCA makes sense. While none of the three parties is free of corruption, Mexico has long battled endemic corrupt activities from the presidential level to that of local public officials. One observer summarizes the situation "Corruption is a significant risk for companies operating in Mexico. Bribery is widespread in the country's judiciary and police. Business registration processes, including obtaining construction permits and licenses, are negatively influenced by corruption. Organized crime continues to be a very problematic factor for business, imposing high costs on companies… Mexico's anti-corruption laws are rarely enforced, and public officials are rarely held liable..."[346]

B. EU–Mexico Agreement brief

The EU and Mexico have reached an "agreement in principle" on the main trade chapters of a new EU–Mexico Association Agreement. Negotiations started in May 2016, and both parties agreed in principle on the trade points in April 2018. Once ratified, the new agreement will replace a trade deal between the EU and Mexico from 2000. Currently, trade relations between the EU and Mexico are governed by the EU–Mexico Economic Partnership, Political

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[342] Jenkins (n 5).

[343] Rosenberger (n 4).

[344] Jenkins (n 5).

[345] ´First-Ever Anticorruption Chapter Included in USMCA´ *(Grenberg Taurig*, 6 February 2020) <https://www.gtlaw.com/en/insights/2020/2/first-ever-anticorruption-chapter-included-in-usmca> accessed 12 April 2023 "In 2022, the total value of trade within North America exceeded $1.5 trillion, equivalent to nearly $3 million per minute and the result of double-digit growth in trade over the past two years. Combined, the three countries now account for almost a third of global GDP." Joshua P. Meltzer, Earl Anthony Wayne, Diego Marroquín, ´USMCA at 3: Reflecting on impact and charting the future´ (*Brookings*, July 19, 2023) https://www.brookings.edu/articles/usmca-at-3-reflecting-on-impact-and-charting-the-future/ accessed 9 October, 2023.

[346] David A. Gantz, ´The USMCA: Updating NAFTA by Drawing on the Trans-Pacific Partnership´ (*Baker Institute*, 21 Feburary 2020) <https://www.bakerinstitute.org/research/usmca-updating-nafta-drawing-trans-pacific-partnership> accessed 15 April 2023. Transparency International in 2018 ranked Mexico 138 out of 180 reviewed countries. (Canada ranks number 9, and the US number 22). Moreover, under current president López Obrador´s administration, official statistics show that corruption is worse than ever. During the early months of his presidency, there were no major prosecutions of public officials. More than 70% of government contracts were awarded directly without competitive public bids.

Coordination, and Cooperation Agreement (also referred to as the "Global Agreement"), a trade pillar of the 2000 agreement.[347]

This new agreement will be the first EU trade agreement to include measures to coordinate the fight against corruption with the private and public sectors and to tackle money laundering.[348] Until recently, the European Union´s trade agreements were generally limited to provisions related to transparency in regulatory and procurement procedures.

The EU has become more supportive of including anti-corruption provisions in its trade agreements. As a way of highlighting the commitment, in 2011 a communication from the European Commission on fighting corruption pinpointed trade relations as a critical mechanism to promote anti-corruption and good governance measures in the EU's foreign policy agenda.[349]

II. Comparative Analysis Between the USMCA and the EU–Mexico Agreement

Transparency and anti-corruption provisions in FTAs can take different forms depending on the rationale behind their inclusion. Anti-corruption provisions are either targeted at state parties or private enterprises. Measures aimed at state parties oblige them to take anti-corruption measures at the national level, particularly the ratification of anti-corruption conventions. By comparison, provisions addressing private enterprise may include specific clauses depriving corrupt transactions or investments from the standard protections in FTAs.[350]

A. USMCA / Chapter 27: Anti-Corruption

In general terms, the USMCA´s anti-corruption chapter requires each party to adopt or maintain standards to combat anti-corruption domestically. It also includes a subsection dedicated to promoting integrity among federal public officials. Finally, it encourages all parties to call upon the private sector to develop internal controls, ethics and compliance programs or measures to prevent and detect bribery and corruption in international trade and investment.[351]

That said, the chapter´s innovations are limited, since the countries mainly reaffirm their adherence to the Organization for Economic Cooperation and Development (OECD), the United Nations, and similar conventions against foreign bribery, as well as the principles developed by the Asia-Pacific Economic Cooperation Forum and the Group of Seven.[352]

B. EUMA / Chapter 36: Provisions on Anti-corruption in the Context of the Modernization of the EU–Mexico Association Agreement

The new EUMA is part of a broader Global Agreement to prevent and combat corruption. Both parties commit themselves to i) making bribery a criminal offense for

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[347] ´EU-Mexico Trade Agreement´ (*European Commission*) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement_en> accessed 14 April 2023. "The texts are published for information purposes only and may undergo further modifications including as a result of the process of legal revision. The texts will be final upon signature."

[348] European Commission, 'Guide to the new EU-Mexico Trade Agreement' (2018).

[349] Jenkins (n 5).

[350] *Ibid.*

[351] 'First-Ever Anticorruption Chapter Included in USMCA' (n 16).

[352] Gantz (n 17) "Some trade agreements have begun to include a "horizontal" chapter on transparency, which extends transparency obligations to all policy areas of the trade agreement in question. For instance, it has become standard practice for U.S. trade agreements to include specific anti-corruption and anti-bribery commitments into these crosscutting transparency chapters." Jenkins (n 5).

government officials; ii) considering making bribery an offense for businesses; iii) ensuring that private individuals or businesses that act in a corrupt way can be prosecuted; iv) creating and enforcing codes of conduct for government officials; and v) encouraging companies to train their staff in ethics and to audit and publish their accounts. The Global Agreement enables civil society to hold the EU and Mexico accountable for fulfilling the pledges made in the agreements.[353]

C. Comparative analysis of the FTAs anti-corruption chapters

Nature and Scope. Anti-corruption measures don´t fall within the WTO-covered agreement; they go beyond its rules. Both FTAs pick up and are based on anti-corruption provisions and elements from other international instruments and treaties.

Regarding what the anti-corruption commitments are designed to address, both FTAs serve a similar purpose. The USMCA scope is to prevent and combat bribery and foreign corruption relating to anything covered under the Agreement, emphasizing international trade and investment, and stating that the private and public sectors have complementary responsibilities. On the other hand, the EUMA approach is to set and reaffirm a bilateral framework of commitments to combat and prevent corruption affecting trade and investment, as well as to recall that corruption undermines good governance and economic development and distorts international competitive conditions.

Textual Analysis. The USMCA includes the commitment to eliminate bribery and anti-corruption in the preamble, in other words, from the very beginning. However, no such thing can be said of the EUMA, since a preamble still doesn´t exist. Nonetheless, both FTAs have a specific chapter to address anticorruption issues, so at first a similar level of commitment to include the topic in both agreements exists. The USMCA contains a much more binding and obligatory language, "shall" being the most used word. Such an FTA seeks to create obligations for the parties specifically by way of legislative and non-legislative measures. In contrast, the EUMA includes language that intends to reaffirm and recognize the previous anti-corruption commitments made by both parties in other international agreements and working groups.

Commitments. Regarding the scope of the commitments established by the FTAs, neither agreement includes sector-specific or horizontal commitments. The USMCA leaves much to be desired in this area, in comparison to the EUMA. The latter encompasses more issue areas, such as dispositions around active and passive bribery in the private sector and specific measures to prevent corruption in such sectors, such as the inclusion of responsible business conduct guidelines and financial and non-financial reporting.[354] Additionally, the EUMA includes specific anti-money laundering and transparency provisions for the private sector. On another note, a Sub-Committee on Anti-Corruption on Trade and Investment is envisioned, with the purpose of facilitating and monitoring the effective implementation of Chapter 36, among other functions. Also, a review procedure for implementing the chapter is incorporated.

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[353] ´EU-Mexico agreement explained´ (*European Commission)* <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/eu-mexico-agreement-explained_en > accessed 14 April 2023.

[354] "FTAs of recent require trading partners to criminalize both "active bribery" (offering a bribe to a public official) and "passive bribery" (the solicitation of a briber by a domestic official). This mind-set and activities go beyond governments, as companies have also begun to build a legal framework against international corruption and transnational bribery." Rosenberger (n 4).

The EUMA compiles, reinforces, and reincorporates many rules already signed upon by the parties but doesn´t envision new ones. Such FTA is strongly inclined towards affirming its adherence and commitment to international conventions, principles, codes of conduct, and any other relevant international instruments adopted by any of the parties, which in turn, are a constant source for drafting many of the obligations taken up by the countries. To a certain extent, the EUMA´s anti-corruption chapter resembles a compilation of the parties' previous commitments to existing anti-corruption and bribery dispositions.

On the other hand, although the USMCA also reaffirms its previous anti-corruption commitments, a more specific approach is taken by implementing three types of measures: legislative, non-legislative, and dispute settlement mechanisms. Although specific, the legislative and non-legislative measures establish general provisions that the parties' domestic laws must include but in accordance with each country´s legal system principles. However, the USMCA leaves no room for innovation since it is almost a copy-paste version of the former Trans-Pacific Partnership (TPP).[355]

Regarding the dispute settlement mechanisms, the USMCA simply states the general terms of its application and refers to the overall Dispute Settlement chapter of the Agreement (Chapter 31). In the case of the EUMA, it includes a specific system for anti-corruption matters, although its effectiveness still needs to be proved. Finally, as in the commitment to consult, both Agreements include such possibility when a dispute arises between the parties.

Enforcement mechanisms and the obligation of result. In both FTAs it depends on each country to enforce its domestic anti-corruption laws. However, USMCA states that parties cannot enforce national anti-corruption legal frameworks to favor investment or trade. The endpoint is that there is no room in either one of the FTAs to punish countries for a non-compliance with the multiple measures provided for in the anti-corruption chapters. No enforcement mechanisms beyond what is foreseen by each party´s domestic legislation exist, nor any type of action scheme or time frame.

The USMCA sets out specific actions but without specific results; in some cases it refers to best efforts and commitment to take steps towards fighting corruption. On the other hand, the EUMA takes the best effort and reasonable care approach by aggregating and summing up all the previous anti-corruption commitments made by the parties in the form of recommendations and recognitions.

In terms of a result-oriented approach, neither one of the two agreements has included any standard nor mechanism to verify that either of the parties have established and addressed the intended legislative and non-legislative measures. The only punishment that both agreements establish for non-compliance is left out to the domestic law of each country, since offenses will be prosecuted and punished internally.

Policy Space. Another critical aspect of the comparative analysis is the policy space that both FTAs give to the signatory countries. The USMCA enhances such a space by establishing and proposing anti-corruption policies and legislative measures to be adopted and maintained by the parties within its means and in accordance with the fundamental principles of their domestic legal systems. Such FTA even includes the right of each Party to retain its law enforcement, prosecutorial and judicial authorities to exercise discretion when enforcing

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[355] Ian Joyce, 'The Anti-Corruption Chapter in United States-Mexico-Canada Agreement: A First for North American Trade Deals, But Unlikely to Have a Practical Impact' (*JD SUPRA*, 18 March 2021) <https://www.jdsupra.com/legalnews/the-anti-corruption-chapter-in-united-3525756/> accessed 15 May 2022. Most of the legislative measures are already covered by existing law, so the parties don´t have to do significant changes to their domestic laws.

domestic anti-corruption laws. On the other hand, the EUMA reaffirms the parties´ previous commitments to implement appropriate anti-corruption measures in each country. So, in this regard, both trade agreements include and give sufficient policy space to governments to develop their own domestic frameworks and agendas.

Tailor Provisions to Context. There are no provisions tailored to the context in either one of the FTAs. Such a lack is an interesting point, considering that Mexico is lagging on the anti-corruption front and is not a recipient of any differential treatment, more tolerant considerations, or flexibility for addressing development needs and implementation challenges.

Cooperation and transparency. The USMCA includes a mutual engagement and trust provision which provides transparency and cooperation mechanisms between the respective anti-corruption law enforcement agencies, as well as an institutional structure for addressing and implementing such mechanisms. In the EUMA case, transparency mechanisms are directed exclusively toward country's domestic public and private sectors but not between parties.

On the cooperation front, the EUMA does contain a provision for establishing a Sub-Committee on Anti-Corruption on Trade and Investment which is entrusted with cooperation, monitoring of implementation, exchange of information, and identification of common issues.

Dispute Settlement System. The EUMA created a unique system for resolving anti-corruption disputes, however, its effectiveness still needs to be proven. On the other hand, the USMCA establishes that if any party has a matter that arises from its anti-corruption Chapter, it will have to be solved according to the general dispute settlement system of the USMCA.[356]

Sustainable Development. Regarding the pillars of Sustainable Development, the EUMA explicitly references the commitment to Goal 16 of the 2030 Agenda to "substantially reduce corruption and bribery in all their forms" and recognizes that corruption directly affects economic development and trade. The USMCA doesn't explicitly reference any SGD goal. However, both FTAs aim to tackle corruption and not interfere with economic development caused by trade and investment. Still, the commitments are established in a very general and non-enforceable manner.

Protection of vulnerable communities and other stakeholders´ involvement. The only rules both FTA include regarding the protection of the most vulnerable are for the most part drafted in economic terms. Both agreements promote civil society's active participation, whistleblowers' protection and assistance, and special consideration for SMEs. Both FTAs include provisions to lay out the means to recognize the importance and promote civil society´s participation in anti-corruption measures, which means that both agreements present a possibility for considering the needs of stakeholders other than private companies and governments.

Balance State Commitments with Investor Obligations. The balance between State commitments and investor obligations in both FTAs is included in the responsibility of companies to comply with the anti-corruption measures established by their home country. In contrast, the state must comply with its task of regulating and punishing accordingly. In both

[356] The good practices that can be taken from the USMCA are that it opens the door for activating the dispute settlement system of the USMCA as a measure of one of the parties inconsistent with Chapter 27. However, it excludes the application and enforcement of domestic anti-corruption laws, making it difficult for other countries to claim any misapplication or non-enforcement of national anti-corruption laws. The USMCA should consider addressing how to subject the entire Chapter 27 to the dispute settlement system by also considering not excluding the sovereignty debate.

agreements there are no restrictions on performance requirements that would condition investment access.

III. Key Findings: Gaps and Recommendations

From an analytical and methodological perspective for assessing trade and development, the USMCA would be considered a deep trade agreement. Such FTA includes regulatory outreach (not new standards), domestic law changes, and obligatory commitments to establish anti-corruption measures, although no enforcement mechanism is appointed. The EUMA, regardless of its high cooperation and coordination standards, doesn´t include comprehensive regulatory standards or domestic law changes. Instead, it reaffirms previous commitments to the anti-corruption international agenda and sets out non-binding recognitions of diverse measures, creating a shallower approach.

Gaps. Both FTAs are a good starting point for inserting anti-corruption topics into the international trade agenda. However, they leave much to be desired since no disposition in the agreements guarantees that parties will implement the required changes to domestic legislation. Both agreements would highly benefit from proper implementation and enforcement mechanisms to truly influence the fight against corruption.

On the other hand, both FTAs ignore the reality of Mexico's anti-corruption crisis, which has been marked by very particular and sensitive cases such as the widely known Odebrecht scandal. By being one of the most corrupt countries in the world, it's impressive how neither of the FTAs included a unique and differential approach towards Mexico. The FTAs overlook the political and legal scenario that has been unfolding in such a country for the last 40 years. Added to this challenge, Mexico´s National Anti-Corruption Strategy (2017) has been a failed attempt choked down by President López Obrador himself.

The likeliness that sufficient political interest will accumulate to implement domestic anti-corruption law reforms in Mexico remains low. Negotiators from both FTAs shouldn´t expect internal law to be changed by the same people benefiting from it and shouldn´t ignore that Mexico's systemic corruption crisis is worsening. Mexico desperately needs a broad anti-corruption policy shift, which will not be achieved through FTAs simply requiring a change in domestic legal frameworks. Both FTAs, especially the USMCA, offer a good starting point as a legal instrument to incorporate a special and differential treatment for Mexico.

Another big question rests on the enforcement side. Both FTAs are redundant and ineffective in this regard, since they leave enforcement to each country's prosecution agencies. The USMCA even states that each party retains the right to "exercise discretion over enforcement actions." Additionally, both FTAs, especially the EUMA, leave enforcement to be dealt with in accordance with the international instruments that the parties have previously signed. Unfortunately, the enforcement and implementation of these frameworks are very uneven and could become untraceable for FTAs purposes.[357]

Recommendations. It would be in the parties' best interest that the anti-corruption commitments already made in both FTAs be more binding and enforceable. The EUMA could include new provisions and not just reinforce previous commitments. Also, it could start by

[357] Sachs, Jeffrey D., et al., editors, *Ethics in Action for Sustainable Development* (Columbia University Press, 2022). "What happens, however, if a country lacks the proper institutions for the desired implementation, for instance, judicial independence? Mechanisms might exist in trade agreements but have no impact if further development of enforcement structures is not pursued…. Newly included references to anticorruption conventions are good news only as far as the simple ratification of those conventions goes, for such conventions can have almost no effect, particularly in countries with high corruption (membership is nearly universal, certain developed countries excepted)." Mungiu-Pippidi (n 1).

changing a fair amount of the language to transition from "reaffirming the commitment," "recognizing the importance," and "may, if appropriate…" to a more enforceable one that allows the implementation of new anti-corruption measures that are not subjected to the will of the parties. Additionally, the EUMA negotiators should analyze all the conventions and treaties that they intend to reaffirm to understand which are genuinely enforceable and have sufficient and efficient implementation mechanisms. There´s a risk that the EUMA will add to the pile of dead letters. A narrower but deeper agreement is better than overwhelming gestures of international law that can neither be implemented nor enforced.

Shift on policy measures. It seems, particularly on the EUMA front, that the parties are interested in the reaffirmation of previous anti-corruption commitments instead of the incorporation of new ones. However, for anti-corruption measures to be effective, besides domestic law reforms, there is a need to first implement profound policy changes inside a given system in order to accomplish regulatory coherence across jurisdictions.

If the North American Region and the EU want to seriously delve into the fight against corruption, they must consider including other policy reforms in their FTAs, not by way of domestic anti-corruption law reforms and the sanctioning of corrupt activities, but by requiring countries to incorporate profound policy changes. Ordering that legislative anti-corruption measures be implemented in domestic legal frameworks is not sufficient to tackle corruption.

On the contrary, effective approaches to curve corruption are holistic and multi-faceted. Previous international experiences indeed demonstrate that the reforms needed to underpin a permanent and non-politicized anti-corruption strategy are not, in fact, corruption specific. Such measures stand on the broader regulatory and administrative front, such as pushing for an independent and funded judicial system; changing the structure of incentives and sanctions; reforming the whole procurement system; carrying out a deep regulatory analysis of the legal system to decide which regulations are open to corruption; deregulating specific activities; demonopolizing discretion on public officials´ decision making processes; establishing a professional civil service system; protecting the free press, etcetera.[358]

If such structural and institutional changes are to be made, especially in the case of Mexico, understanding the country-specific context is critical when designing an effective anti-corruption strategy. Such an analysis is not seen in either one of the two FTAs.

That said, meaningful changes to the domestic legal frameworks at a national level would be hard to accomplish since the governments and public officials that highly benefit from the policies and institutions in place are the ones that have the political power to change them. The incentives are simply not in place. The anti-corruption community needs to strive for the creation of institutions that can truly implement policy and structural changes.[359]

FTAs could provide a promising pathway for implementing such efforts. The international community could exert pressure from the trade front to incentivize countries to perform policy and structural changes that directly impact the anti-corruption front. Now, this comes with challenges: How do you enforce institutional and policy anti-corruption reforms while respecting sovereignty? It is a lifelong trade debate that exceeds the scope of this paper but which has the utmost importance.

Both FTAs should include an implementation plan for the domestic law reforms of each signatory country, which ought to incorporate specific, gradual, and progressive steps, as well as accountability mechanisms. A specific body should oversee, supervise, and review the

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[358] *Ibid.*

[359] Mungiu-Pippidi (n 1)

implementation agenda. In the EUMA case, it could be the already existing Sub-Committee on Anti-Corruption on Trade and Investment. In the USMCA case, a similar body that could also tackle consultation and coordination efforts could be created.

Finally, on the development front, both the FTAs offer a significant opportunity to include development dispositions, especially on the economic front. The only development efforts in both trade agreements are the ones referring to SMEs and compliance programs, and in the case of the EUMA, the inclusion of civil society on anti-corruption matters and vigilance. Specific dispositions that exploit anti-corruption measures to enhance the signatories' economies and trade practices are not included, only general commitments that reaffirm the importance of curbing corruption to benefit economic development and good governance, but they lack clear goals and implementation mechanisms.

The summary of the previous section and additional proposed changes are as follows:

For the EUMA: i) Modification of the language in FTAs provisions; ii) inclusion of new commitments, instead of only reaffirming previous ones; iii) review of reaffirmed conventions and treaties, as to understand which are effectively enforceable and implementable; and iv) the establishment of transparency mechanisms between the signatories.

For the USMCA: i) Non-exclusion of the enforcement of domestic anti-corruption laws from the agreement´s dispute settlement system; ii) inclusion of anti-money-laundering provisions; and iii) establishment of an Anti-Corruption committee or special body.

For both FTAs: i) Amendment of the scope for domestic law reforms to instead include policy and institutional reforms; ii) addition of enforcement mechanisms; iii) tailor provisions to context, in the sense of granting a special and differential treatment to Mexico when implementing and enforcing anti-corruption measures; iv) addition of an implementation and result-approach agenda which includes progressive steps and commitments; and v) the addition of specific provisions that seek to more closely link anti-corruption measures with SMEs development, corporate compliance programs, and civil society´s involvement.

Conclusions

The fight against corruption is one that some skeptics consider aspirational or far-off. FTAs are leading and encouraging the trend of including anti-corruption chapters and measures into the trade debate, however, the effectiveness and results of such attempts still need to be tested.

Nevertheless, after analyzing the USMCA and the EUMA's first attempts to draft entire anti-corruption sections (Chapters 27 and 26, respectively), while they do represent a positive initial attempt, they lack serious commitments, as well as enforcement and implementation mechanisms. By including dispositions that address these omissions, the anti-corruption chapters could avoid being framed as good-intention chapters.

FTAs may present an optimal window of opportunity to insert the much-needed reforms and structural changes of institutions and practices that allow and facilitate corruption. Anti-corruption is not about enacting anti-corruption laws; it's about restructuring entire legal systems. In such restructuring, law and development can find a unique doorway to create new measures that make use of the anti-corruption framework to ensure economic development and institutions that seek egalitarian and fair distribution of humanity´s benefits. That's what law and development should initially intend to achieve.

There is a need to generate a new approach to the trade and anti-corruption conversation and a broader debate around how FTAs can be legal tools that can properly and effectively include and implement policies that address the structural challenges and foundations for anti-corruption measures.

CHAPTER 6: CORRUPTION REFORM IN FRONTIER ECONOMIES: HOW ENHANCING RULE OF LAW PROVISIONS IN THE DOMINICAN REPUBLIC-CENTRAL AMERICAN FREE TRADE AGREEMENT CAN SUPPORT FOREIGN INVESTMENT IN EL SALVADOR AND HONDURAS

ISABELLA L. BLOSSER*

Abstract

Corruption is cited as a primary barrier to foreign investment in El Salvador and Honduras. Despite this challenge, in 2021, the Biden-Harris administration renewed efforts to increase investment in the region as a means to facilitate inclusive economic growth and reduce the tide of migration. Leveraging the Partnership for Central America as an independent third-party to lead this investment mobilization effort, the effort has mobilized more than $4.2B in private sector investment to the northern Central American region. Given this momentum, there is a critical need to reform corruption policies to facilitate a more conducive environment for sustained investment. This paper examines substantive provisions from the United States-Mexico-Canada Free Trade Agreement (USMCA) and trade agreements within the European Union as models upon which to base incorporation of measures on countering corruption into the Dominican-Republic Central American free trade agreement (CAFTA-DR), the primary source of regulation for trade relations between the U.S., El Salvador, and Honduras.

I. Introduction

El Salvador and Honduras are impoverished countries that experience among the highest rates of poverty, violence and corruption in the world.[360] As a result, migration from the two nations has reached historic highs in recent years, threatening the region's development trajectory.[361]

Corruption in the region has long been cited as the primary barrier to foreign investment and economic growth in the two countries.[362] For example, in Honduras, corruption "siphons off some $3 billion a year…deepening poverty and spurring migration."[363] In this context, corruption is the abuse of power for personal gain and includes activities such as money

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* Isabella currently serves as Senior Advisor and a founding member of the Partnership for Central America, a public-private partnership established by Vice President Kamala Harris in May 2021. To date, the Partnership has mobilized more than $4.2B in multilateral, private sector and civil society commitments to support inclusive economic growth across El Salvador, Guatemala and Honduras.

360 See e.g. "Intentional Homicides (per 100,000 people)," The World Bank Group, 2023, https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?most_recent_value_desc=true.

361 C. Shoichet, "Migrants from three countries paid $2.2 billion trying to reach the US. Most of it went to smugglers," CNN, 24 November 2021, https://www.cnn.com/2021/11/24/us/central-american-migration-costs/index.html.

362 S.K. O'Neil, "The Fight Against Corruption in Central America Needs to Get Ugly," Bloomberg, 23 June 2021, https://www.bloomberg.com/opinion/articles/2021-06-23/u-s-fight-against-corruption-in-central-america-needs-teeth?sref=hF44Hb0C&leadSource=uverify%20wall.

363 Reuters, "Honduras, U.N. to Sign Pact Establishing Anti-Corruption Commission," U.S. News and World Report, 14 December 2022, https://www.usnews.com/news/world/articles/2022-12-14/honduras-to-sign-agreement-for-u-n-anti-corruption-mission.

laundering, bribery, fraud, extortion, and embezzlement.[364] There is a widely accepted view that corruption impedes competition, increases prices and reduces trust in public institutions. This contributes to significant economic and social losses and perpetuates the cycle of poverty that leads to migration from El Salvador and Honduras.[365]

Historically, El Salvador and Honduras have suffered from a lack of political will power to advance critical reform on corruption, which contributes to significant economic and social costs to society.[366] However, in recent years, the governments of El Salvador and Honduras have indicated a willingness to increase foreign direct investment (FDI) to support economic and social development in the two nations. In response to these signals, the *U.S. Strategy For Addressing the Roots Causes of Migration In Central America* – issued by the White House in July 2021– identifies increasing and diversifying trade from the region as a primary strategic objective.[367] To support this objective, the Partnership for Central America (Partnership) was established alongside the White House strategy as an independent corporation to serve, coordinate and facilitate investments from the global private sector, multilateral development banks, U.S. government, and the governments of El Salvador and Honduras. To date, the organization has mobilized more than $4.2B in private sector investment to support inclusive development objectives in the region.[368] However, to establish the stable climates required to support the Partnership's investments, it is critical to root out the primary causes of corruption. It is only with such reform that a cycle of economic prosperity can sustain in the two countries.

II. Legal & Regulatory Context

Legal and regulatory reform across El Salvador and Honduras persist as priorities to support FDI and facilitate inclusive economic growth. Despite being signatories to the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and advancing several policies to promote global trade and investment, both countries face significant challenges in controlling and alleviating widespread corruption across both the public and private sectors. The levels of corruption experienced in both nations contributes to significant economic losses and reduces access to the formal economy, education and social welfare systems, further exacerbating the poverty trajectory for the region. The following section discusses the current scope of CAFTA-DR and priorities for corruption reform in the Central American region.

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[364] "Anticorruption Fact Sheet," The World Bank Group, 19 February 2020, https://www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet#:~:text=Corruption%E2%80%94the%20abuse%20of%20public,affected%20by%20fragility%20and%20conflict.

[365] S.K. O'Neil, "The Fight Against Corruption in Central America Needs to Get Ugly," Bloomberg.

[366] See e.g., R. Brown, "EU-China FTA: Enhanced Enforcement and Umbrella Coverage of Anticorruption," Hastings International and Comparative Law Review, Vol. 43, No. 2, Summer 2020, Page 213, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1848&context=hastings_international_comparative_law_review.

[367] National Security Council, "U.S. Strategy For Addressing the Roots Causes of Migration In Central America," The White House, Page 1, July 2021, https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.

[368] "FACT SHEET: Vice President Harris Launches Next Phase of Public-Private Partnership for Northern Central America," The White House, 6 February 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/06/fact-sheet-vice-president-harris-launches-next-phase-of-public-private-partnership-for-northern-central-america/.

A. Summary and Purpose of the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR)

Central America and the U.S. are critical trading partners. Recognizing this important relationship, in 2004, the U.S., El Salvador and Honduras signed the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR), "which aims to facilitate trade and investment and enhance regional integration by eliminating tariffs, opening markets, reducing barriers to services, and promoting transparency."[369] The Agreement also affords protections for U.S. investments in Central America.

Proponents of CAFTA-DR acknowledge the benefit of increased regional economic integration as a tool to advance foreign policy objectives for the region – i.e. combating corruption and systemic violence, enhancing rule of law, and promoting democracy – and to establish access to new markets for investment in the region.

Since CAFTA-DR entered into force in 2005, trade between the U.S. and El Salvador and the U.S. and Honduras has increased significantly. In 2005, the U.S. had a trade deficit with El Salvador of $134M USD.[370] With the implementation of CAFTA-DR, the U.S. and El Salvador had a trade surplus of $301M USD by 2006.[371] Most recently, in 2020, "trade in total (two-way) goods between the United States and El Salvador was $4.5 billion in 2020, and the United States had a goods trade surplus with El Salvador in North and Central America of $660.9 million in 2020."[372] The narrative remains consistent with regard to trade relations between the U.S. and Honduras: "U.S. exports to Honduras are up 67.2% from 2005;" and, "U.S. imports from Honduras are up 28.7% from 2005."[373] The U.S. is the primary trading partner of Honduras.[374]

Despite these numbers, critics of CAFTA-DR acknowledge significant challenges concerning the grave social and economic inequality that pervades both El Salvador and Honduras. These challenges stem from widespread corruption, inconsistent and often detrimental labor conditions associated with the production of traded goods, and a lack of intellectual property rights protections in investor-state relations.[375]

CAFTA-DR remains the primary source of regulation for trade relations between the U.S., El Salvador, and Honduras.

B. Current Scope of CAFTA-DR: Article 18, Transparency

Current provisions addressing corruption reform in CAFTA-DR Article 18 have had little impact and continue to impede trade and investment, prompting inquiries into additional areas for corruption reform within the Agreement.

The primary source of anticorruption obligations within CAFTA-DR is Article 18, Section B, which applies to the whole agreement. These provisions broadly commit the U.S., El Salvador and Honduras to "eliminat[ing] bribery and corruption in international trade and

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[369] "U.S. Relations With El Salvador," U.S. Department of State, 1 March 2023, https://www.state.gov/u-s-relations-with-el-salvador/.

[370] "El Salvador," Office of the U.S. Trade Representative, 2022, https://ustr.gov/countries-regions/western-hemisphere/el-salvador.

[371] "El Salvador," Office of the U.S. Trade Representative.

[372] "U.S. Relations With El Salvador," U.S. Department of State.

[373] "Western Hemisphere: Honduras." Office of the U.S. Trade Representative, 2022, https://ustr.gov/countries-regions/western-hemisphere/honduras.

[374] "Western Hemisphere: Honduras." Office of the U.S. Trade Representative.

[375] "Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)." Congressional Research Services, 22 July 2022, https://crsreports.congress.gov/product/pdf/IF/IF10394.

investment."[376] Further provisions require each government to "adopt or maintain the necessary legislative or other measures to establish that [bribery and corruption are] a criminal offense under its law, in matters affecting international trade or investment."[377] Additional measures focus primarily on acts of bribery among public officials and grant parties the opportunity to enforce "effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions," to enterprises that engage in bribery or corruption, but are not subject to criminal responsibility.[378]

CAFTA-DR provisions on anticorruption are criticized as too broad and lacking authority to induce any substantive impact on combating corruption, and "[a] review of CAFTA-DR could both address corruption and authoritarianism and boost economic health in the region in the long run."[379] The requirements place ownership of corrupt activities on public sector officials, while failing to address the corrupt practices of private and institutional investors and families who control the largest share of the economic and power dynamic in each of the countries, including the U.S. Additionally, unlike provisions on anticorruption in other trade agreements, Article 18 does not mention a required commitment to the UN Convention Against Corruption, the Inter-American Convention Against Corruption, or the OECD Anti-Bribery Convention, which establish globally-recognized standards and objectives to serve as a blueprint on countering corruption domestically.

However, the current growth trajectory and political priorities for each country coupled with increased investment from the U.S. and foreign nations presents an opportunity to facilitate reforms to CAFTA-DR oriented towards suppressing the root causes of corruption.

III. Attempts at Corruption Reform

Widespread corruption across public and private institutions remains the primary barrier to accelerating FDI across El Salvador and Honduras. Despite both countries being signatories to both the Inter-American Convention Against Corruption (IACAC)[380] and the United Nations Convention Against Corruption (UNCAC),[381,382,383] which is "the only legally binding universal anti-corruption instrument,"[384] neither El Salvador nor Honduras have implemented a national strategy to counter corruption, often perceived as a requirement under Article 5(1)

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[376] "Chapter Eighteen: Transparency," Office of the United States Trade Representative, Page 18-3, 5 August 2004, https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file294_3938.pdf.

[377] "Chapter Eighteen: Transparency," Office of the United States Trade Representative, Page 18-3.

[378] "Chapter Eighteen: Transparency," Office of the United States Trade Representative, Page 18-4.

[379] R.J. Valencia and M. Paarlberg, "Want to Counter Authoritarianism in Central America? Follow the Money," Foreign Policy, 21 June 2021, https://foreignpolicy.com/2021/06/21/authoritarianism-corruption-central-america-investigations-sanctions-loans-trade-agreements/.

[380] The Convention "establishes a set of preventive measures; provides for the criminalization of certain acts of corruption, including transnational bribery and illicit enrichment; and contains a series of provisions to strengthen the cooperation between its States Parties in areas such as mutual legal assistance and technical cooperation, extradition and identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of acts of corruption, among others." Department of Legal Cooperation, "Background," Organization of American States Secretariat for Legal Affairs, 2011, https://www.oas.org/juridico/english/corr_bg.htm#:~:text=This%20Convention%20establishes%20a%20set,as%20mutual%20legal%20assistance%20and.

[381] "14. United Nations Convention against Corruption," United Nations Treaty Collection, 16 April 2023, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en.

[382] El Salvador ratified the Convention on 1 July 2004. United Nations Treaty Collection, 16 April 2023.

[383] Honduras ratified the Convention on 23 May 2005. United Nations Treaty Collection, 16 April 2023.

[384] "UNCAC," Stolen Asset Recovery Initiative: An initiative of the World Bank Group and the United Nations Office on Drugs and Crime, 2022, https://star.worldbank.org/focus-area/uncac#:~:text=The%20United%20Nations%20Convention%20against,for%20addressing%20a%20global%20problem.

of the UNCAC,[385] and one which signals a country's substantive commitment toward democratic reform. While the current Bukele Administration in El Salvador[386] and the Castro Administration in Honduras[387] have signaled a willingness to make reforms on corruption in recent years, Transparency International's 2022 Corruption Perceptions Index, the primary indicator for global corruption, ranks El Salvador and Honduras as 113[388] and 157,[389] respectively, out of 180 countries globally for 2022.[390] These poor rankings primarily stem from significant concerns over: (1) the concentration of power in divisive political factions, which "reduc[es] transparency and accountability, and pos[es] serious threats to human rights and basic freedoms,"[391] and (2) practices of "law enforcement and corrupt officials collaborat[ing] with criminal gangs or accept[ing] bribes [from private citizens] in exchange for turning a blind eye on their activities."[392] Such activities lead to a lack of trust in public institutions and reduce foreign investors' confidence in the establishment and maintenance of an attractive business climate necessary to support their investments.

For example, President Nayib Bukele of El Salvador referred to himself as the "the world's coolest dictator"[393] and has since implemented sweeping authoritarian reforms to combat crime and control gang-related violence in the country.[394] Such actions have caused investors to feel skeptical of his commitment to democracy, equality and sustainability: "the implementation of the reforms has been slow, and laws and regulations are occasionally passed and implemented quickly without consulting with the private sector or assessing the impact on the business climate."[395] While El Salvador introduced a new anti-corruption initiative with the establishment of International Commission Against Impunity in El Salvador (CICIES) through presidential decree in 2019, "CICIES currently lacks the autonomy to conduct investigations independently," which renders executive control as the dominant influence on

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[385] "The United Nations Convention against Corruption, National Anti-Corruption Strategies: A Practical Guide for Development and Implementation," United Nations Office on Drugs and Crime, Page 1, 2005, https://www.unodc.org/documents/corruption/Publications/2015/National_Anti-Corruption_Strategies_-_A_Practical_Guide_for_Development_and_Implementation_E.pdf.

[386] See e.g. N. Bullock and C. Call, "Surprise: El Salvador's Anti-Corruption Commission Is Alive. But Can It Succeed?" Americas Quarterly, 8 February 2021, https://www.americasquarterly.org/article/surprise-el-salvadors-anti-corruption-commission-is-alive-but-can-it-succeed/.

[387] See e.g. E. Olson, "Honduras Seeks International Help to Fight Corruption," Wilson Center, 24 February 2023, https://www.wilsoncenter.org/blog-post/honduras-seeks-international-help-fight-corruption.

[388] "Our Work In El Salvador," Transparency International, 2023, https://www.transparency.org/en/countries/el-salvador.

[389] "Our Work in Honduras," Transparency International, 2023, https://www.transparency.org/en/countries/honduras.

[390] Lower ranking on the scale indicates lower perceived rates of corruption.

[391] "CPI 2022 For The Americas: Fertile Ground For Criminal Networks And Human Rights Abuses," Transparency International, 31 January 2023, https://www.transparency.org/en/news/cpi-2022-americas-corruption-criminal-networks-human-rights-abuses.

[392] "CPI 2022: Corruption As A Fundamental Threat To Peace And Security," Transparency International, 31 January 2023, https://www.transparency.org/en/news/cpi-2022-corruption-fundamental-threat-peace-security.

[393] M. Youkee, "Nayib Bukele calls himself the 'world's coolest dictator' – but is he joking?" The Guardian, 26 September 2021, https://www.theguardian.com/world/2021/sep/26/naybib-bukele-el-salvador-president-coolest-dictator?utm_term=Autofeed&CMP=twt_gu&utm_medium&utm_source=Twitter#Echobox=1632647468.

[394] See e.g., J. Blitzer, "The Rise of Nayib Bukele, El Salvador's Authoritarian President," The New Yorker, 5 September 2022, https://www.newyorker.com/magazine/2022/09/12/the-rise-of-nayib-bukele-el-salvadors-authoritarian-president.

[395] Feit, "2022 Investment Climate Statements: El Salvador."

such investigations,[396] further perpetuating an environment of mistrust and lack of transparency.

In comparison, the National Congress of Honduras, the nation's primary decision-making body, "is seen as the most corrupt institution in Honduras,"[397] creating a deep-seated lack of trust in public institutions. This dynamic has led to a division of power between the two primary political parties – the Liberal Party and the National Party – which have historically dominated Honduran politics, and President Castro's Liberty and Refoundation Party. As a consequence of this division, President Castro, who is praised as a socially democratic leader with a strong commitment to rooting out corruption and organized crime,[398] is limited in "her ability to pass laws."[399]

These issues are not unique to this time period, but have persisted in different forms throughout history and hampered inclusive development across the two nations.

IV. Proposed Amendments to CAFTA-DR, Article 18 (Transparency)

In recent years, there has been a growing trend towards incorporating anticorruption measures into regional trade agreements as a means to facilitate a stable investment environment across parties to the agreement. This section focuses on the substantive provisions incorporated into the United States-Mexico-Canada Free Trade Agreement (USMCA) and into trade agreements within the European Union as models upon which to base incorporation of measures on countering corruption into CAFTA-DR.[400]

A. Reforming CAFTA-DR: USMCA, Article 27 (Anti-Corruption)

The USMCA designates Article 27 to matters concerning transparency and anti-corruption. While the Article focuses on similar substantive issues that are addressed in the UNCAC and IACAC – of which both El Salvador and Honduras are parties – Article 27.8 avails the three countries "to the USMCA dispute settlement system on anti-corruption matters if a party implements a particular measure that is inconsistent with the commitments in this chapter or fails to properly carry out an obligation under this Chapter to the extent that they affect trade and investment."[401] Building upon this measure, Article 27.9 centers upon

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[396] D. Runde, E. Leal, L. Sandin, and L. Guerra, "An Alliance for Prosperity 2.0," Center for Strategic and International Studies, 28 January 2021, https://www.csis.org/analysis/alliance-prosperity-20.

[397] "The Rule of Law in Honduras," The World Justice Project, Page 6-7, 2021, https://worldjusticeproject.org/sites/default/files/documents/Honduras.pdf.

[398] See e.g., O. Stuenkel, "Why the United States Is Keen to Court Honduras' New President," Carnegie Endowment for International Peace, 27 January 2022, https://carnegieendowment.org/2022/01/27/why-united-states-is-keen-to-court-honduras-new-president-pub-86293.

[399] A. Kurmanaev, "New Honduran Leader Loses Grip on Congress, Sapping Hope for Change," The New York Times, 21 January 2022, https://www.nytimes.com/2022/01/21/world/americas/honduras-castro-congress-rebellion.html.

[400] Reform to CAFTA-DR is not unprecedented. See e.g. "Modifications to Certain Textile & Apparel Rules of Origin Under the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)," U.S. Customs and Border Protection, 18 March 2014, https://www.cbp.gov/trade/priority-issues/textiles/tbts/dr-cafta.

[401] E. Miller and A. Lopez de la Osa Escribano, "Working Paper: Toward a North American Anti-Corruption Regime," Wilson Center and Harvard Kennedy School Belfer Center for Science and International Affairs, Page 14, January 2022, https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/2021%20-%20Miller%20%20Lopez%20-%20Toward%20a%20North%20American%20Anti-Corruption%20Regime_AR.pdf.

cooperation in anti-corruption activities and establishes "notional principles and pathways rather than specific commitments."[402] Such principles entail the following:

> "1. The Parties recognize the importance of cooperation, coordination, and exchange of information between their respective anticorruption law enforcement agencies in order to foster effective measures to prevent, detect, and deter bribery and corruption.
> 2. The Parties shall endeavor to strengthen cooperation and coordination among their respective anticorruption law enforcement agencies.
> 3. Recognizing that the Parties can benefit by sharing their diverse experience and best practices in developing, implementing, and enforcing their anticorruption laws and policies, the Parties´ anticorruption law enforcement agencies shall consider undertaking technical cooperation activities, including training programs, as decided by the Parties.
> 4. The Parties acknowledge the importance of cooperation and coordination internationally, including the OECD Working Group on Bribery in International Business Transactions, the UNCAC Conference of the State Parties and the Mechanism for Follow-Up on the Implementation of the IACAC, as well as their support to the APEC Anti-Corruption and Transparency Working Group and the G20 Anti-Corruption Working Group."[403]

There are three critical distinctions on anti-corruption provisions included in USMCA to consider in reforming CAFTA-DR Article 18: (1) establishment of baseline principles, (2) adherence to globally recognized standards and guidelines, and (3) the importance of information sharing and transparency.

First, CAFTA-DR asserts a broad commitment to "eliminat[ing] bribery and corruption," but fails to acknowledge an agreement on the requisite cooperation necessary to facilitate such activities, as in USMCA Article 27.9(2). CAFTA-DR presents a unilateral scheme placing ownership of anti-corruption activities on individual states, rather than establishing a shared trust amongst parties to the agreement, which reduces incentives for individual parties to take action within the boundaries of the framework.

Second, while El Salvador and Honduras are both parties to the UNCAC, of which they agreed to take part in the UNCAC peer-review mechanism,[404] the Convention and accompanying peer review mechanism have been criticized as lacking transparency and effectiveness due to resource and time constraints.[405] For example, El Salvador completed its first review in 2012, of which the report is available online.[406] The country was scheduled to engage in its second review beginning in 2020, and as of April 2023, the country visit – a

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[402] Miller and Lopez de la Osa Escribano, "Working Paper: Toward a North American Anti-Corruption Regime," Wilson Center and Harvard Kennedy School Belfer Center for Science and International Affairs, Page 15.

[403] "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," Office of the United States Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[404] The peer review mechanism was established through 2009 Conference of State Parties resolution as a tool to monitor adherence to and implementation of commitments to the Convention. "UNCAC Review Mechanism: Up and Running But Urgently Needing Improvement," Transparency International, 25 November 2013, https://www.transparency.org/en/news/uncac-review-mechanism-up-and-running-but-urgently-needing-improvement.

[405] "UNCAC Review Mechanism: Up and Running But Urgently Needing Improvement," Transparency International, 25 November 2013.

[406] "UNCAC Review Status Tracker," UNCAC Coalition, 2023, https://uncaccoalition.org/uncacreviewstatustracker/.

critical initial step to complete the peer review – had not yet occurred.[407] In parallel, Honduras was scheduled to begin its second peer review in 2016 or 2017, and the country visit did not occur until January of 2022.[408] As of April 2023, the peer review report is not publicly available.[409]

While CAFTA-DR advances a broad commitment to "recognize the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment" and encourages "[p]arties [to] work jointly to encourage and support appropriate initiatives in relevant international fora,"[410] USMCA binds parties to standards for cooperation and coordination set forth in the OECD Working Group on Bribery in International Business Transactions, the UNCAC Conference of the State Parties and the Mechanism for Follow-Up on the Implementation of the IACAC, and requires support to the APEC Anti-Corruption and Transparency Working Group and the G20 Anti-Corruption Working Group. The mention of these mechanisms serves as a tool to monitor progress towards implementation of commitments, while maintaining consistent and regulated engagement on the subject matter. Despite commitments to the UNCAC and IACAC, El Salvador and Honduras continue to face challenges in curbing corruption, illuminating a need to implement supplementary accountability mechanisms – in addition to other measures. Establishing binding provisions around participation in the Mechanism for Follow-Up on the Implementation of the IACAC, the APEC Anti-Corruption and Transparency Working Group and the G20 Anti-Corruption Working Group through CAFTA-DR Article 18 aims to establish a consistent framework for engagement on corruption reform in the two nations as a means to facilitate transparency and accountability.[411] While inclusion of these mechanisms in trade agreements has been criticized as symbolic, rather than practical tools, "trade agreements requiring signatories to ratify anti-corruption conventions or enact de jure anti-bribery measures can encourage and accelerate the diffusion of good governance and transparency norms in international trade."[412]

Third, unlike CAFTA-DR, USMCA emphasizes the need for information sharing and transparency in pursuing anti-corruption policy and programming. Despite each nation pursuing their own domestic measures in combating corruption, the agreement aims to build upon shared capacities and best practices emphasizes the joint ownership of the three countries in addressing the issue.[413] This mechanism creates a network of support and shared accountability, signaling to partners and investors the potential for a more stable regulatory and investment regime.

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[407] "UNCAC Review Status Tracker," UNCAC Coalition.
[408] "UNCAC Review Status Tracker," UNCAC Coalition.
[409] "UNCAC Review Status Tracker," UNCAC Coalition.
[410] "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," Office of the United States Trade Representative.
[411] See e.g., "G20 Anti-Corruption Working Group: Anti-Corruption Action Plan 2022-2024," United Nations Office on Drugs and Crime, Page 4, 2022, https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Action-Plans-and-Implementation-Plans/2021_G20_Anti-Corruption_Action_Plan_2022-2024.pdf .
[412] M. Jenkins, "Anti-corruption and Transparency Provisions in Trade Agreements," Transparency International, Page 11, 20 July 2018, https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption-and-transparency-provisions-in-trade-agreements-2018.pdf.
[413] See e.g. E.W. Collins, "First-Ever Anti Corruption Chapter Included in USMCA," GreenbergTraurig, 6 February 2020, https://www.gtlaw.com/en/insights/2020/2/first-ever-anticorruption-chapter-included-in-usmca.

B. Reforming CAFTA-DR: EU Anti-Corruption Measures in Trade Agreements

In recent years, the European Union has taken significant strides towards integrating binding and non-binding anti-corruption provisions into trade agreements. Provisions most relevant to this proposal, however, stem from the EU's Trade Agreement with Mexico established in 2018. Section XX.I of the Agreement is dedicated to anti-corruption provisions, and in particular, mentions the involvement of private sector actors in four distinct areas: Article XX.1(3), Article XX.1(5), Article XX.4, and Section XX.IV.[414] Article XX.1(3) and Article XX.1(5) recognize the critical role of private sector actors in combating corruption in the objectives, setting the precedent for their inclusion and incorporation throughout the agreement.[415] Article XX.4 "recognise(s) the importance of combating active and passive bribery in the private sector affecting trade and investment" and commits signatories to "comply[ing] with their commitments under UNCAC."[416] Section XX.IV establishes "[m]easures to prevent corruption in the private sector," focusing on a commitment to responsible business conduct, standards for financial and non-financial reporting, and measures to facilitate transparency.[417]

The recognition of the private sector's role in aiding corruption reform is critical to understand the context and scope of trade relations between the U.S., El Salvador and Honduras. The public and private sectors across the two nations are deeply integrated, often making it hard to distinguish between the two groups. In Honduras, wealthy individuals who operate private businesses across all sectors of society, are also the "the ones at the top of the political hierarchy."[418] El Salvador faces a similar situation where the famous '14 families'[419] continue to dominate the political classes while exercising monopoly control on local businesses.[420] Given these realities, it is argued that CAFTA-DR fails in its capacity to advance normative change on corruption by excluding acknowledgement of the private sector's role in Article 18.

The EU-Mexico agreement provides a model for how to integrate the private sector into corruption provisions of trade agreements. However, given the macroeconomic context of this time, where U.S. influence in El Salvador and Honduras is particularly contentious as it relates to U.S. diplomatic relations with China,[421] this paper advocates the use of the EU-

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[414] "Provisions on Anti-corruption in the context of the Modernisation of the EU-Mexico Association Agreement," European Commission, 21 April 2018, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en.

[415] "Provisions on Anti-corruption in the context of the Modernisation of the EU-Mexico Association Agreement," European Commission, Page 1, 21 April 2018.

[416] "Provisions on Anti-corruption in the context of the Modernisation of the EU-Mexico Association Agreement," European Commission, Page 2, 21 April 2018.

[417] "Provisions on Anti-corruption in the context of the Modernisation of the EU-Mexico Association Agreement," European Commission, Page 3, 21 April 2018.

[418] N.P. Flannery, "Will Honduras Win the Fight Against Corruption?" Forbes, 5 July 2021, https://www.forbes.com/sites/nathanielparishflannery/2021/07/05/can-honduras-fight-corruption/?sh=3e287d15679b

[419] The '14 families' refer to the oligarchy of El Salvador which operated the majority of the land in the country from 1827 to 1921. J. Beverley, "El Salvador," Social Text, No. 5, Page 55, Spring 1982, https://doi.org/10.2307/466334.

[420] See e.g., J. Beverley, "El Salvador," Social Text, No. 5, Page 55-82, Spring 1982.

[421] See e.g., "U.S. warns China's promises often empty as Honduras wavers on Taiwan," Reuters, 25 March 2023, https://www.reuters.com/world/asia-pacific/us-warns-chinas-promises-often-empty-honduras-wavers-taiwan-2023-03-25/.

Mexico model as a starting point for negotiations on corruption reform to CAFTA-DR, recognizing that incorporating all provisions is unlikely to bear fruit at this time.

C. Proposed Domestic Reforms on Corruption

Domestic reform on corruption is critical to realizing commitments imposed by CAFTA-DR. However, often "in countries marked by a high incidence of corruption, the impetus for an improvement in governance is unlikely to emerge domestically, as these states are typically caught in a vicious cycle in which effective constraints on corruption, such as judicial independence, freedom of the press and an active civil society, are suppressed."[422] While the U.S., El Salvador and Honduras have all enacted domestic legislation aimed to eliminate corruption, El Salvador and Honduras lack a comprehensive, centralized strategy to address the challenge.

The U.S. El Salvador and Honduras are all parties to the UNCAC, the only universal and legally binding tool to counter corruption. The UNCAC establishes a commitment towards preventing and deterring corruption through coordinated national policies (Art. 5(1)), which play an essential role in establishing principles on rule of law and governance, transparency, accountability, and integrity applied to the whole of society. National anti-corruption strategies, in particular, establish specific objectives for national governments to pursue and, through a process-oriented approach, can be leveraged as an all-encompassing tool to guide the implementation of commitments to countering corruption.[423] Anti-corruption strategies assist in centralizing policies and activities concerning corruption, while balancing individual discretionary powers.[424]

Recognizing the increasing global threat of corruption and its impact on weakening the roots of democracy and economic systems, the U.S. and several Latin American nations have pursued national anti-corruption strategies in recent years. In an unprecedented move, the Biden Administration administered the *U.S. Strategy on Countering Corruption* in 2021 oriented around five strategic pillars to establish an integrated interagency approach to addressing the systemic causes of corruption.[425] The Strategy serves as a tool to coordinate resources to combat corruption at the domestic level, while integrating policies and practices aimed to identify, prevent and respond to threats from corrupt actors globally. However, El Salvador and Honduras lag behind; neither country has implemented a comprehensive, coordinated strategy on countering corruption, despite the grave and systemic threat it poses to each democracy. While Honduras has taken a critical first step through entering a memorandum of understanding with the UN to establish the "International Mission Against Corruption and Impunity (CICIH)" in December 2022, the UN and Honduras must now take the next step of signing a treaty in order for the Mission to enter force.[426] In parallel, El Salvador has pursued an Inter-Institutional Anti-Corruption Working Group, however, "[l]acking a national anti-

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[422] M. Jenkins, "anti-corruption and Transparency Provisions in Trade Agreements," Transparency International, p. 4.

[423] "The Global Programme Against Corruption: Anti-Corruption Toolkit," U.N. Office on Drugs and Crime, Page 19, https://www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf.

[424] "The Global Programme Against Corruption: Anti-Corruption Toolkit," U.N. Office on Drugs and Crime, Page 19.

[425] "United States Strategy on Countering Corruption," The White House, 20 December 2021, https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

[426] "Honduras signs U.N. deal paving way for anti-corruption commission," Reuters, 15 December 2022, https://www.reuters.com/world/americas/honduras-signs-un-deal-paving-way-anti-corruption-commission-2022-12-15/.

corruption strategy, there is no inter-institutional coordination on the prevention of corruption and little progress has been made in this regard."[427] Given these realities, for El Salvador and Honduras, it is critical that each country build upon these steps to establish a comprehensive and coordinated national anti-corruption strategy, which aims to serve as a signal to foreign investors of each country's commitment to root out the principal causes of corruption and build a healthy environment for investment.

V. Benefits of Proposal

A. Promotion of Inclusive Economic Growth

The OECD indicates inclusive economic growth as a priority in achieving the UN's Sustainable Development goals.[428] The agenda advocates for a holistic approach – one that prioritizes economic growth, social inclusion, community empowerment, and environmental sustainability.[429] Reform on corruption through amendments to CAFTA-DR aims to reduce the restraints that corruption imposes on access to economic prosperity. In 2013, the G20 Anti-Corruption Working Group identified a direct link between corruption and negative impacts on "investment (including FDI), competition, entrepreneurship, government efficiency, including with regards to government expenditures and revenues, and human capital formation."[430] While reform to CAFTA-DR corruption provisions will not conclusively solve for the cultural and systemic challenges of corruption across the region, the amendments aim to present one viable pathway towards advancing progress on corruption reform. The internationalization of corruption networks with roots in Central America threaten the development of an established trust and transparency required to compete on the global stage. Given the current development priorities, El Salvador and Honduras must demonstrate their willingness to adhere to globally recognized standards and practices across international fora.

B. Stemming Internal and External Migration

El Salvador, Honduras, and the U.S. each face distinct challenges resulting from mass migration at their borders. Concerns for economic stability and national security across the three countries stem from an inability to systemically address the root causes of migration.

For El Salvador and Honduras, the primary reason cited for migration is lack of economic opportunity, followed by rampant violence and environmental instability.[431] Reducing migration push factors through combating corruption can help to ensure long-term stability, while ultimately reducing pressures from overcrowding and illegal migration that plague the U.S. Southern Border.

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[427] "New Civil Society Report On El Salvador: Reinstating Independence Of Public Institutions And The Judiciary & Reversing Recent Trends Of Restricting Civic Space Urgently Needed To Combat Corruption," UNCAC Coalition, 1 February 2023, https://uncaccoalition.org/uncacparallelreportelsalvador/.

[428] "Opportunities for all: OECD Framework for Policy Action on Inclusive Growth," Organisation for Economic Co-operation and Development (OECD), May 2018, https://www.oecd.org/inclusive-growth/resources/Opportunities-for-all-OECD-Framework-for-policy-action-on-inclusive-growth.pdf.

[429] "Opportunities for all: OECD Framework for Policy Action on Inclusive Growth," Organisation for Economic Cooperation and Development (OECD).

[430] G20 Anti-corruption Working Group, "Issue Paper on Corruption and Economic Growth," Organisation for Economic Cooperation and DEvelopment (OECD), September 2013, Page 1, https://www.oecd.org/g20/topics/anti-corruption/issues-paper-on-corruption-and-economic-growth.htm.

[431] A. Cheatham and D. Roy, "Central America's Turbulent Northern Triangle," Council on Foreign Relations, 22 June 2022, https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle.

VI. Challenges for Consideration: Political and Diplomatic Consequences of Proposed Reform to CAFTA-DR

The U.S. has a history of contentious diplomatic relations with both El Salvador and Honduras stemming from concerns around political corruption, widespread human rights and labor violations, limited access to justice, and the resulting governance and democratic instability. Negotiations around CAFTA-DR, in particular, faced challenges from both political parties within the U.S. and in the Central American region.[432]

Negotiating the proposed amendments to CAFTA-DR are distinguished by the current geopolitical landscape: global debt challenges, the Russia-Ukraine conflict, COVID-19 recovery, unprecedented migration from Central America, and contentious trade relations with the People's Republic of China (PRC). Narrowing on the latter three issues, the governments of the U.S., El Salvador and Honduras have signaled the need to address corruption, albeit without establishing a common approach or rhetoric on the matter. With regard to China, the current administrations in El Salvador[433] and Honduras[434] have both demonstrated a willingness to support investment from PRC, at the expense of appeasing U.S. diplomatic efforts in the nations. Given U.S. strategic interests in the region – and assuming the U.S. brokers negotiations on the proposed reforms – the geopolitical risks associated with reform to CAFTA-DR should be considered in light of the potential economic and national security implications of persistent challenges with economic development in the region. From the perspective of El Salvador and Honduras, consideration of the benefits associated with investment from established democracies and the limitations attached to Chinese investments should be balanced alongside the development priorities for each country.

VII. Conclusion

Implementing corruption reform is essential to attracting and maintaining the level of foreign direct investment necessary to facilitate inclusive economic growth across El Salvador and Honduras. Increased trade and diplomatic relations between the U.S., El Salvador and Honduras alone cannot achieve the systemic change necessary to create a sustained market for investment. In response to increased economic interest in the region under the Biden-Harris administration, reform to CAFTA-DR Article 18 that leverages models from USMCA and EU free trade agreements can help facilitate progress towards sustainable development objectives for El Salvador and Honduras.

VIII. Research Limitations

The proposal discussed is intended to represent one potential pathway towards improving inclusive economic growth in El Salvador and Honduras. The feasibility of such a proposal is dependent upon a multitude of factors, the primary of which are discussed above: sustained investment and political will. Additionally, it is essential to consider the distinct nuances between El Salvador and Honduras.

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[432] See e.g., P.C. Albertson, "The Evolution Of Labor Provisions In U.S. Free Trade Agreements: Lessons Learned And Remaining Questions Examining The Dominican Republic-Central America-United States Free Trade Agreement (Cafta-Dr)," Stanford Law & Policy Review, 21, no. 493 (2010), Page 499-501, Accessed May 1, 2023, https://law.stanford.edu/wp-content/uploads/2018/03/albertson.pdf.

[433] J.A. Guzman, "China's Latin American Power Play," Foreign Affairs, 16 January 2023, https://www.foreignaffairs.com/central-america-caribbean/chinas-latin-american-power-play?check_logged_in=1&utm_medium=promo_email&utm_source=lo_flows&utm_campaign=registered_user_welcome&utm_term=email_1&utm_content=20230421.

[434] "U.S. warns China's promises often empty as Honduras wavers on Taiwan," Reuters, 25 March 2023.

Access to data and reliable academic and government resources necessary to perform a thorough and transparent analysis of the situation is hampered by regional limitations and restrictions.

CHAPTER 7: BUILDING INFRASTRUCTURE AS A MEANS TO PARTICIPATE IN TRADE OPPORTUNITIES

JOHANNA ALMARIO CHAN*

Abstract

Physical infrastructure plays an important role in affording countries, especially low- and middle-income developing countries, opportunities to participate in trade. One of the objectives of the World Trade Organization (WTO) is to engage developing countries in international trade. However, in recent years, WTO Member States have failed to advance new multilateral agreements to further this goal, and many countries have entered into their own Regional Trade Agreements (RTAs) to open more trade opportunities. As part of this shift, many countries have started to incorporate RTA provisions with the goal of attaining the Sustainable Development Goals (SDGs) of the United Nations. Out of the 17 SDGs however, one of the most overlooked is the goal of building resilient infrastructure, promoting inclusive and sustainable industrialization and fostering innovation; more specifically, RTAs have often overlooked supporting and investing in physical infrastructure in developing countries. This paper seeks to propose an analysis of the Belt and Road Initiative (BRI) adjacent to a discussion of the concept of RTAs in order to provide a solution for a better agreement or policy for future infrastructure investments, that is, by combining the features of both types of agreements.

I. Introduction

Infrastructure is crucial for trade promotion and global economic integration.[435] Positive international trade participation requires connectivity along different media of communication and transportation, as well as financial markets and information-processing.[436] Business and trade have become so deeply intertwined that the lack of trade-related infrastructure can severely impact a country's ability to compete globally.[437] Reliable infrastructure is essential not only for the domestic development of countries but also to aid in the development of its international trade capabilities.

Various studies have shown that poor infrastructure and low investment in crucial infrastructure hinder the international trade goals of developing countries.[438] In a 2017 Asian Development Bank (ADB) Report, the ADB found that the majority of Asian countries still lack the necessary infrastructure – specifically in terms of transportation, power and electricity, telecommunications, water supply, and transportation.[439] It advised that Asian countries should endeavor to focus on investing in the aforementioned infrastructure in order to boost exports and tackle trade deficits. Additionally, cross-border infrastructure such as roads, railways, and electricity transmission lines, according to ADB, should be prioritized in order

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435 Douglas Brooks and Jayant Menon, *Infrastructure and Trade in Asia* (Edward Elgar Publishing Limited 2008).

436 '*Connectivity, Logistics & Trade Facilitation*' (The World Bank) <https://wwwworldbank.org/en/topic/trade-facilitation-and-logistics > accessed 15 May 2022.

437 ibid.

438 Faheem Ur Rehman and others, '*Does infrastructure increase exports and reduce trade deficit? Evidence from selected South Asian countries using a new Global Infrastructure Index'* [2020] 9(10) Journal of Economic Structures. Cf Julian Donaubauer and others, '*Disentangling the impact of infrastructure on trade using a new index of infrastructure*' [2018] 154, Review of World Economics.

439 Asian Development Bank, '*Meeting Asia's Infrastructure Needs'* (Asian Development Bank, 2017) <https://www.adb.org/sites/default/files/publication/227496/special-report-infrastructure.pdf> accessed 2022.

to encourage economic opportunities through regional cooperation and integration.[440] Based on the Global Infrastructure Outlook of the G20 for forecasting infrastructure investment needs and gaps, more than USD94 trillion is needed to address global infrastructure.[441] Out of this USD94 trillion, the same G20 report indicated that an investment worth USD51 trillion is needed address infrastructure needs in Asia alone.[442]

In its 2017 report, the ADB emphasized the essential role of infrastructure investment for the expansion of trade capacity:[443]

> "**Infrastructure** – defined here as transport, power, telecommunications, and water supply and sanitation – **is essential for development. It is an essential input into the production of goods and services and raises productivity**. It powers factories and businesses and enables firms to trade…Efficient infrastructure lowers distribution costs and boosts living standards by making goods and services more affordable. **One of infrastructure's most dramatic benefits is on the poor, allowing access to better health and educational services, improving living conditions, and fostering greater social and economic mobility**. And **decisions on infrastructure development** – including the type of infrastructure and technology – have **significant implications for economic sustainability, as climate change, pollution, and other environmental factors present new challenges.**
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> **Roads and railroads ease the flow of people, commodities, and manufactures, allowing economic activities to be concentrated and specialized across regions**… increasingly, there is growing recognition of the role of infrastructure in helping societies deal with the challenges presented by climate change. In short, ***sound infrastructure promotes economic development, enhances welfare and helps provide the basis for more sustained, inclusive growth***."[444]

As a simple example, investment in roads can help countries build interconnecting trade relations across their borders and allow them to access international markets at a lower cost.[445] Other areas for investment necessary for developing countries are energy infrastructure – to lower energy production and consumption costs – and telecommunications infrastructure – which aids in connecting buyers and sellers and marketing the goods and services of a developing country.[446]

Impact of quality infrastructure

The substandard quality of the same is also detrimental to the accessibility of trade opportunities as this can severely affect the cost of goods and services transported. Quality infrastructure can reduce costs involved in the transportation of goods and services, transit time, as well as decrease the costs of production. A case study done in Cameroon revealed that their pothole-filled roads contributed to around 15% of the production costs of beer because producers of beer needed to shell out more money to keep large amounts of inventory at each

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[440] ibid.
[441] G20, 'A Global Infrastructure Outlook' (Infrastructure Outlook) <https://outlook.gihub.org> accessed 2023.
[442] ibid.
[443] ibid (n 5).
[444] *Emphasis supplied.*
[445] ibid, (n 4) (Julian Donaubauer and others).
[446] ibid (n 4) (Rehman).

stage of the production chain: "Guinness Cameroon keeps a 40-day inventory in the factory, while some European factories keep only a few hours of inventories." [447]

Where products traded are time sensitive such as those that are perishable or easily damaged, quality infrastructure becomes even more crucial.[448] There are two (2) aspects that are relevant to infrastructure and transport related services. First, the time to ship goods internationally determines a country's comparative advantage. For example, the importation and exportation of fruits are highly time-sensitive and any delay in the shipment of these items would discourage investors from continuing their patronage of the country's products. Relatedly, if shipping costs from a certain country are cheaper than others, it will automatically have a comparative advantage in the exportation of its products. The second aspect to consider is the time spent in loading, unloading, and carrying out administrative procedures to receive customs clearance[449] which all contribute to the total shipping time for the goods, essentially affecting the country's trade capacity.

Essentially, the cost and quality of infrastructure and services related to infrastructure are important in determining the volume of opportunities available for international trade.[450] Thus, to ensure that markets become more accessible, it is highly important that hard infrastructure are built and intangible soft infrastructure are improved.[451]

II. The Shortcomings of the WTO and Multilateral System

The World Trade Organization (WTO) provides a multilateral forum for negotiations. It acknowledges that trade and economic development should be conducted with a view to raising a country's standards of living while allowing for the optimal use of the world's resources in accordance with its sustainable development goals (SDGs) and in a manner consistent with a country's needs at different levels of economic development.[452]

The WTO is considered essential to the 2030 Agenda for Sustainable Development and its SDGs. SDGs encompass the recognition that international trade plays an important role in promoting sustainable development, and trade is referenced throughout the SDG indicators. Since the WTO Covered Agreements contain the main set of international rules governing international trade relations for goods and services, among other things, the WTO framework could be leveraged to make the SDGs possible.[453]

The WTO's main functions include ensuring that trade flows as smoothly, predictably, and freely as possible.[454] Its rules serve to ensure that trade is not conducted in a manner that discriminates against developed and developing countries alike, and to guarantee that the best possible circumstances are present to encourage the liberalization of trade. Currently, however, the most obvious challenge to the WTO is that it is losing its role as the primary institutional

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[447] World Trade Organization, '*Infrastructure in Trade and Economic Development*,' (World Trade Report 2004), <https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr04_2b_e.pdf> accessed 2022.
[448] ibid.
[449] ibid.
[450] ibid*;* Cf Marie-Agnes Jouanjean, Dirk Willem te Velde, Neil Balchin, Linda Calabrese and Alberto Lemma, *'Regional infrastructure for trade facilitation,'* (Overseas Development Institute 2016) <https://cdn.odi.org/media/documents/10295.pdf> accessed 2022.
[451] ibid.
[452] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994) 1867 UNTS 154, 33 I.L.M. 1144 [hereinafter WTO Agreement].
[453] World Trade Organization '*Mainstreaming Trade to Attain the Sustainable Development Goals'*, (World Trade Organization, 2018) <https://www.wto.org/english/res_e/booksp_e/sdg_e.pdf> accessed 2023.
[454] World Trade Organization, '*WTO in Brief',* (World Trade Organization) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 2023.

vehicle for creating a space for unencumbered trade amongst its members. WTO Member States are increasingly entering into RTAs with both Member States and non-Member States. Members of the WTO have recognized that the multilateral system cannot successfully function on its own; they recognize that system should be accompanied by improvements in trade capacity.[455]

RTAs allow countries to gain significant access to new markets otherwise not available under the WTO,[456] and expand upon the trade rulebook. In a sense, these negotiations have become a way for countries to address the shortcomings of WTO, allowing for expanded trade between parties to the RTAs and granting states greater control during negotiations than those under the framework of the WTO.

Recently, many countries have entered a significant number of RTAs. For some countries, RTAs deliver deeper and broader trade opportunities than would be possible, at least at the moment, within the WTO. Recent RTAs have included provisions on investment, movement of persons, competition and state-owned enterprises, digital trade, anti-corruption, and intellectual property rights. The WTO has made inadequate efforts to fully address other global issues related to trade, particularly under the SDGs (e.g., food security, climate change, or gender equality) and this has contributed to the fact that countries may no longer see the WTO as a significant player in the field of international relations.[457] The increasing use of RTAs suggests that the future of the multilateral trading system is at risk, with dominant countries from the East and the West proposing various incentives to get countries, essentially, to join their side.[458] Perhaps the preference for RTAs could be because the WTO does not address investment issues which is why RTAs purposely include chapters addressing trade and investment liberalization, among others.

III. Inadequacy of Infrastructure-Related Solutions

While RTAs have generally given countries more control of their role in international trade, as well as given them more access to relevant opportunities that simultaneously addresses their respective trade-related needs, they only address the creation of soft infrastructure. In short, they do not address the physical and foundational needs of developing nations to build reliable infrastructure that could grant them access to more opportunities to enhance their economy.

Considering then that investment in infrastructure is vital to countries' participation in global trade, developing countries are still struggling to increase infrastructure in their own countries since it is expensive. Parties to RTAs and members of the WTO do not prioritize investing in poor, developing countries, mainly because investments in these countries are not the most profitable and the rate of return in investments in these countries is low.[459] Additionally, investing in developing countries is risky since political instability, arbitrary implementation of laws, and issues of government transparency and accountability are

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[455] World Trade Organization, *'Building Trade Capacity'*, (World Trade Organization) <https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm> accessed 2022.

[456] Joshua Meltzer, *'The Future of Trade'*, [2011] Foreign Policy <https://foreignpolicy.com/2011/04/18/the-future-of-trade> accessed 2022.

[457] ibid.

[458] Michael Sutton, *'Free Trade Agreements, the World Trade Organization and Open Trade',* [2007] <http://www.ritsumei.ac.jp/ir/isaru/assets/file/journal/20-1_04sutton.pdf> accessed 2022.

[459] Andreea Brinza, *'Biden's "Build Back Better World" Is an Empty Competitor to China'*, [2021], Foreign Policy, <https://foreignpolicy.com/2021/06/29/biden-build-back-better-world-belt-road-initiative/> accessed 2022.

prevailing issues in these countries.[460] Perhaps one of the greatest impediments to investments is the corruption that is characteristically present in these countries. Infrastructure investments often entail large sums of money for long periods of time and they are usually deeply complex projects which are subject to high risks of corruption at multiple stages of the process.[461] A 2014 OECD Foreign Bribery Report found that over 60% of foreign bribery cases occur in infrastructure-related sectors.[462]

Investing and building infrastructure for developing or low-income countries are not only extremely costly, but also highly risky. Whenever parties to the RTA or WTO member-states do decide to focus on investing in these countries, they often do not address the needs of these countries: paved streets, efficient transportation systems, and clean water. The problem is, without these, most trade and infrastructure initiatives simply cannot work for most low-income countries.

Thus, even though both RTAs and the WTO Covered Agreements promise to facilitate trade relations and increase international trade opportunities, the lack of infrastructure in developing or low-income nations make it sufficiently harder to capitalize on these opportunities.

IV. Soft Infrastructure and Hard Infrastructure

It cannot be denied that RTAs do promote trade relations between and among countries. However, while RTAs were designed to facilitate trade relations and expand opportunities for developing countries, there is an absence of provisions for building infrastructure, especially hard infrastructure. Of course, the improvement of trade capacities and provision of opportunities cannot result from only one type of infrastructure but requires that complementing measures from both types be implemented.[463]

Soft Infrastructure involves the rules and regulations that govern trade and is essential to maintaining the framework of a society; it shapes and directs the economic, health, and cultural policies of a country.[464] This affects the goods that are traded across the border directly. The most common example of soft infrastructure would be a country's constitution, or the laws and policies that govern taxes or processes of the judicial system. Essentially, it is defined as "governance mechanisms".[465] On the other hand, *hard Infrastructure,* or physical infrastructure, encompasses roads, buildings, power plants, and bridges that aid in delivering goods and services to citizens in a country. It essentially guarantees physical connectivity of one market to another.

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[460] Organisation for Economic Co-operation and Development [OECD], '*Risk and Return Characteristics of Infrastructure Investment In Low Income Countries',* [2015] OECD, <https://www.oecd.org/g20/topics /development/Report-on-Risk-and-Return-Characteristics-of- Infrastructure-Investment-in-Low-Income-Countries.pdf> accessed 2022.

[461] OECD, '*Towards a global certification framework for quality infrastructure investment: Private sector and civil society perspectives on the Blue Dot Network – Highlights',* [2021] OECD, <https://www.oecd.org/daf/Towards-a-global- certification-framework-for-quality-infrastructure-investment-Highlights.pdf > accessed 2022.

[462] OECD, '*OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*' [2014] OECD, <https://doi.org/10.1787/9789264226616-en> accessed 2022.

[463] Ibid (n 16) (Jouanjean).

[464] Council of Development Finance Agencies, '*Future Structure'* [2013] <https://www.cdfa.net/cdfa/cdfa web.nsf/0/52F27A8C107E2C5188257C77004FB14E/$file/FS13_Transporation+2.pdf> accessed 2022.

[465] Tracy Raymond and Constance Falk, '*Feeding the Tribe: The Role of Soft Infrastructure in Addressing the Root Problems of the Navajo Nation San Juan River Irrigation System'*, [2018] University of Nebraska Press <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/10.5250/amerindiquar.42.3.0306.pdf?refreqid=excelsior %3A683268deb7d85170d12f4c9219489d12&ab_segments=0%2Fbasic_phrase_search%2Fcontrol&origin=> accessed 2022.

A few trade agreements have been analyzed for the purpose of this paper, particularly the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA), the Dominican Republic-Central America FTA (CAFTA-DR), the Regional Comprehensive Economic Partnership Agreement (RCEP), the China-ASEAN Free Trade Agreement, and the China-Hongkong Closer Economic Partnership Agreement (CEPA).

The CPTPP is one of the most recent RTAs, and the only one among the agreements assessed, that provides for specific provisions recognizing the importance of investing and developing physical infrastructure. The CPTPP adopted some of the chapters of the original Trans-Pacific Partnership Agreement (TPP), including Chapter 23 on "Development", which notes that the parties of the TPP recognize "*that* ***generating and sustaining broad-based economic growth requires*** *sustained high-level commitment by their governments to effectively and efficiently administer public institutions,* ***invest in public infrastructure, welfare, health and education systems****, and foster entrepreneurship and access to economic opportunity*."[466]

Attempts to improve and recognize the importance of infrastructure can also be seen in the WTO Trade Facilitation Agreement Facility (TFAF) that was launched in 2014. Various countries and international organizations aim to deliver support to least-developed countries and developing countries, with the goal of aiding in the implementation of the Trade Facilitation Agreement. In line with most of the observations for infrastructure building, the TFAF provides this support through the development of soft infrastructure. In a statement by the former WTO Director-General Azevêdo, the TFAF will provide implementation grants for infrastructure development, but these grants could only be used for soft infrastructure projects (i.e. modernization of customs laws through consulting services, in-country workshops, or training of officials).[467]

While these agreements had provisions pertaining to soft infrastructure, it is apparent that these RTAs lack provisions specifically dedicated to investments in infrastructure, nor do they incorporate a recognition of its importance in trade and development.

V. Other Initiatives Addressing Infrastructure Needs

A. Belt-and-Road Initiative

Developing countries are in the utmost need for infrastructure investment. China saw this need and saw this an opportunity to expand its trade and policy agenda outwards towards its neighbors. In 2013, President Xi Jinping announced the creation of the Belt and Road Initiative (BRI) which is aimed at "*promoting orderly and free flow of economic factors, highly efficient allocation of resources and deep integration of market; encouraging countries along the Belt and Road to achieve economic policy coordination and carry out broader and more in-depth regional cooperation of higher standards...*"[468] The BRI is focused on developing both soft and hard infrastructure: (1) facilities connectivity; (2) policy coordination; (3) unimpeded trade; (4) financial integration; and (5) people-to-people bond.[469] The Chinese government says that the BRI is focused on improving and aiding in transport infrastructure creation, connectivity of energy infrastructure, and the

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[466] *Emphasis supplied.* Trans-Pacific Partnership Art 23.3.

[467] World Trade Organization, '*Statement by Director General Azevêdo'* (World Trade Organization, 22 July 2014) <https://www.wto.org/english/news_e/news14_e/fac_22jul14_e.htm> accessed 2022.

[468] National development and reform commission, '*Full text: Action plan on the Belt and Road Initiative'* (The State Council; The People's Republic of China, 30 March 2015) <http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm> accessed 2022.

[469] ibid.

construction of cross-border optical cables and communications network to increase connectivity between and among states, as well as to promote efficiency in transportation and communication, while promoting environmentally sustainable infrastructure creation and operation.[470] Essentially, the BRI seeks to focus on regional connectivity to boost interregional trade and BRI seeks to fund and build roads, power plants, ports, railways, 5G networks, and fiber-optic cables around the world to achieve this.

It is important to note that the BRI is not a trade agreement and cannot technically be compared to current RTAs in effect. As opposed to an RTA which is an agreement between countries regarding obligations that affect trade and protections offered by either country for each other, BRI is simply just a set of agreements between China and another country that are focused on building hard infrastructure in the host country.

Currently, one hundred forty-eight (148) countries are formally affiliated with the BRI[471] and majority are it offers an easy and flexible plan: China is willing to build to budget with less stringent requirements for meeting social and environmental safeguards. Out of all the current trade-related initiatives, only the BRI can prioritize physical infrastructure development as part of its policies.

While on paper, the goals of the BRI are appealing, the BRI has turned out to be more problematic than could have predicted. In fact, a World Bank analysis concluded that while the BRI has potential to substantially improve trade, foreign investment, and living conditions for citizens in participating countries it is only truly achievable if "*China and corridor economies adopt deeper policy reforms that increase transparency, expand trade, improve debt sustainability, and mitigate environmental, social, and corruption risks*." [472] Unfortunately, in recent years, China, through the BRI, has made it possible for unsustainable and environmentally harmful infrastructure projects to be funded and it has managed to increase developing countries' reliance on Chinese technology.[473]

BRI's Shortcomings

BRI is not heavily regulated by the Chinese government. Neither is there a central governing institution tasked with overseeing projects that will be backed by BRI. As an unfortunate result, no policy is in place to regulate the projects it undertakes nor the practices it employs in seeing it to fruition. Different government agencies and private entities shape and lead the initiative, depending on their interests and priorities.[474] Often, Chinese business interests are prioritized and any oversight, feasibility analysis, or risk management for investment is overlooked. Since transparency is a considerable issue surrounding the BRI, it should not come as a surprise that data is limited on its operations. Even the World Bank recognizes that, with regard to Chinese business interests and involvement in the BRI, data is severely limited.[475] However, with what is available, Chinese State Owned Enterprises (SOEs)

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[470] ibid.

[471] Christoph Nedophil, '*Countries of the Belt and Road Initiative (BRI)*' (*Green Finance and Development Center*, 2023) <https://greenfdc.org/countries-of-the-belt-and-road-initiative-bri/> accessed 2023.

[472] World Bank Group, '*Belt and Road Economics: Opportunities and Risks of Transport Corridors'* [2019] <https://documents1.worldbank.org/curated/en/715511560787699851/pdf/Main-Report.pdf> accessed 2023.

[473] Jennifer Hillman and David Sacks, *'Council on Foreign Relations' (How Should the United States Compete With China's Belt and Road Initiative*?', (23 March 2021) https://www.cfr.org/blog/how-should-united-states-compete-chinas-belt-and-road-initiative accessed 2022.

[474] Thomas Hale and others, 'Belt and Road Decision-Making in China and Recipient Countries: How and to What Extent Does Sustainability Matter?' [2020] X(X) ISEP, BSG, and Climate Works Foundation <https://sais-isep.org/wp-content/uploads/2020/04/ISEP-BSG-BRI-Report-.pdf> accessed 2022.

[475] ibid (n 43).

account for the majority of BRI infrastructure contracts and according to one estimate, more than half of Chinese-funded BRI projects are allocated to Chinese companies.[476] Similarly, more than ninety percent (90%) of outstanding loans and equity investments in the BRI are with Chinese financial institutions and other state owned banks of China.[477] This, in itself, is problematic enough because while on paper, the intention of China is to open up trade for countries along the Belt and Road through infrastructure building, the financing and implementation of infrastructure creation is not opened up to international players; it still remains with these Chinese firms.

This problem is further exacerbated by the fact that standards for granting loans are essentially non-existent. At its core, China's loan terms do not impose economic or social reforms as loan conditions, which appeals to countries with existing debt or governance issues.[478] Most often, lenders insist that borrowing countries meet their environmental standards, however, China does not impose such a strict mandate, making BRI funding easier to obtain, and projects faster to initiate and implement. Many projects are pursued without the need to conduct financial viability or environmental- or social-impact assessments.[479]

Debt traps

BRI has been labelled as "debt-trap diplomacy," as countries agree to unsustainable loans for financing much needed projects and once they are unable to pay, China can wield its influence over the country and/or demand control over the infrastructure it sought to finance in the first place.[480] One study found that the BRI has caused dozens of lower- and middle-income countries to accumulate $385 billion in "hidden debts" to China.[481] Due to the fact that countries do not have to pass an extremely stringent set of standards before qualifying for a loan with China, indebtedness has significantly increased in borrowing countries.[482] Since the criteria for lending money is next to non-existent, borrowing countries have been observed to overextend their finances.[483] Recipient countries often do not have the means to independently finance infrastructure projects and China offers a way to finance these through loans with collateral.[484] This means that borrowing countries may pledge or sell a specific asset to China

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[476] ibid.

[477] Elaine Dezenski, 'Below the Belt and Road Corruption and Illicit Dealings in China's Global Infrastructure' [2020] Foundation for Defense of Democracies Center on Economic and Financial Power <https://www.fdd.org/wp-content/uploads/2020/05/fdd-monograph-below-the-belt-and-road.pdf> accessed 2023.

[478] Paola Subacchi, 'China is Changing the Way Money is Lent to Countries in Need' (Nikkei Asia, 24 May 2017) <https://asia.nikkei.com/Opinion/China-is-changing-the-way-money-is-lent-to-countries-in-need> accessed 2022.

[479] ibid (n 44).

[480] Olivia Adams, '*Asia Pacific Foundation of Canada'* (The G7's B3W Infrastructure Initiative, a Rival to China's BRI, 5 July 2021) <https://www.asiapacific.ca/publication/g7s-b3w-infrastructure-initiative-rival-chinas-bri> accessed 2022.

[481] Elliot Smith, '*Chinese Loans Leave Developing Countries with $385 Billion in Hidden Debts, Study Says*,' (CNBC, 30 September 2021) <https://www.cnbc.com/2021/09/30/study-chinese-loans-leave-developing-countries-with-385-billion-in-hidden-debts.html> accessed 2022.

[482] David Sacks, '*China's Belt and Road Initiative Should Be on the World Bank and IMF's Agenda'* (Council on Foreign Relations, 7 April 2021) <https://www.cfr.org/blog/chinas-belt-and-road-initiative-should-be-world-bank-and-imfs-agenda> accessed 2022.

[483] ibid.

[484] Deborah Brautigam and Jyhjong Hwang, '*Eastern Promises: New Data on Chinese Loans in Africa, 2000 to 2014'* [2016] 4 China-Africa Research Initiative, School of Advanced International Studies, Johns Hopkins University <https://foreignpolicy.com/wp-content/uploads/2018/06/96909-easternpromisesv4.pdf> accessed 2023.

as security against repayment of the loan. Collateral may be in the form of the countries' assets.[485]

The Council on Foreign Relations' Belt and Road Tracker demonstrates that debt to China has increased significantly since 2013. For example, Cambodia's debt to China is equivalent to approximately 22.4 per cent of Cambodia's total GDP,[486] for Mongolia with 23.3% of their GDP.[487]

Corruption

Infrastructure projects are one of the biggest areas of country development that is at high risk for corruption[488] and BRI projects confirm this risk. TRACE International, a non-profit business association that provides companies with anti-bribery compliance support, found that most BRI recipient countries fall below the 50th percentile of its Bribery Risk Matrix – which is a measurement of business bribery risk in one hundred ninety-four (194) countries.[489] Additionally, based on recent Corruption Perception Index (CPI) scores, the perceived corruption in the Belt and Road corridor economies is "higher than the global average and is highest among lower-middle- and low-income corridor economies.[490]

High corruption rates within BRI could be a result of a multitude of factors including its vague and unclear lending terms and contracts, and the lack of accountability with both recipient country's governing body, and the BRI itself. Chinese banks and companies perpetuate the corruption by preferring to carry out BRI infrastructure projects with domestic political actors they know or are most comfortable with, "*skirting democratic institutions and tying the fate of projects to the continued success of individual politicians and political parties.*"[491]

Labor-related issues

Governments of recipient countries prefer if BRI projects would employ local hires in order to contribute to the economy by providing more jobs and increasing local income. BRI funded infrastructure projects abroad employ Chinese laborers who are imported and hired instead of local laborers of the recipient country. Aside from the reliance of the BRI on importing Chinese laborers, there have been complaints from recipients countries – like Myanmar, Cambodia,[492] Laos, Indonesia,[493] and the Philippines – that the rights of workers hired for BRI projects are not sufficiently protected[494] and often times result in exploitation through unpaid wages, confiscated passports, working under tourists visas, unsafe working

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[485] ibid (n 43).

[486] Benn Steil, '*Belt and Road Tracker*' (Council on Foreign Relations, 1 June 2022) <https://www.cfr.org/article/belt-and-road-tracker> accessed 2023.

[487] ibid.

[488] ibid (n 43).

[489] Trace, '*Bribery Risk Matrix*' (Trace, 2022) https://matrixbrowser.traceinternational.org accessed 2023.

[490] ibid (n 43).

[491] ibid (n 44).

[492] Ivan Franceschini, '*As far apart as earth and sky: a survey of Chinese and Cambodian construction workers in Sihanoukville*' [26 August 2020] Critical Asian Studies <https://www.tandfonline.com/doi/abs/10.1080/14672715.2020.1804961 > accessed 2022.

[493] Lily Kuo and Alicia Chen, '*Chinese Workers Allege Forced Labor, Abuses in Xi's 'Belt and Road' Program*' (Washington Post,April 2021)<https://www.washingtonpost.com/world/asia_pacific/china-labor-belt-road-covid/2021/04/30/f110e8de-9cd4-11eb-b2f5-7d2f0182750d_story.html> accessed 2022.

[494] Jennifer Hillman and Alex Tippett, '*Who Built That? Labor and the Belt and Road Initiative*' (Council on Foreign Relations, July 2021) <https://www.cfr.org/blog/who-built-labor-and-belt-and-road-initiative> accessed 2022.

conditions, and forced labor.[495] In fact, a New York-based China Labor Watch acknowledges that inhumane conditions of work are prevalent in BRI projects: being forced to work while infected with the coronavirus and falling victim to human trafficking, among other things.[496]

Environmental Issues

Commonly observed in BRI projects is its disregard of social and environmental considerations. BRI projects are generating huge carbon emissions and locking countries into decades of carbon-intensive growth.[497] BRI offers financing to build power plants, often coal-fired plants because many borrowing countries are more interested in coal as this source of energy is perceived to be cheaper. On China's side, however, they are incentivized to support investments in coal-fired power plants because not only is it the biggest importer of coal, it has also drastically increased the importation of the coal it mines within the state.[498] Thus, financing the construction of coal-fired power plants not only makes BRI profitable in terms of interest payments for loans, but it allows China to get rid of its excess inventory for coal. Despite the fact that in 2019, China committed itself to make the BRI greener and more sustainable,[499] it continues to construct and operate more coal-fired power plants.[500] More than sixty percent (60%) of BRI's financing has gone towards funding nonrenewable energy resources.[501] This casts doubt on the sincerity of China's commitment to become more ecologically friendly.

B. Build Back Better World

As a way to compete against China's BRI, President Joe Biden launched the Build Back Better World Initiative (B3W) during the G7 summit, the purpose of which is to serve as a better alternative to China's BRI through the creation of a values-driven, high- standard, and transparent infrastructure partnerships to help finance infrastructure projects in developing countries[502] and hopefully narrow the trillions of dollars needed by developing nations in terms of this specific area of development.[503] Through B3W, G7 partners aim to focus on four (4)

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[495] Daniel Russel and Blake Berger, 'Navigating the Belt and Road Initiative' [2019] Asia Society Policy Institute <https://asiasociety.org/sites/default/files/2019-06/Navigating%20the%20Belt%20and%20Road%20Initiative_0.pdf> accessed 2022.

[496] China labor watch, 'Silent Victims of Labor Trafficking: China's Belt and Road Workers Stranded Overseas Amid Covid-19 Pandemic' [2021] X(Z) China Labor Watch <http://chinalaborwatch.org/wp-content/uploads/2021/04/Overseas-worker-report-English.pdf> accessed 2022.

[497] ibid (n 44).

[498] Trading economics, '*China Imports of Coal*' (Trading Economics) <https://tradingeconomics.com/china/imports-of-coal> accessed 2023.

[499] Jason Tower and Jennifer Staats, '*China's Belt and Road: Progress on 'Open, Green and Clean*?' (United States Institute of Peace, 29 April 2020) <https://www.usip.org/publications/2020/04/chinas-belt-and-road-progress-open-green-and-clean> accessed 2022.

[500] '*Global Coal Plant Tracke*r' (Global Energy Monitor) <https://globalenergymonitor.org/projects/global-coal-plant-tracker/summary-tables/> accessed 2023).

[501] Boston University, 'China's Global Energy Finance' (Global Development Policy Center, 14 March 2022) <http://bu.edu/cgef/#/all/Country-EnergySource > accessed 2022.

[502] Matthew Goodman and Jonathan Hillman, '*The G7's New Global Infrastructure Initiative'* (CSIS, 15 June 2021)<https://www.csis.org/analysis/g7s-new-global-infrastructure-initiative> accessed 2022.

[503] Steve Holland and Guy Faulconbridge, '*G7 rivals China with grand infrastructure plan'* (Reuters, 13 June 2021) <https://www.reuters.com/world/g7-counter-chinas-belt-road-with-infrastructure-project-senior-us-official-2021-06 12/#:~:text=CARBIS%20BAY%2C%20England%2C%20June%2012,dollar%20Belt%20and%20Road%20initiative.>accessed 2022.

areas, particularly: climate, health and health security, digital technology, and gender equity and equality.[504]

B3W aims to raise the standards for implementing various infrastructure projects. The B3W puts a premium on infrastructure development in a financially, environmentally, and socially sustainable and transparent manner. Additionally, G7 leaders commit to providing recipient countries with long-run benefits through higher standards and principles for good governance, labor and social matters, and other relevant areas of concern. To fund infrastructure development, B3W heavily relies on investments from the private sector and securing loans from multilateral development banks and other international financial institutions (IFIs).[505]

To complement the B3W, the current administration also revived the Blue Dot Network program of the previous administration and partnered with Organization for Economic Co-operation and Development (OECD) on a new initiative called "Connecting the Dots: Building Trusted Systems to Address Corruption in Infrastructure".[506] This initiative aspires to tackle corruption in recipient low- and middle-income countries abroad, a common hurdle for investors seeking to provide financing for infrastructure projects.

VI. Comparing the Belt-and-Road Initiative and the Build Back Better World Initiative to Provide a Framework for Future Policy

Perhaps it is unfair to compare B3W and the BRI at this point because currently, BRI has nine (9) years of experience ahead of the B3W and B3W has not even been institutionalized as of writing this analysis. BRI has already established its integrated belt and road supply chain by connecting different markets from different recipient countries.

Both the BRI and the B3W (the "initiatives") offer funding for infrastructure projects for low-income countries to better their economic standing and accordingly aid in their trade capabilities. The BRI and the B3W, however, have their own shortcomings, as is usual with any initiative or trade agreement. It has already been established that trade agreements have been lacking in terms of provisions that provide adequate guidance on physical infrastructure investment and development. A comparison between the BRI and the B3W may be able to shed light on how future trade agreements or policies may be improved to address physical infrastructure needs.

First, the initiatives differ as to the type of infrastructure that they are focused on. BRI is focused on physical infrastructure: building ports, roads, electric power plants, railways, and telecommunication facilities. On the other hand, B3W is focused on soft infrastructure, particularly developing policies pertaining to health, gender equity and equality, and climate issues.

Second, B3W emphasizes that in the implementation of its infrastructure projects, it will advance its core values of good governance. The B3W is values-driven, and highlights its commitment to transparency, environmental, and social sustainability. BRI, on the other hand, has, for years following its implementation, raised multiple red flags as to how it is actually

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[504] White House, 'FACT SHEET: President Biden and G7 Leaders Launch Build Back Better World (B3W) Partnership' (The White House, 12 June 2021) < https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/12/fact-sheet-president-biden-and-g7-leaders-launch-build-back-better-world-b3w-partnership/> accessed 2022.

[505] ibid.

[506] Office of the spokesperson, 'US and OECD Co-Host Panel on Quality Infrastructure and the Blue Dot Network' (US Department of State, 5 October 2021) <https://www.state.gov/u-s-and-oecd-co-host-panel-on-quality-infrastructure-%20and-the-blue-dot-network/> accessed 2022.

carried out and governed: corruption issues, lack of transparency, a host of environmental issues, and unsustainable debt traps are often causes for concern for the recipient countries.

Financing concerns are also one of the relevant issues for infrastructure initiatives. Because B3W puts a premium on its clean and values-driven initiative, costs for procuring and implementing infrastructure projects may be higher than that of BRI. Since BRI is recognized as having lower standards for these projects, it will be cheaper for recipient countries to avail of these infrastructure projects, and the materials to help it come to fruition can be cheaper too.

Even though B3W presents a better platform, BRI may remain palatable to the majority of low- and middle-income countries because it promises easier financing, flexible standards for compliance, and quicker results. The standards in terms of sustainability or financial transparency might be a hindrance to the success of the B3W. While higher standards and greater transparency are great values to have, B3W might still be unable to deliver the essential services and infrastructure projects that the developing world needs. Most of the contents of the B3W plan is simply a first-world framework to solve first-world problems as it focuses on climate, health and health security, digital technology, and gender equity and equality. While these are great initiatives that majority of the world needs to change for the long term, these are, unfortunately, not problems that are being prioritized by low- and middle-income countries.

The promise of the B3W of clean and sustainable infrastructure investment is naturally the better initiative. However, in terms of addressing the actual problems of those countries, B3W may be lacking. With the number of issues it seeks to tackle in the implementation of its infrastructure projects, recipient countries may look at (1) longer waiting times before the approval of their aid request and (2) more expensive costs for constructing or carrying out the needed project, if they pass the standards of the B3W.

VII. Recommendations

It is worth reiterating that RTAs are not, in all aspects, similar to the BRI and the B3W ("investment initiatives"). It is proposed that these two types of agreements be merged to create a new form of investment agreement: one that benefits from the structure and more importantly, the binding nature of RTAs and the focus of the investment initiatives on physical infrastructure.

The BRI is not a binding agreement in and of itself; contracts are still needed to be entered into by interested countries, tailor-fit to what China would need from the host country at that particular time. While the BRI provides a promise of international liberation of trade through its choice to concentrate on in infrastructure investment, appropriate policies, domestic regulations, and good governance are still essential to international liberalization of trade, especially for developing countries.[507] Thus, while BRI provides the perfect mechanism to fill in the gaps left by traditional RTAs, the BRI is in itself, problematic because it does not answer to any other authority than China; it does not provide investment and financing pursuant to predictable and transparent rules.

On the other hand, RTAs feature binding rules on signatories: rules that affect national policy to align with the RTA. With this said, while RTAs do provide for stringent rules and policies to follow for its signatories, it does not provide sufficient investment plans for infrastructure. The rules provide for a more binding agreement amongst its signatories. Thus, if at all possible, new agreements combining the framework of the BRI to that of trade

[507] ibid (n 13).

agreements could prove to be more beneficial for all parties involved: the framework of BRI that provides for investment in infrastructure could be merged with the framework of a traditional trade agreement that provides for rules in order to make investing in infrastructure more concrete and binding on its parties-signatories.

PART I

ECONOMIC GROWTH

Digital Trade

CHAPTER 8: DRAFTING CYBERSECURITY ARTICLES INTO TRADE AGREEMENTS FOR DEVELOPING NATIONS

NICHOLE CHEN*

Abstract

The rapid growth of the digital age has been met with greater reliance on digital trade in all sectors. While this increasing digital connectedness is proportional to the growth in cyberthreats, digital trade has not yet caught up in dealing with these threats. Part I of this Article introduces what digital trade and cybersecurity are and how the lack of cybersecurity affects digital trade, especially for developing nations. Part II explores how the traditional exceptions of security and necessity in trade agreements, through the lens of the WTO, are inadequate for dealing with cybersecurity. Part II also explores the competing theories of mutual cooperation and data localization using select regional trade agreements. Part III discusses the gap between developed and developing nations in combating cybercrime and enforcing legislation. Part IV proposes solutions on how trade agreements can remedy cybersecurity challenges that developing nations face. Finally, Part V concludes the paper with an urge for mutual cooperation in cybersecurity.

I. Introduction

International trade and cybersecurity have become increasingly intertwined because of the growth in internet use and dependence on data flows by businesses and consumers for communication, e-commerce, and information exchange.[508] The digital age is characterized by the flow of goods and services, assets, people, and information. As a result, businesses, supply chains, and governments have become reliant on the internet and artificial intelligence in a world of growing global interconnectivity.[509] Most industries rely on data movement to some degree, especially with internet platforms, e-commerce firms, online payment, and financial services, computer services, and logistics firms. This growth in the use of information and communication technologies (ICT) results in a proportional reliance on ICT goods and services, estimated to represent 6.5% of the world's gross domestic product (GDP) in 2017.[510]

The rise in e-commerce experienced an unprecedented boost during the COVID-19 pandemic, with greater consumer demand for consumer goods.[511] Not only did businesses shift from physical stores to e-commerce, but many businesses also shifted from domestic

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[508] Joshua P. Meltzer, 'The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment' (2014) 79 Brookings 127.

[509] Michael J. Ferentina and Emine E. Koten, 'Understanding Supply Chain 4.0 and its Potential Impact on Global Value Chains' (*Global Value Chain Development Report*, 2019) www.wto.org/english/res_e/booksp_e/gvc_dev_report _2019_e_ch5.pdf.

[510] Anahiby Becerril, 'Cybersecurity and E-commerce in Free Trade Agreements' (2020) Mexican L. Rev. 6.

[511] Katrin Kuhlman, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (United Nations Econ & Soc. Comm'n for Asia and the Pacific, 2021) [hereinafter, UNESCAP Handbook].

sales to cross-border e-commerce with the mandated physical store closures.[512] E-commerce became more heavily tied to data transmission, which resulted in greater reliance on third party online platforms, especially in developing countries.[513] For example, Paystack, a financial payment company in Africa, recorded a five-fold surge in transactions compared to pre-pandemic levels.[514] India's United Payment Interface saw double the number of transactions from 2020-21.[515] COVID-19 has shown the importance of many data privacy and protection issues such as increased personal data collection and the need for protection for stakeholders by government parties.

The growth of global interconnectivity also increases exposure to the risks and costs of cyberattacks. For example, the WannaCry ransomware attributed to North Korea infected over 200,000 computers across 153 countries, resulting in millions of dollars in damage.[516] Additionally, the risks of cyber threats increased with the COVID-19 pandemic, disproportionately affecting developing countries. For example, Uganda's telecommunications and banking sectors were hacked through SIM cards in October 2020, compromising the country's mobile money network and costing the country approximately 3.2 million dollars.[517] At the height of COVID-19, the second largest hospital operator in South Africa was hit by a cyberattack, forcing the hospital to switch back to manual backup systems.[518] The International Telecommunication Union's Global Cybersecurity Index reported that developing countries, especially in South America, Africa, the Middle East, and Southeast Asia, are the least equipped to deal with cyberthreats.[519]

The growth of ICT in every sector of the world's economy, politics, and society presents security threats. Due to the transnational nature of cyberspace, countries face difficulty in cybersecurity enforcement. This Article will discuss how trade policy can support good cybersecurity practice and how trade agreements can better incorporate cybersecurity.

A. Defining Digital Trade and E-Commerce

The World Trade Organization (WTO) defines e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means."[520] Digital trade is broader because it also involves data flow and the exchange of goods and services.[521]

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[512] Evelyn Cheng, 'Chinese Companies Look to Ride A New Cross-Border E-Commerce Wave Driven By The Coronavirus' (Consumer News and Business Channel, 28 July 2020).

[513] UNESCAP Handbook (n 4) 102.

[514] Pallavi Pengonda, 'Flipkart IPO May Ride Piggyback on Post Covid-19 Boom in E-Commerce' (Livemint, 7 December 2020) <www.livemint.com/market/mark-to-market/flipkart-ipo-may-ridepiggyback-on-post-covid-boom-in-e-commerce-11607343275>.

[515] 'Pandemic in the Internet Age: Communications Industry Responses, International Telecommunication Union' (2020) <https://reg4covid.itu.int/wp-content/uploads/2020/06/ITU_COVID-19_and_Telecom-ICT.pdf>.

[516] Joshua P. Meltzer and Cameron F. Kerry, 'Cybersecurity and Digital Trade: Getting it Right' (*Brookings*, 18 September 2019) <www.brookings.edu/research/cybersecurity-and-digital-trade-getting-it-right/> [hereinafter Meltzer and Kerry].

[517] Stephen Kafeero, 'Uganda's Banks have been Plunged into Chaos by a Mobile Money Fraud Hack' (*Quartz Africa*, Oct. 10, 2020) <https://qz.com/africa/1915884/uganda-banks-mtn-airtel-hacked-by-mobile-money-fraudsters/>.

[518] Samuel Mungadze, 'Life Healthcare Group Hit by Cyber Attack Amid COVID-19' (*ITWeb*, 9 June 2020) <www.itweb.co.za/content/JBwErvnBK4av6Db2>.

[519] Global Cybersecurity Index 2018, (*ITU Publications*, 2018) <www.itu.int/dms_pub/itu-d/opb/str/D-STR-GCI.01-2018-PDF-E.pdf>.

[520] *Work Programme on Electronic Commerce* (25 September 1998) WTO Doc. WT/L/274, <www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm>.

[521] ibid.

The WTO's definition notes "electronic commerce is […] the production, distribution, marketing, sale or delivery of goods and services by electronic means," which encompasses electronic fund transfers, credit card payments, virtual markets, cloud computing, big data, artificial intelligence or blockchain, the Internet of Things (IoT), biotechnology, nanotechnology, and other related areas.[522]

B. Defining Cybersecurity

The International Technology Union (ITU) defines cybersecurity as the "collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment."[523] However, there is currently a lack of consensus over what cybersecurity entails. For example, the U.S. National Institute of Standards and Technology (NIST) suggests cyberattacks can be divided into two types: attacks on information and attacks on information systems.[524] However, the NIST definition does not differentiate between actions taken by countries and actions taken by private individuals or between the impact of a cyberattack on public information or networks from the impact on private ones. The NIST definition of cybersecurity highlights the difficulty of a lack of consensus over cybersecurity policies. This Article takes the position that digital trade requires a definition of cybersecurity rooted in mutual cooperation in trade agreements.

II. Cybersecurity in Trade Agreements: Challenges to Enforcement in International Law

Cybersecurity is often not a priority in trade agreements. Instead, aspects of cybersecurity, such as data privacy, are often mentioned as sections under various sector-specific parts of trade agreements. Absent an international framework for cybersecurity, countries are left to negotiate their own free trade agreements or rely on multilateral trade agreements. Considering the different extremes, this section explores how the WTO framework functions as a standard for most Free Trade Agreements (FTAs) and discusses how major treaties deal with enforcement in cyberspace.

A. Digital Trade and Cybersecurity in the WTO

Trade agreements traditionally have exceptions for parties to take measures out of necessity. Because digital technology affects nearly every sector of trade, the necessity exception has sometimes been expanded to cybersecurity through a new "digital protectionism."[525] For example, even a good-faith measure taken to protect consumer personal information or system to track exports can be vulnerable to malicious code or hacking, creating barriers to trade. The WTO's "national security" exception under GATS Article XIV provides the most comprehensive explanation of how the exception has been

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[522] Becerril, (n 3).

[523] International Telecommunication Union (ITU), *Capabilities and their context scenarios for cybersecurity information sharing and exchange*, Rec. ITU-T X.1209 (12/2019) (17 December 2010) <www.itu.int/rec/T-REC-X.1209-201012-I>.

[524] NISTIR 7298, Revision 3, *Glossary of Key Information Security Terms* (NISTIR 7298 Rev. 2. 06/05/2013) (July 2019) (Cybersecurity is "the prevention of damage to, unauthorized use of, exploitation of, and […] the restoration of electronic information and communications systems, and the information they contain, to strengthen the confidentiality, integrity and availability of these systems.)

[525] Ziyang Fan & Anil Gupta, 'The Dangers of Digital Protectionism' (30 August 2018) Harvard Bus. Rev. <https://hbr.org/2018/08/the-dangers-of-digital-protectionism>.

used and how it can be applied to cybersecurity.[526] This section uses the example of the WTO to highlight how the security and general exception provisions, common to most trade agreements, are inherently inadequate to address cybersecurity.

1. WTO Security Exception and Why It is an Inadequate Framework for Cybersecurity

The security exceptions in the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), and Generic Access Profile (GAP) allow members to adopt measures for security purposes otherwise inconsistent with WTO obligations. This exception, though seemingly logical to apply to cybersecurity, was drafted during the Cold War in 1948, and references "national security" as matters related to arms trafficking and fissionable material.[527] The security exception of the GATS Article XIV has not often been used until recently because parties have been reluctant to cite "national security" as a factor for a dispute settlement test and because the exception could greatly affect trade.[528] However, because cybersecurity consists of a broad umbrella of risks from online hate speech to identity theft, many parties have cited "national security" as a cybersecurity justification to exert political control or protect domestic industries.[529] For example, China's cybersecurity law justifies limiting access of foreign firms due to a "national security" interest and Vietnam's laws prohibits "distorting history, denying revolutionary achievements, or destroying the […traditions…], social ethics or health of the community."[530]

Cybersecurity, unlike traditional and physical forms of security issues, raises challenges on how to distinguish between legitimate security problems and disguised protectionism or trade restrictions. Given the WTO panel's definition of "national security" in the *Russia Transit* case and what constitutes an "emergency in international relations," and the temporal link required between them, the national security exception is not an available legal avenue for resolving cybersecurity issues in digital trade.[531] Cyber risks can originate from any country with an internet connection and throughout the entire global supply chain. Because cyberthreats are continuous and require parties to adopt long-term measures to minimize risks, preventative measures are not considered to be actions "taken in time" of an "emergency in international relations." Therefore, the security exception in the GATT, GATS, and GAP are insufficient in the cybersecurity context.

2. General Exceptions in the WTO and Why They Are Inadequate Frameworks for Cybersecurity

The WTO's GATT and GATS general exception provisions can be used to justify trade restrictions for cybersecurity under the supply chain exception or protection of human life or health exception. However, the WTO Appellate Body has found that to qualify for these general exception provisions, governments would have to ensure their cybersecurity measures

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[526] *General Agreement on Trade in Services*, Article XIV, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[527] Mona Pinchis-Paulsen, 'Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exception' (2020) 41(1) MICHIGAN J. INT'L L. 109.

[528] Tania Voon, 'Can International Trade Law Recover? The Security Exception In WTO Law: Entering A New Era' (2019) 113 American J. of Int'l L. 38, 45-50.

[529] Meltzer and Kerry (n 9).

[530] ibid.

[531] Joshua P. Meltzer, 'Cybersecurity and Digital Trade: What Role for International Trade Rules?' (November 2019) Global Econ. & Dev. at Brookings <www.brookings.edu/wp-content/uploads/2019/11/Cybersecurity-and-digital-trade_final-11.20.pdf> [hereinafter Meltzer].

are the least restrictive measure and a less trade-restrictive alternative does not exist to provide the same level of protection from cyber threats.[532] Additionally, governments would need to prove their cybersecurity measures are not unjustifiable or a disguised trade restriction.[533]

The general exception provisions would also be difficult to apply to the cybersecurity context. Because of the market failures cybersecurity measures would need to be addressed, a WTO panel would need to assess the impact of the measure on private sector incentives, as well as determine whether alternative measures apply.[534] If the cybersecurity measure is taken under a broader set of actions to reduce cyber risk, the WTO Appellate Body would need to consider the overall system and its impact over time, which further complicates the analysis for the exception. Additionally, the balance test presents evidentiary requirements with the burden of proof on the complaining party to identify a less trade-restrictive alternative, which would be difficult if an action consisted of classified information.

3. WTO Exceptions in Free Trade Agreements

The security and general exception provisions in the WTO, as well as the many FTAs that follow WTO provisions, do not distinguish between cyber risks arising from state and non-state actors and do not account for government measures meant to address economy-wide cyber risks.[535] Therefore, setting boundaries for government reach under the "national security" exception would first require a common global definition of the cybersecurity domain. Coupled with the narrow objective definition of necessity, the security exceptions of the GATT or similar "national security" exceptions in trade agreements are ill-suited to govern cybersecurity. These exceptions do not provide enough flexibility or a clear definition for parties to form cybersecurity policies and are not specific to digital trade. Additionally, given the proliferation of cyberthreats, cybersecurity policies should be a priority to trade agreements, not governed by an exception to trade. Therefore, current multilateral trade agreements do not adequately address cybersecurity.

B. Competing Theoretical Frameworks in Regional Trade Agreements

There are multiple approaches to enhancing cybersecurity. Experts agree "although states are not obliged to cooperate in the investigation and prosecution of cybercrime, such cooperation may be required by the terms of an applicable treaty or other international law obligation."[536] Even outside cybersecurity, international law includes a broad network of bilateral conventions for mutual cooperation in criminal matters.[537] International agreements often include mutual cooperation provisions that do not explicitly mention information security and data sharing, but may implicitly apply when the specific activities are triggered.[538] Statutes arising from international criminal tribunal and binding United Nations Security

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[532] WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Panel* (3 December 2007) WT/DS332/AB/R [306]–[308].
[533] Meltzer and Kerry (n 9).
[534] Meltzer (n 24).
[535] Meltzer and Kerry (n 9).
[536] *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Rule 13(Schmitt ed., 2d ed., 2017).
[537] *Certain Questions of Mutual Assistance (Djibouti/France)*, [2006] ICJ Rep.
[538] International Convention for the Suppression of Terrorist Bombings (1997) 2149 UNTS 284, Art. 7(1–2); International Convention for the Suppression of Acts of Nuclear Terrorism (2005 1987 UNTS 125, Art. 7(1)(b).

Council resolutions also require cooperation.[539] Therefore, mutual cooperation is neither new nor exclusive to cybersecurity.

However, jurisdiction in cyberspace consists of two extremes between mutual cooperation and data localization. On one end, as already adopted by multiple countries, is an integrated view of the cyberspace, using existing international legal frameworks to allow disclosure of information held overseas. The mainstream approach of Western nations is to frame the narrative around "cybersecurity," which can be defined as "the ability to protect or defend the use of cyberspace from cyberattacks" by the NIST[540] or "the protection of cyberspace itself [and] electronic information [from] either tangible or intangible . . . attacks originating in cyberspace."[541] In other words, cybersecurity is focused on control and compliance within the cybersphere with open information flow on a global scale. The other extreme is to reassert territorial control through data localization, which includes polices that play both facilitative and preventive roles.[542] This protectionist approach allows governments to use domestic procedures to both access data located within other countries and prevent definite access by other governments. From an information security approach, as taken by China, Russia, and some Arab countries, the discourse also focuses on protecting a nation's "digital sovereignty," the society, and the government from negative information flow.[543] In particular, China and Russia have been enacting horizontal data localization policies under domestic law to restrict data flow.[544] The disjointed approaches taken by countries, if they take any approaches at all, could culminate into an arms race for internet jurisdiction. With these competing theories in mind, this Article seeks to argue that digital localization is ultimately unsustainable and disproportionately harms developing nations.

1. Mutual Cooperation: The United States-Mexico-Canada Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Both the United States-Mexico-Canada Agreement (USMCA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which created the framework for the Digital Economy Partnership Agreement (DEPA), create a comprehensive framework for digital trade. The USMCA adopts a "risk-based" approach to cybersecurity by "relying on census-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events."[545] The USMCA requires parties to adopt or maintain the legal framework for areas such as non-

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[539] Rome Statute, Arts. 86–87, 89, 91–93; UN Security Council, Resolution 1593 (31 March 2005) UN Doc. S/RES/1539 [2]; UN Security Council Resolution (26 February 2011) 1970 UN Doc. S/RES/1970 [5].

[540] Celia Paulsen and Robert Byers, 'Glossary of Key Information Security Terms' (2019) NIST Internal or Interagency Report.

[541] Rossouw Von Solms and Johan Van Niekerk, 'From Information Security to Cyber Security' (2013) 38 *Computers & Security* 101.

[542] Paul Greaves, 'How African Countries Can Benefit From the Emerging Reform Initiatives of Cross-Border Access to Electronic Evidence' (*Cross Border Data Forum*, 6 July 2020) <www.crossborderdataforum.org/how-african-countries-can-benefit-from-the-emerging-reform-initiatives-of-cross-border-access-to-electronic-evidence/> [hereinafter Greaves].

[543] Julia Pohle and Thorsten Thiel, 'Digital Sovereignty' (2020) 9(4) Internet Policy. Rev. <https://policyreview.info/concepts/digital-sovereignty>.

[544] Stanislav Budnitsky and Lianrui Jia, 'Branding Internet Sovereignty: Digital Media and the Chinese–Russian Cyberalliance' (2018) *21(5) European Journal of Cultural Studies* 594–613.

[545] United States-Mexico-Canada Agreement (adopted 30 November 2018, entered into force 1 July 2020), art. 19.15(2) [hereinafter USMCA].

discriminatory treatment of digital products, electronic authentication and signatures, online consumer protection, and personal information protection.[546] The CPTPP contains an entire chapter devoted to electronic commerce affirms the importance of cooperation on cybersecurity matters but does not create any obligations for the parties,[547] and discusses digital trade issues and creates minimum obligations for parties such as the non-discriminatory treatment of digital products, electronic authentication and electronic signatures, and personal information protection.[548]

Examples of mutual cooperation in the USMCA and CPTPP are best seen through code sharing. Specifically, both Agreements preclude parties from requiring code sharing proposals related to "mass-market software or products containing such software."[549] The USMCA explicitly prohibits parties from requiring disclosure of source code and goes further to bar governments from requiring the disclosure of "algorithms expressed in that source code" unless that disclosure was required by a regulatory body for a "specific investigation, inspection, examination enforcement action or proceeding."[550] This is important because parties and nations are interested in ensuring the code running on their systems are free from malicious components.[551] For example, many cybersecurity experts have urged the U.S. Federal Communications Commission (FCC) to require all manufactures of WiFi devices to ensure their source code is "publicly available and regularly maintained" in response to the Volkswagan emission scandal, where a computer code was left uninspected and allowed the company to cheat in its emissions testing.[552] In short, the USMCA and CPTPP are examples of trade agreements that favor mutual cooperation.

2. Data Localization: The Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership (RCEP) promotes data localization rather than mutual cooperation. The RCEP permits parties to impose data localization requirements to achieve a public policy objective provided that the restriction is non-discriminatory.[553] This exception is discretionary and not subject to dispute settlement.[554] The RECP specifically states, "the Parties recognise that each Party may have its own measures regarding the use or location of computing facilities, including requirements that seek to ensure the security and confidentiality of communications."[555] Furthermore, its provisions do not prevent a party from adopting any measures it subjectively judges to be a protection of essential security interests.[556] Other parties may only allege that a measure is arbitrary,

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[546] Chimene Keitner and Harry Clark, 'Cybersecurity Provisions and Trade Agreements' (2019) 10 Harvard Business. L. Rev., 1 [2] <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2764&context=faculty_scholarship> [hereinafter Keitner and Clark].

[547] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 8 March 2018, entered into force 30 December 2018), Art 14.16 [hereinafter CPTPP].

[548] ibid art. 14.

[549] ibid art. 14.17(1).

[550] USMCA (n 38) art. 19.16.

[551] Keitner and Clark (n 39) 5.

[552] Darlene Storm, 'Vint Cerf and 260 Experts Give FCC a Plan to Secure Wi-Fi Routers' (*Computerworld*, 14 October 2015) <www.computerworld.com/article/2993112/vint-cerf-and-260-experts-give-fcc-a-plan-to-secure-wi-firouters>

[553] Regional Comprehensive Economic Partnership, (adopted 15 November 2020, entered into force 1 January 2022), art 12.14 [hereinafter RCEP].

[554] Andrew D. Mitchell & Neha Mishra, 'Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute' (2019) 22(3) J. Int'l. Econ. L.

[555] RCEP (n 50) art. 12.14(1).

[556] ibid art. 12.14(3).

unjustifiably discriminatory, or a disguised restriction on trade but they cannot claim that it does not pursue a legitimate public policy objective or that it is not necessary.[557] Finally, the RCEP encourages good-faith consultations between the parties and within RCEP's Joint Committee, rather than creating a dispute mechanism.

C. Why Trade Agreements Should be Hesitant to Adopt Data Localization Articles

Data localization is essentially the opposite of a trade agreement. The purpose of trade agreements is to reduce barriers in cross-border trade. However, the issue of cybersecurity and perceived cyber threats create incentives for nations to engage in trade-restrictive actions, absent a well-defined trade agreement, which counters general trade theory and cooperation.

Proponents of data localization often argue for the benefits of greater protection of privacy, protection of sensitive health information, and a higher standard for intellectual property protections.[558] However, data localization essentially permits foreign companies to work in a country only if they build out or lease costly separate data infrastructures in that country.[559] As a result, although data localization creates greater control for the country the business is operating in, it limits access to global services for companies that are unable to create separate infrastructure or unwilling to allow government access to data.

Both the USMCA and CPTPP recognize and call for strengthening the existing mechanism to cooperate and identify cyber threats among parties.[560] However, these U.S.-backed trade agreements' calls for intelligence sharing may be stunted if parties use equipment or platforms from China, a country that has often advocated for greater state sovereignty over data flow.[561] This contrast highlights a critical issue in multilateral trade agreements related to digital technology – a lack of consensus over state involvement and data localization.

III. Development: The Gap Between International Law and the Needs of Developing Countries

Cybercrimes have a disproportionate effect on developing countries, not only because of rampant cyberattacks, but also because of their reliance on technologies. The rapid population and GDP growth in developing countries over the past two decades is linked to the liberalization of telecommunications, the widespread availability of mobile technologies, and the increasing availability of broadband systems.[562] However, this increasing reliance on technology brings about cybersecurity concerns. Developing nations struggle with a lagging capacity to deal with cyberattacks, despite an increasingly digitalized infrastructure. Cyberattacks have often impacted financial services and private infrastructures.[563] Although some governments have alerted businesses and citizens of cyberthreats, the attacks continue

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[557] ibid art. 12.14.

[558] Michael Giest, 'How the USMCA Falls Short on Digital Trade, Data Protection, and Privacy' Washington Post (Washington DC, 3 October 2018) <www.washingtonpost.com/news/global-opinions/wp/2018/10/03/how-the-usmca-falls-short-on-digital-trade-data-protection-and-privacy/>.

[559] The Coming North American Digital Trade Zone (*Council on Foreign Relations*, 9 October 2018) <www.cfr.org/blog/coming-north-american-digital-trade-zone>.

[560] USMCA (n 38) art. 19; CPTPP (n 40) art. 14.

[561] Intel Brief, 'Could Huawei Signal the End of the "Five Eyes"?' (*Cipher Brief*, 28 March 2019) <www.thecipherbrief com/columnarticle/could-huawei-signal-the-end-of-the-five-eyes.

[562] GSMA, The Mobile Economy Report 2013 (A.T. Kearney: London, United Kingdom, 2013) [16].

[563] UNESCAP Handbook (n 4).

to remain rampant.[564] For example, Africa lost approximately USD $3.5 billion to cybercrimes in 2017.[565] Additionally, developing nations, especially those in the Arab region, are often targets of cybercrime because of the "significant gains, low risks, remote access, and the relative difficulty of assigning liability."[566] These issues are compounded by political instability, prioritizing other problems, or a lack of digital culture among officials, all of which can create difficulty in ensuring legislation passes. This section explains why developing nations also struggle with enforcement against cybercrimes.

A. Issues with Access to Data

Developing nations often lack access to data when conducting enforcement because the evidence is often located in a foreign service provider, which often requires a request through a bilateral mutual legal assistance treaty (MLAT). Developing nations are often unable to exercise extraterritorial production orders due to a lack of personal jurisdiction over service providers because most service providers are located in larger countries.[567] For example, U.S. law allows service providers to disclose data on a voluntary basis if requested by foreign law enforcement.[568] From the transparency reports of Facebook, Google, and Microsoft, African governments only made sixty-three requests in 2019, most of which were rejected.[569]

There are three reasons for the disparity. First, many developing nations lack MLATs in the first place. When prioritizing bilateral agreements, countries often prioritize agreements with countries holding the most electronic evidence, such as the United States, EU countries, and India, which creates a gap in mutual assistance for mid-sized to smaller countries.[570] As a result, criminal investigations in these countries often lack crucial evidence. Second, an enforcement agency might lack awareness of these request channels, assuming that the request would be ignored or take too long, or there is a lack of substantive or procedural laws.[571] Third, this disparity is compounded because the more experience an internet service provider has with information requests from a particular country, the more the country's due process is authenticated.[572] Since smaller countries often do not make requests, the service provider has no similar basis for determining if due process standards are satisfied and are therefore more likely to reject the request. These factors contribute to access to data issues when investigating a crime.

B. A Lack of Consensus Over Digital Trade

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[564] Landry Signé and Kevin Signé, 'How African States Can Improve Their Cybersecurity' (*Tech Stream*, 16 March 2021) <www.brookings.edu/techstream/how-african-states-can-improve-their-cybersecurity/> [hereinafter Signé and Signé].

[565] Kenya Cyber Security Report 2017, 'Demystifying Africa's Cyber Security Poverty Line' (*Serianu*, 2017) <www.serianu.com/downloads/KenyaCyberSecurityReport2017.pdf>.

[566] United Nations Economic and Social Commission for Western Asia 'Policy Recommendations on Cybersecurity and Combating Cybercrime in the Arab Region' (2015) E/ESCWA/TDD/2015/1/Summary <https://archive.unescwa.org/sites/www.unescwa.org/files/uploads/policy-recommendations-cybersafety-arab-region-summary-english.pdf> [hereinafter UNESCWA Recommendations].

[567] Greaves (n 35).

[568] U.S. Department of Justice, 'Promoting Public Safety, Privacy, and the Rule of Law Around the World: The Purpose and Impact of the CLOUD Act' (April 2019) <www.justice.gov/opa/press-release/file/1153446/download>.

[569] Greaves (n 35) fn 19-20.

[570] ibid.

[571] ibid.

[572] ibid.

The issue of state sovereignty over source code review for malicious content has been a source of ideological disagreement. On one hand, Western nations, as seen in both the USMCA and CPTPP, have included provisions in trade agreements to preclude party access to source code.[573] As a result, businesses are left to negotiate their own source code verification provisions on a contract-by-contract basis, without government involvement in forming agreements to mandate access to source code.[574] On the other hand, China- and Russia-led initiatives for greater government sovereignty and extraterritorial jurisdiction have resulted in policies such as mandatory source code inspection. IBM and Microsoft agreed to let the Chinese government inspect its code in a secure setting in 2015, resulting in Western criticism.[575] Without a coordinated approach to digital trade and cybersecurity, private businesses are left to negotiate their own terms. While digital trade provisions of the USMCA and CPTPP provide some feasible cooperation, trade wars and the fight for government sovereignty suggest that attempts at coordination in trade agreements are unlikely to create solutions with a global reach.

Although approaches to digital trade exist between larger countries, the trickle-down effect on developing nations is even greater. While larger countries are in a position to either demand or circumvent source code inspection, developing nations do not hold the same power. In using platforms and services from developed nations, developing nations do not have the same bargaining power to demand source code inspection as China or Russia can due to their high reliance on these services, their lack of alternatives, and their small percentage of the service providers' total income. As a result, developing countries are subject to the service providers' promise of security and protection from the threat of malicious code.

C. Inadequate Access to Cybercrime Enforcement Tools

Most training modules and legislation, if any at all, in developing countries are directly "copied and pasted" from Western legislation.[576] These models do not adequately capture the unique needs of developing countries. Additionally, developing nations often lack personnel and training programs to combat cybercrimes.[577] Developing nations often deal with a lack of cybercrime enforcement tools. These tools should describe immediate, nation-wide actions with digital fallback alternatives should the government or private organizations experience a sudden loss of digital tools.[578] A country's enforcement plan must be context-dependent to account for the developing nation's low income and lack of cybersecurity specialists to carry out a response plan.[579]

Developing nations often lack the infrastructure to deal with cyberthreats. Compared to developed nations, developing nations notably lack data protection legislation, breach notification measures, legislation on the theft of personal information, legislation on illegal access, and legislation on online harassment.[580] Additionally, developing nations lag in having

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[573] CPTPP (n 40) art. 14.11-13; USMCA (n 38) art. 19.11-12.

[574] Keitner and Clark (n 39) 6.

[575] Bogdan Popa, 'Microsoft, Intel, Others Oppose China's Plans to Get Access to Source Code' (*Softpedia News*, 5 December 2016) <https://news.softpedia.com/news/microsoft-intel-others-oppose-china-plans-to-get-access-to-sourcecode-510723.shtml>.

[576] Catherine Chapman, 'How Africa is Tackling its Cybersecurity Skills Gap' (*The Daily Swig*, 22 August 2018) <https://portswigger.net/daily-swig/how-africa-is-tackling-its-cybersecurity-skills-gap>.

[577] ibid.

[578] Signé and Signé (n 57).

[579] ibid.

[580] Global Cybersecuirty Index 2020 (*ITU Publications*, 2022) <www.itu.int/epublications/publication/D-STR-GCI.01-2021-HTM-E/>.

national Computer Incident Response Teams (CIRTs) or Computer Emergency Response Teams (CERTs) and sector-specific CERTs, as well as total spending in its CIRT if it has one.[581]

D. Issues with Local Legislation on Cybercrime

Trends show that legal texts on cybercrime, if a country even has legislation, are not codified under one law but are instead spread out among penal codes, information technology laws, and criminal procedure laws.[582] Additionally, existing legislation often focuses more on criminalizing cybercrime than on procedural aspects such as evidence collection and international cooperation.[583] Because developing countries often prioritize legislation connected with economic growth, as seen in the Malabo Convention,[584] these countries have been slow in updating both substantial and procedural laws relating to cybercrime.

E. The Gap in Cybersecurity for Developing Nations

As discussed in the introduction, developing nations are especially vulnerable to cyberattacks because they have less developed cybersecurity laws, major service providers are often located in developed nations, and the countries tend to focus on other areas of economic growth rather than combating cyber threats. Compounded with rampant cyberattacks, developing countries are at a disadvantage in protecting their cybersphere.

IV. Trade: What Multilateral Treaties Should Incorporate As Their Focus

The challenges created by existing trade agreements and the cybersecurity issues among developing nations highlight reasons why new trade rules are needed. In an ideal world, parties would negotiate a multilateral trade agreement under the WTO or a similar agreement. However, government respect for sovereignty in the form of data localization and national security has shown that such an agreement would be unlikely. While trade agreements like the USMCA, CPTPP, and DEPA offer a starting point for mutual cooperation in digital trade, these Agreements are limited by region. Because of the gaps for developing nations created by the current frameworks, this section offers three recommendations for trade agreements.

A. Global Cybersecurity Standards

First, parties need to create common cybersecurity standards based on best practices. This would include common security features with a task force developing relevant standards. As previously discussed, some countries prioritize sovereignty, while others prioritize access. A framework for identifying which policies are effective for managing risks would be particularly helpful for developing nations. Because of a greater focus on other sectors such as financial banking or trade, government agencies often lack the specialization in understanding cybercrime, which creates an ineffective system.[585] A task force for best practices can help developing countries establish an agency with a cyber specialization. Trade agreements can

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[581] ibid.
[582] UNESCWA Recommendations (n 59).
[583] ibid.
[584] Yohannes Eneyew Ayalew, 'The African Union's Malabo Convention on Cyber Security and Personal Data Protection Enters into Force Nearly After a Decade. What Does it Mean for Data Privacy in Africa or Beyond?' (EJIL Talk, 15 June 2023) <www.ejiltalk.org/the-african-unions-malabo-convention-on-cyber-security-and-personal-data-protection-enters-into-force-nearly-after-a-decade-what-does-it-mean-for-data-privacy-in-africa-or-beyond/>.
[585] Meltzer (n 24).

then be used to reinforce the role of consensus-based standards by developing commitments for domestic regulation.[586] In short, creating international standards would support developing globally consistent, least trade-restrictive approaches to cybersecurity, as well as provide legislative guidance and local research data for parties with less developed cybersecurity regulations.

B. Compliance Mechanisms

Although regional conventions on cybersecurity can be useful and offer a more in-depth framework to combat cyberthreats, conventions like the Budapest Convention lack compliance mechanisms.[587] Trade agreements can encourage parties to regularly self-assess their progress while minimizing the burdens they impose on trade by requiring governments to allow other parties to undertake conformity assessments in the country of export. Developing countries often lack the bargaining power to ensure internet service providers and exporters of digital trade comply with local standards, therefore exposing developing countries to greater cyberthreats.

Compliance mechanisms would also help countries deal with issues of judicial specialization. This is important for two reasons. First, because of a greater focus on other sectors such as financial banking or trade, government agencies often lack specialization in understanding cybercrime, which creates an ineffective system. A global cybersecurity standard can help developing countries establish an agency with a cyber specialization. Second, because cybercrimes are often cross-border, prosecuting a crime often requires working with Anglo-Saxon legal systems.[588] The judicial systems in developing nations often lack expertise in foreign legal systems, most of which are more specialized in combating cybercrime because they have more cases and personal jurisdiction over internet service providers. As a result, reliance on global standards may help countries have more bargaining power in disputes over where judicial proceedings should take place and will place enforcement agencies in a better position when negotiating.

C. Access to Data and Information Sharing

Finally, mutual cooperation in cybersecurity requires real-time sharing of information of threats to promote awareness, plan responses, and adapt. Some trade agreements, such as the CPTPP and USMCA, and conventions, such as the Budapest Convention and Malabo Convention, have listed commitments to information flow to avoid data localization requirements.[589] Additionally, trade agreements need to include commitments to improve information sharing with international partners and along supply chains by committing to public and private sector information sharing mechanisms.

For example, trade agreements expedite information sharing by encouraging governing systems to act as authenticating organizations between countries, similar to correspondent banking transactions.[590] The correspondent banking transaction model[591] would use regional

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[586] ibid.

[587] Cybercrime Programme Office (C-PROC) of the Council of Europe, 'CyberEast - Action on Cybercrime for Cyber Resilience in the Eastern Partnership region (PMM 2088)' (C of E, 2021) <https://rm.coe.int/2088-cybereast-summary-and-workplan-v9/1680a4db77>.

[588] UNESCWA Recommendations (n 59).

[589] CPTPP (n 40) art. 14.11-13; USMCA (n 38) art. 19.11-12.

[590] Greaves (n 35).

[591] ibid.

organizations or Cyber Emergency Response Teams (CERTs) to authenticate a country.[592] In applying this model to cross-border data sharing, a regional organization or CERT can act as a large bank on behalf of developing countries in the region.[593] The regional organization can enter into bilateral agreements with the small, individual countries and act as a point of contact to authenticate the requests from these small countries.[594] This approach bypasses the costs for individual nations to create legislation, local procedures, and bilateral agreements.

D. Mutual Cooperation in Cybersecurity

All the above mentioned areas of improvement for trade agreements – creating global compliance standards, compliance mechanisms, and access to data – focus on mutual cooperation. Because of an increasing gap in cybersecurity between developed and developing countries, and because of the pervasiveness of cyber threats, there is an even greater need for mutual cooperation. A data localization model would merely further drive developing countries to combat threats alone.

V. Conclusion

Increasing digital connectedness and interdependence in trade necessitates that regulatory barriers to cooperation be impermeable. In recent years, countries have increasingly relied upon digital trade. However, with this reliance comes greater cyberthreats. These issues have been exacerbated by the COVID-19 pandemic and trade agreements are not well-equipped to deal with cybersecurity. Although the WTO and many traditional free trade agreements carve out exceptions for necessity and security, cyberthreats should be dealt with on their own, rather than as an exception for governments to act. Additionally, regional trade agreements have highlighted the ideological differences between mutual cooperation and data localization in trade. The myriad issues developing nations deal with, in particular – access to data, lack of consensus over how digital trade should be framed, lack of enforcement tools, and underdeveloped local legislation – have proven the need for greater mutual cooperation. In a world of developing countries rapidly turning to digital trade for all their transactions, cybersecurity must be a primary, if not a paramount, consideration in trade agreements.

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[592] Greaves (n 35) (In correspondent banking transactions, a smaller Bank A in Country X would not have a direct relationship with smaller Bank D in Country Y. To make a payment, Bank A would utilize its relationship with large Bank B in Country X, who has an existing relationship with large Bank C in Country Y)

[593] ibid.

[594] ibid.

CHAPTER 9: ENABLING TRUSTWORTHY DIGITAL TRADE FOR SUSTAINABLE DEVELOPMENT: CYBERSECURITY IS ESSENTIAL FOR INCLUSIVE TRADE AND INVESTMENT

CRISTEN BAUER*

Abstract

The global economy is today a digital economy, and information and communications technology (ICT) has the potential to spur a new era of inclusive trade where all people and businesses can benefit from improved access to the global trading system. The COVID-19 pandemic and the years since have underscored the importance of ICTs in all aspects of our lives, as remote work, e-commerce, and distance learning, and telemedicine have boomed. However, more than half of the global population still unconnected from the Internet, revealing the growing chasm of the digital divide and highlighting the pressing need for us to facilitate trade and investment that can bring meaningful Internet access and connectivity globally to all people. At the same time, with the uptake in ICT use, we have also seen cyber-attacks proliferate. And in order to maximize the economic benefits and potential of the Internet and ICTs across populations, we must build trust. In order to build trust in 21st century trade and investment, robust, cross-border security measures will be required. However, international coordination on cybersecurity measures used to reduce the risks of cyber-attacks remains a challenge. Diverging domestic regulatory approaches to cybersecurity and a recent shift among governments towards assessing cybersecurity risk as a national security threat have led to a number of new challenges, including a rise in new digital trade barriers and digital protectionism. These challenges underline the urgent need for cooperative trade rules on cybersecurity that can help safeguard and facilitate trustworthy twenty-first century trade and investment. However, given the limits of the current WTO rule/exception framework for regulating cross-border data flows and related public policy constraints, like cybersecurity, global digital and sustainable development will remain a challenge. This paper outlines some of the main cybersecurity challenges in the digital trade context and argues that cybersecurity regulatory controls should be embedded in all levels of digital trade and investment legal frameworks in order to facilitate digital trade and sustainable development.

Introduction

Digital technologies underpin efforts to realize all of the 17 UN Sustainable Development Goals.[595] The global economy is today a digital economy and information and communications technology (ICT) have the potential to unleash a new era of inclusive trade where people and businesses, regardless of size, sector or location, can benefit from improved access to the global trading system. This potential is not limited to the ICT sector and to digital firms – arguably, the biggest economic impact comes from the digitalization of processes and supply chains across all sectors of the global economy.

However, cybercrime threatens to thwart the potential economic impact of ICT and digital development, as consumer and business express growing concerns over cybersecurity.[596]

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[595] *See* U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY, U.N. Sales No. E.17.II.D.3 (2017).

[596] *See* John Nanry, Subu Narayanan & Louis Rassey, *Digitizing the Value Chain*, MCKINSEY & CO. (Mar. 2015), https://www.mckinsey.com/business-functions/operations/our- insights/digitizing-the-value-chain.

Today, cybercrime impacts all businesses regardless of size or industry, with around 50% of all cyber-attacks being committed against small and medium-sized enterprises (SMEs).[597] Experts estimate that cybercrime costs the world 600 billion U.S. dollars (0,8% of global GDP) annually, reflecting losses to companies, investors, individuals and governments.[598]

Cybercrime is not just committed by rogue, individual actors but also by state actors and the proliferation of this state-sponsored cyber mischief has become especially problematic.[599] The power imbalance based on the enormous resources of these state and state-sponsored cyber-attacks has led to significant challenges for businesses and also led to a blurring of the threshold for state sponsored cyber behaviour in peace time. This behaviour has fuelled conversation around a need for actionable solutions and an improved international legal framework for cyber peace.[600]

The UN Group of Government Experts (GGE) and UN Open Ended Working Group (OEWG) have reignited discussions around cybersecurity in an effort to quell geopolitical tensions over state-sponsored behaviour, as well as address the myriad of business and economic concerns around tackling cybercrime more broadly. The groups are working to tackle cyber issues, including the applicability of international humanitarian law and state responsibility in cyberspace. However, given the diverging 'norms' on fundamental cybersecurity issues and definitions and the difficulties plaguing the GGE, a comprehensive (or timely) international legal agreement on cyber is unlikely.[601]

As such, this paper argues that the international community should decouple discussions around issues of state-responsibility and cyberwarfare and incorporate cyber provisions into international trade and investment agreements. International rules on cybersecurity are necessary to safeguard and facilitate 21st century trade and investment. By embedding such regulatory controls in trade and investment agreements, we can help facilitate a common understanding of cybersecurity policy and best practices in order to foster a more secure Internet for investors, businesses and users in order to fully realize the potential of the digital economy.

In the context of COVID-19, e-commerce and digital services such as digital education platforms and video applications like Zoom have become enormously important and have highlighted the need for us to facilitate trade and investment that can bring meaningful internet access and connectivity to all people. At the same time, cybercrime has proliferated during the pandemic – underscoring the urgent need for international rules on cybersecurity to help enable inclusive trade and help bridge the digital divide. In order to maximize the economic benefits of online activity across populations, we must build trust; and robust, cross-border security measures will be required. Addressing cybersecurity concerns will help facilitate the

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[597] *See* Cybercrime costs reflect losses to companies, investors, individuals, and governments. *See* STEVE MORGAN, CYBERSECURITY VENTURES, 2017 CYBERCRIME REPORT 3 (2017).

[598] See CSIS, ECONOMIC IMPACT OF CYBERCRIME—NO SLOWING DOWN, (Feb. 2018), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/economic-impact-cybercrime.pdf?kab1HywrewRzH17N9wuE24soo1IdhuHdutm_source=Pressutm_campaign=bb9303ae70-EMAIL_CAMPAIGN_2018_02_21utm_medium=emailutm_term=0_7623d157be-bb9303ae70-194093869.

[599] *See* Scott J. Shackelford et al., *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. 1, 2–3 (2015).

[600] *See From Multilateral to Multistakeholder? New Developments in UN Processes on Cybersecurity*, COUNCIL ON FOREIGN REL. (Jan. 27, 2020), https://www.cfr.org/blog/multilateral-multistakeholder-new-developments-un-processes-cybersecurity.

[601] *See id. A Cyberspace 'FIFA' to Set Rules of the Game? UN States Disagree at Second Meeting*, COUNCIL ON FOREIGN REL. (Mar. 2, 2020), https://www.cfr.org/blog/cyberspace-fifa-set-rules-game-un-states-disagree-second-meeting.

trade and investment necessary to reach the goals for global digital development by fostering trust in emerging industries.

To that end, this paper discusses (1) the potential for ICTs and digital technology to drive inclusive trade and investment; (2) the main cybersecurity issues and challenges that businesses, investors, and society are facing; and (3) the opportunity to incorporate cybersecurity provisions into international trade and investment agreements.

I. The Potential for ICT and Digital Technology

ICTs and digital technology have the potential to drive inclusive trade and investment and sustainable digital development. SMEs represent 60% of private sector jobs and access to affordable and relevant technology can transform SMEs by reducing traditional trade barriers and increasing productivity, efficiency, and innovation across all sectors.[602] The digital economy can make markets more accessible to exports, including by linking domestic companies and SMEs to global value chains (GVCs).[603] The World Bank has found that SMEs that use on-line platforms are five times more likely to export than those in the traditional economy.[604] The digital economy can also open up niche sectors and create opportunities for new types of entrepreneurs. For example, in China, though women account for only 25% of all entrepreneurs, they have founded 55% of all new online businesses.[605]

In order to seize the opportunity of ICTs for trade and investment, Internet access is an important prerequisite. Connectivity underpins national efforts to develop knowledge economies, fostering digital transformation across all sectors, expanding opportunities for SMEs and providing greater value for citizens and consumers. For that to happen, continued long-term investment in infrastructure, cybersecurity, local application and service providers, and digital skills will be required.[606] According to the Broadband Commission, more than 50% of the world is now using the Internet, and it estimates that connecting a further 1.5 billion people would require US$450 billion in high-level infrastructure investment.[607] However, it is important to bring meaningful connectivity that will have the power to include new players in the global trading system. This will require a focus on Internet adoption barriers, including creating locally relevant content in local languages, addressing digital literacy skills gaps, and creating a secure environment to conduct business online.[608]

Trade and investment can act as a catalyst for digital transformation, but for these technologies to reach their full potential, they must be reliable, relevant and secure. Currently, the lack of a sufficient international cybersecurity framework and lack of binding digital trade rules has created an environment for both cybercrime and digital protectionism to proliferate, which is deterring trade and investment. As we move towards a global framework on cyber, it

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602 *See* Elizabeth Gasiorowski-Denis, *The big business of small companies*, ISO (Mar. 4, 2015) https://www.iso.org/news/2015/03/Ref1937.html#:~:text=Although%20precise%20data%20is%20unavailable,gross%20value%20add%20(GVA).

603 *See* Francesca Casalini and, Javier López González, *Trade and Cross-Border Data Flows*, OECD Trade Policy Papers No. 220.

604 *See* id.

605 *See* Simone McCarthy, *Chinese Women Are Killing It In WeChat Commerce*, SUPCHINA (Mar. 22, 2017) https://supchina.com/2017/03/22/chinese-women-wechat-commerce/.

606 *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

607 *See* ITU/UNESCO BROADBAND COMMISSION FOR SUSTAINABLE DEVELOPMENT, THE STATE OF BROADBAND: BROADBAND AS A FOUNDATION FOR SUSTAINABLE DEVELOPMENT SEPTEMBER 2019 (2019).

608 *See* id. U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

is important to understand the complex nature of cybersecurity challenges, which are outlined in the following section.

II. Cybercrime and the digital economy

Cybercrime has reshaped our world and pushed the boundaries of international legal frameworks, as businesses, policymakers and users struggle to keep up with this rapidly evolving issue. In 2019, the average cost of a data breach was USD$ 3.92 million.[609] Yet, the cost of cyber breach for business extends beyond just purely monetary damage, as the loss of trade secrets, privileged, proprietary information, or reputational damage could threaten to destroy a business entirely.[610] In the United States, 60% of SMEs are out of business within six months of a cyberattack.[611] As businesses across all parts of the traditional economy, from manufacturing to energy, seek to digitalize their operations as a way to increase competitiveness, the impact of cybercrime will continue to grow, especially as state and non-state actors increasingly seek to target and disrupt critical infrastructure and systems.[612]

Cybercrime and the cybersecurity legislation enacted to quell cybercrime threaten to thwart the potential economic impact of ICT and digital development. In an attempt to deal with cybercrime, regulators have enacted legislation such as data localization requirements, restrictions on cross-border data flows and software disclosure requirements – many of which have inadvertently resulted in new non-tariff barriers. The range and complexity of cybersecurity issues is itself a challenge for regulators, as they need to draft legal frameworks that are both robust and effective, while still provide an enabling environment that will allow for the digital economy to flourish.[613] This section outlines some of the main cybersecurity issues and challenges, which provides context and support for embedding cyber controls inside of trade and investment agreements.

A. Cyberattacks are borderless, increasingly complex, and constantly evolving.

The borderless nature of the Internet, the digital economy, and cybercrime paints a complex legal and operational picture for cybersecurity. Most sectors use ICTs and rely on the Internet for everything from the simplest to the most strategic tasks. This rise of technology and the digitalization of business processes has allowed for increases in productivity and competitiveness, but it has also exposed companies to new cyber risks. Global supply chains are increasingly more interconnected, and the ICT systems along those supply chains have both internal and external devices meant to facilitate business operations. However, more interconnected systems make combating cybercrime even more challenging, as threat actors

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[609] *See* PONEMON INSTITUTE, COST OF A DATA BREACH REPORT *2019,* https://www.all-about-security.de/fileadmin/micropages/Fachartikel_28/2019_Cost_of_a_Data_Breach_Report_final.pdf.

[610] *See* Nick Eubanks, *The True Cost of Cybercrime for Businesses*, FORBES (July 13, 2017), https://www.forbes.com/sites/theyec/2017/07/13/the-true-cost-of-cybercrime-for-businesses/#7d15cf214947; *See* PONEMON INSTITUTE, 2016 COST OF CYBER CRIME STUDY & THE RISK OF BUSINESS INNOVATION 12 (2016).

[611] *See* Robert Johnson, *60 Percent Of Small Companies Close Within 6 Months Of Being Hacked*, CYBERSECURITY VENTURES (Jan. 2, 2019) https://cybersecurityventures.com/60-percent-of-small-companies-close-within-6-months-of-being-hacked/.

[612] *See* Gerardo Guzman, et al. UNLOCKING THE VALUE OF DIGITAL OPERATIONS IN ELECTRIC POWER GENERATION (McKinsey & Company) (2019)*;* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

[613] *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, FACT SHEET ON THE 2020 NATIONAL TRADE ESTIMATE: STRONG, BINDING RULES TO ADVANCE DIGITAL TRADE, (2020).

can exploit vulnerabilities in businesses processes and target individual employees across all parts of the supply chain.[614] Neither businesses nor governments can combat these borderless threats on their own and the increasing digitalization of all sectors, makes the global economy increasingly vulnerable.[615] As businesses and regulators both seek to find meaningful ways to mitigate cybersecurity concerns, collaboration is required in order to build awareness of vulnerabilities and incidents and to increase resilience against these complex, borderless cyber threats.

B. An increase in state-sponsored cyber attacks

While there have been a number of international and bilateral policy statements to restrain state-sponsored cyberattacks targeting enterprises and critical infrastructure, the business community continues to be exposed to serious and growing cyber threats from state actors.[616] State-sponsored espionage has been on the rise, with 20% of global businesses ranking it as the most serious risk to their business.[617] The power imbalance based on the enormous resources of these state and state-sponsored cyber-attacks has led to significant challenges for businesses and also led to a blurring of the threshold for state sponsored cyber behaviour in peace time. Despite these pervasive challenges, progress in developing and adopting international norms governing and binding states to responsible behaviour in cyberspace has been slow.[618]

C. Fragmented approaches to cybersecurity

Globally, there are fragmented approaches to cybersecurity which has contributed to an environment where cybercrime can flourish.[619] Threat actors in a cyberattack can include anyone seeking to disrupt one of the three fundamental pillars of cybersecurity – confidentiality, integrity, or availability (CIA) – and prevent a system to perform as needed.[620] A cyberattack can involve unsanctioned access to and theft of information, changes to data, or preventing the use or access to information or systems.[621] One of the challenges to fostering comprehensive approaches to cybersecurity is the fragmentation of approaches, which has led to a lack of definition or common understanding of the types of threats and cybercrimes.[622] This complex nature of these crimes and rapidly changing threat profile makes conceptualizing cyber threats difficult. Current business approaches to cybersecurity can only go so far and

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[614] *See Increasing International Cooperation in Cybersecurity and Adapting Cyber Norms,* COUNCIL ON FOREIGN REL. (Feb. 23, 2018), https://www.cfr.org/report/increasing-international-cooperation-cybersecurity-and-adapting-cyber-norms.

[615] *See* id.

[616] *See* Justin Sherman, *How Much Cyber Sovereignty is Too Much Cyber Sovereignty?* COUNCIL ON FOREIGN REL. (Oct. 30, 2019), https://www.cfr.org/blog/how-much-cyber-sovereignty-too-much-cyber-sovereignty.

[617] *See* Business Wire, *Cyber Espionage Tops the List as Most Serious Threat Concern to Global Businesses in 2017,* BUSINESS WIRE (Mar. 2017) https://www.businesswire.com/news/home/20170314005235/en/Cyber-Espionage-Tops-List-Threat-Concern-Global/?feedref=JjAwJuNHiystnCoBq_hl-Q-tiwWZwkcswR1UZt V7eGe24xL9TZOyQUMS3J72mJlQ7fxFuNFTHSunhvli30RlBNXya2izy9YOgHlBiZQk2LOzmn6JePCpHPCiY GaEx4DL1Rq8pNwkf3AarimpDzQGuQ.

[618] The Group of Governmental Experts is a UN-mandated working group on advancing responsible state behavior in cyberspace in the context of international security that has been working since 2004. See, UNGA Resolution 73/266.

[619] *See* Francesco Calderoni, *The European Legal Framework on Cybercrime: Striving for an Effective Implementation*, 54 CRIME L. & SOC. CHANGE 339 (2010).

[620] *See* id.

[621] *See* id.

[622] *See* JEFF KOSSEFF, CYBERSECURITY LAW 233 (2017).

effective public-private cooperation is essential to strengthening security and responding to the large and growing range of cybersecurity threats to the global Internet. It is essential that businesses and governments have a shared understanding of how to conceptualise cybersecurity threats, impacts, and responses.

D. Regulatory responses to cybersecurity can negatively impact trade and investment.

In trying to bridge the global digital divide, states need to provide an enabling environment for trade and investment in order to stimulate digital development in areas such as ICT infrastructure, Internet services, and digital solutions providers.[623] Increased cybersecurity regulation can stimulate the digital economy, as online security measures build trust for users, businesses and investors. However, cybersecurity legislation should not be implemented in a way that is inadvertently (or intentionally) arbitrary, ambiguous, or lack transparency. The integration and interdependence of the digital environment relies on compatible rules between national jurisdictions and open cross-border data flows in order to keep data moving seamlessly. Implementing cyber measures that disproportionately restrict cross-border data flows or reduces market access might negatively impact trade, investment, or innovation.

A few examples of such kinds of measures, include data localization, content restriction and source code disclosure requirements. Data localization measures include requirements to process and store data locally inside of a country. It has been touted by some states as a way to protect national security or privacy; while others chalk those policies up to digital protectionism.[624] Meanwhile, tech experts challenge the voracity of protecting privacy or cybersecurity via data localization.[625] These policies significantly increase costs, reduce investment, and can force smaller digital firms to leave the host state – resulting in less proficient service providers for domestic business and customers.[626]

Data localization can also manifest as limits on cross-border data flows and content restrictions, which can amount to substantial Internet censorship and fragmentation.[627] The World Investment Report says, 'content restrictions, ranging from filtering to internet shutdowns, can undermine opportunities in a country and fuel uncertainty.'[628] For example, in 2018, Vietnam approved a new cybersecurity law requiring data localization that tightens restrictions on Internet data-flows and content.[629] Google, Twitter and Facebook who had already established a physical presence in the country all publicly objected to the changes on economic and human rights grounds.[630]

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[623] *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

[624] *See* WILLIAM J. DRAKE, VINTON G. CERF & WOLFGANG KLEINWÄCHTER, WORLD ECON. FORUM, INTERNET FRAGMENTATION: AN OVERVIEW 41–45 (2016).

[625] *See* id.

[626] *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

[627] See RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R44565, DIGITAL TRADE AND U.S. TRADE POLICY (2019).

[628] *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 1.

[629] *See* Mai Nguyen, *Vietnam Lawmakers Approve Cyber Law Clamping down on Tech Firms, Dissent*, REUTERS (June 11, 2018, 11:04 PM), https://www.reuters.com/article/us-vietnam- socialmedia/vietnam-lawmakers-approve-cyber-law-clamping-down-on-tech-firms-dissent- idUSKBN1J80AE [https://perma.cc/YC8V-9GB7].

[630] *See* Jon Russell, *Vietnam's New Cyber Security Law Draws Concern for Restricting Free Speech*, TECHCRUNCH (June 12, 2018), https://techcrunch.com/2018/06/12/vietnams-new-cyber-security-law-draws-concern-for- restricting-free-speech/.

It is important to keep the context of cybersecurity challenges in mind when contemplating how to effectively embed cyber protections into trade and investment agreements.

III. Incorporating cybersecurity provisions into trade and investment agreements

Incorporating cybersecurity provisions into trade and investment agreements can enable inclusive trade, investment and digital development. Binding cyber provisions inside of trade agreements can help build trust, certainty and predictability among businesses and consumers seeking to use ICTs as a way to partake in the global trading system. Globally aligned approaches to cyber risk management can facilitate interoperability and improve visibility and understanding among entities that have cross-border operations.

As we move towards a global framework on cyber, a primary question is *how* to effectively incorporate cybersecurity provisions into international trade and investment agreements? How do we create effective legal frameworks that will facilitate robust cyber practices across national, regional, and global supply chains? One challenge with international agreements is that they are time-consuming and politically challenging to negotiate, so a multilateral solution might be impracticable. Additionally, international agreements must be ratified and implemented through national legislation, meaning that there might still be diverging approaches to cybersecurity, making those cyber protections somewhat less effective.[631]

Though an effective solution has yet to emerge, a couple things are clear. Though countries like China and Russia claim "cyber sovereignty" – given the borderless nature of cybercrime and the transnational landscape of the Internet and the digital economy, international cooperation on regulating cybersecurity is required.[632] Additionally, in order to avoid protectionist and ideology-based reactions to cyberattacks, we must maintain an evidence and expert-based approach in order to create sustainable, effective cyber resilience.[633]

None of the existing agreements on cyber fully addresses the breadth and depth of the issues facing actors in the digital economy. However, as we consider how to effectively embed cyber provisions into trade and investment agreements, it is important to consider whether there are lessons from any of the current and emerging international legal approaches to cyber.

A. Multilateral approach

Examples of multilateral approaches to deal with cybercrime, include the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Council of Europe Convention on Cybercrime (Budapest Convention) and the ongoing e-commerce initiatives at the WTO.[634]

TRIPS was negotiated as part of the single undertaking negotiated in the Uruguay Round at the World Trade Organization and establishes minimum standards of protection for protecting IPRs, while leaving States with the flexibility to tailor their approaches to fit their

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631 *See* Calderoni *supra* note 25.

632 *See* Justin Sherman, *How Much Cyber Sovereignty is Too Much Cyber Sovereignty?* COUNCIL ON FOREIGN REL. (Oct. 30, 2019), https://www.cfr.org/blog/how-much-cyber-sovereignty-too-much-cyber-sovereignty.

633 *Hackers protest Georgia's SB 315 anti-hacking bill by allegedly hacking Georgia sites*, CSO ONLINE (May 2, 2018), https://www.csoonline.com/article/3269535/security/hackers-protest-georgias sb-315-anti-hacking-bill-by-allegedly-hacking-georgia-sites.html; OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, FACT SHEET ON THE 2020 NATIONAL TRADE ESTIMATE: STRONG, BINDING RULES TO ADVANCE DIGITAL TRADE, (2020).

634 Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, *Global E-Commerce Talks Stumble on Data Issues, Privacy, and More*, PETERSON INSTITUTE FOR INT'L ECON (OCT. 2019).

needs.[635] While the protection of IPRs will continue to be very important in the digital economy, TRIPS has been largely ineffective at providing adequate protections and enforcement mechanisms.[636] Many of the complaints around theft of IPR, such as for example, through source code disclosure requirements are in fact used as part of domestic "cybersecurity" measures. However, these types of disclosures can lead to the expropriation of trade secrets and proprietary information.[637] Though there is a need for to balance genuine political sensitivities and urgencies of combating cyber, the use of national security exceptions has plagued the TRIPS system. Since IPR protection intersects heavily with cybersecurity, if cyber protections are to be incorporated into trade and investment agreements, this exception will need to be addressed with innovative legal solutions.

The Budapest Convention is widely regarded as the most comprehensive international agreement on cybercrime cooperation. It seeks to harmonize local cybercrime laws and facilitate cross-border investigatory efforts, such as coordinating law enforcement and extradition efforts.[638] Sixty-five countries have ratified the Convention, with a few notable exceptions – China, India, and Russia. Though the Budapest Convention is not ubiquitous, it has provided some hope for multilateral agreements on cyber. Some states have taken a more flexible approach, and while they have not signed or ratified, many have used Budapest Convention (or pieces of it) as a model text for their national cybercrime legislation.[639]

B. Multistakeholder approach

Some cyber experts recognize and call for a "polycentric approach" to cybersecurity – which is a combination of "private-sector cybersecurity best practices, along with national, bilateral, and regional bodies acting as norm entrepreneurs…in this multi-level, multi-purpose, multi-functional, and multi-sectoral model…that promotes a global culture of cybersecurity".[640] To create effective global cyber resilience, there is a need for multifaceted cooperation across all stakeholders, but does this strategy provide actionable solutions for businesses and investors? Research suggests that this approach might not be an effective long-term solution, as network effects may render polycentric governance difficult to maintain.[641] Thus, there is a need to incorporate such regulatory controls in trade and investment agreements.

Another multistakeholder model has emerged in the aforementioned UN negotiations taking place in the OEWG during in the 2019-2020. The OEWG consists of all interested UN member states, as well as interested stakeholders from academia, private sector and civil society groups who can participate as observer delegations in official meetings and in intersessional consultations. The OEWG was born out of calls for a more inclusive approach

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[635] Daniel J. Gervais, *Intellectual Property, Trade and Development: The State of Play*, 74 FORDHAM L. REV. 505 (2002),
[636] RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R44565, DIGITAL TRADE AND U.S. TRADE POLICY (2019).
[637] *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).
[638] The Budapest Convention was adopted in 2001 and is open for accession by non-convention parties. *See* Calderoni *supra* note 25.
[639] *See* id.
[640] *See* Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192, 199–201 (2009).
[641] *See* Bryan Druzin, *Towards a Theory of Spontaneous Legal Standardization*, 8 J. INT'L DISP. SETTLEMENT 403 (2017).

to cyber negotiations and criticism of the GGE working group, which is comprised of only a selection of 25 member states. The GGE has been working since 2004 and though it had some success coalescing around cyber norms early on, since 2015, the group has failed to adopt a report.[642] This has been due to high political tensions and significant divergence on cyber norms. [643] The groups are working in parallel to address cyber norms, rules and principles – with a particular focus on state responsibility and state behaviour in cyberspace. The intent of the OEWG is to more widely socialize and flesh out the foundational ideas set forth in the GGE. It is perhaps too early to tell what lessons can be drawn from this approach, but initial statements from states and other stakeholders has been largely positive.[644] The group began discussions in September of 2019 and will present a report to the UN General Assembly in September 2020.

C. Bilateral approach

BITs are international agreements between two states seeking to balance the risks of foreign investment in potentially less-stable environments by ensuring baseline protections for their investment. BITs are designed to be a transparent framework of investment protections and state obligations. Crucially BITs allow for foreign investors to bring claims against a host state in a neutral, international forum – which could be advantageous when considering accusations of state-sponsored cyberattacks, for example.[645]

Under BITs, there is an obligation for states to refrain from any harmful acts as well as a duty to prevent harm to the investment from state and non-state actors.[646] This protection was typically seen in cases of an uprising, insurrection, or other conflict situations. However, as investor's security concerns have expanded in the digital era, this protection could also possibly extend to include cyber protections for investors. This obligation could lead to the adoption or enhancement of national cybersecurity legislation in states that are lacking updated cyber legislation. Such action could assist in creating a safer global security environment, as it could prevent cybercriminals from seeking shelter in their jurisdiction and make the state less vulnerable to cyberattacks.[647]

Though BITs might provide innovative remedies for investors and valuable ways to embed cyber protections into the trade and investment landscape, the nature of bilateral agreements might make it more challenging to effectively enhance cybersecurity. With more than 2500 active agreements, the nature and degree of commitments on potential cyber provisions will vary, which might make it "difficult to identify a clear thread of the legal framework."[648] This bilateralism might lead to further fragmentation of the cybersecurity landscape, which could result in less certainty and might lead to an environment where it is easier for cybercrime to flourish.

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[642] *See From Multilateral to Multistakeholder? New Developments in UN Processes on Cybersecurity*, COUNCIL ON FOREIGN REL. (Jan. 27, 2020), https://www.cfr.org/blog/multilateral-multistakeholder-new-developments-un-processes-cybersecurity.

[643] *See* id.

[644] *See* id.

[645] *See* Ignacio Suarez Anzorena & William K. Perry, *The Rise of Bilateral Investment Treaties: Protecting Foreign Investments and Arbitration*, IN-HOUSE DEF. Q., Summer 2010.

[646] *See* id.

[647] *See* Calderoni *supra* note 25.

[648] Rolf H. Weber, *Digital Trade and e-commerce: challenges and opportunities of the asia-pacific regionalism*, ASIAN J. OF WTO & INT'L HEALTH LAW AND POLICY, Vol. 10, No. 2 (2015).

IV. Conclusion

The global economy is today a digital economy and information and communications technology (ICT) have the potential to unleash a new era of inclusive trade where people and businesses, regardless of size, sector or location, can benefit from improved access to the global trading system. However, cybercrime threatens to thwart the potential economic impact of ICT and digital development, as consumer and business express growing concerns over cybersecurity

International rules on cybersecurity are necessary to safeguard and facilitate 21st century trade and investment. By embedding such regulatory controls in trade and investment agreements, we can help facilitate a common understanding of cybersecurity policy and best practices in order to foster a more secure Internet for investors, businesses and users in order to fully realize the potential of the digital economy. The exact nature of how to effectively incorporate cyber provisions into international trade and investment frameworks is yet to be determined. Lessons can be drawn from the advantages and disadvantages of the bilateral, multilateral, and multistakeholder approaches and these approaches can inform future research and analysis going forward. No matter the approach, it is imperative that we find meaningful ways to mitigate cybersecurity concerns in order to be able to reap the potential benefits of ICT to create a more inclusive global trading system.

CHAPTER 10: AFRICA'S DIGITAL DAWN: TOWARD AN AFRICAN CONTINENTAL FREE 'TECH' AGREEMENT

ANTOINE PRINCE ALBERT III*

649

Abstract

The African Continental Free Trade Agreement (AfCFTA) is a landmark agreement with the potential to transform the African continent into a thriving hub of technological innovation and economic growth. This article argues that the AfCFTA can achieve this potential by adopting key American legal innovations that spurred the growth of Silicon Valley such as liability safe harbor, strict intellectual property protection, and a limited privacy regime. The article provides specific recommendations for how the AfCFTA can implement this blueprint, including: prioritizing a intercontinental telecommunications infrastructure project; prescribing an continental intellectual property regime; and proposing a human-rights focused, continental privacy regime. By implementing these key recommendations, the AfCFTA can help Africa to leapfrog the traditional development path and become a global leader in the technology sector.

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649 Antoine Prince Albert III, "UAC Nkanea Golwata," Digital Artwork, 2023 (depicting the Adinkra symbol representing 'technological advancement' in the tradition of the Akan people of Ghana, incorporating the colors and the Gullah/Geechee name for Goldwater Ventures).

I. Understanding the Economic Potential of The African Continental Free Trade Area for the Technology Sector

A. Intra-continental economic partnership structured by the AfCFTA will bring the African Continental Free Trade Area, home to 2.5 billion people and generate $6 trillion USD, to life by 2030.

The Agreement Establishing the African Continental Free Trade Area (AfCFTA) is an open-ended multinational treaty, shepherded by the African Union since 2012, that "creates a single continental market for goods and services as well as a customs union with free movement of capital and business travelers" among at least 30 of Africa's 55 countries.[650] With Nigeria and Benin signing the AfCFTA in July 2019, 54 of the 55 African Union member states[651] have signed the Agreement to become the Africa Continental Free Trade Area (AfCFTA Area) – the largest "free trade area" in the world by number of countries after the World Trade Organization.[652] The world's fastest growing markets,[653] youngest workforces,[654] and most natural resources[655] are all located in Africa. The AfCFTA geographic area encompasses over 1.2 billion people with a combined GDP of between $2.5 to $3.4 trillion USD as of late 2019,[656] and will house upwards of 2.5 billion people with $6 trillion USD of purchasing power by 2030.[657]

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[650] Landry Signé, *African Development*, AFRICAN TRANSFORMATION: HOW INSTITUTIONS SHAPE DEVELOPMENT STRATEGY (2018) at 132. To date, 54 of Africa's 55 states have signed the Agreement, and only 30 have ratified it. Encouraging all 55 countries to sign, ratify, and meaningfully participate is the aspirational goal.

[651] There are currently 54 independent countries in Africa following the independence of the Republic of South Sudan on 9 July 2011. *See* T Tekle "African Union accepts South Sudan as a new member state", available at: http://www.sudantribune.com/spip.php?article39670. *See also* African Union "Member states", available at: http://au.int/en/member_states/countryprofiles.

[652] Farid Fezoua, *Africa and infrastructure: Charting the way forward*, 3 INTERNATIONAL TRADE FORUM 26 (2010) (available online at https://search-proquest-com.proxygt-law.wrlc.org/docview/2338408561?accountid=36339&rfr_id=info%3Axri%2Fsid%3Aprimo#). Though the WTO is not technically a "free trade area" the spirit of this comparison is that the AfCFTA will constitute the largest geographic free trade area in the world. I also note that the "AfCFTA" acronym refers to the Area, not the Agreement.

[653] Jurica Dujmovic, *Opinion: The next decade belongs to Africa as technology ripples through the continent: Among the world's 30 fastest-growing cities, 21 are in Africa*, Dec. 17, 2019, MARKETWATCH, https://www.marketwatch.com/story/the-next-decade-belongs-to-africa-as-technology-ripples-through-the-continent-2019-12-14/.

[654] Kingsley Ighobor, *Africa's youth: a "ticking time bomb" or an opportunity?: Leaders awakening to the need for job-creation programmes*, United Nations: Africa Renewal Blog, May 2013, https://www.un.org/africarenewal/magazine/may-2013/africa's-youth-"ticking-time-bomb"-or-opportunity (quotes: "With 200 million people aged between 15 and 24 (the youth bracket), Africa has the youngest population in the world. The current trend indicates that this figure will double by 2045, according to the 2012 African Economic Outlook report prepared by experts from the African Development Bank (AfDB), the UN Development Programme (UNDP), the UN Economic Commission for Africa (ECA) and the industrialized countries' Organization for Economic Cooperation and Development (OECD), among others.")

[655] Mundy Turner, *Scramble for Africa*, THE GUARDIAN, May 1, 2007, https://www.theguardian.com/environment/2007/may/02/society.conservationandendangeredspecies1 ("With oil, gas, timber, diamonds, gold, coltan and bauxite, Africa is home to some of the largest deposits of natural resources in the world.").

[656] *See* African Union, United Nations Economic Commission for Africa, *African Continental Free Trade Area: Updated Questions and Answers*, Jan. 2020. *See also,* Landry Signé, *Africa's Big New Free Trade Agreement, Explained,* The Washington Post, March 29, 2018, available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm_term=.7ef4d48b47cc.

[657] Farid Fezoua, *Africa and infrastructure: Charting the way forward*, 3 INTERNATIONAL TRADE FORUM 26 (2010) (available online at https://search-proquest-com.proxygt-law.wrlc.org/docview/2338408561?accountid=36339&rfr_id=info%3Axri%2Fsid%3Aprimo#). Here I stated the upper-range population and GPD numbers. However, they range significantly according to statistical modeling methods and sources.

Katrin Kuhlmann and Akinyi Lisa Aguthu explain that, beyond the scale of such an agreement between nearly six dozen legally, ethically, and geologically diverse countries, it's virtually unanimous political will during an era of geopolitical fracturing, it's "framework agreement" model, and it's "incremental" design filling in the details of the framework, all render the Agreement incomparably ambitious.[658] Further, the authors posit that the Agreement can also be a vehicle for mass sustainable development and socioeconomic empowerment for a quarter of the world's population on the continent.[659]

The aforementioned 2030 projections assume *all things equal*, meaning that the continent will grow at this exponential rate even with nominal infrastructure improvements. But the reality is that statistical modeling in Africa's growth numbers admit that the continent cannot feed and house double its existing population, let alone manage other emerging environmental and governmental challenges, without *momentous* multinational infrastructure projects and drastically increased food production and living conditions for the continent's existing population.[660]

With the Continental Agreement, the African Union seeks to harness the power of its people and its landscape, growing together by producing and consuming *intercontinentally*. As a part of the AfCFTA, countries have committed to remove tariffs on 90 percent of goods.[661] According to the UN Economic Commission on Africa, intra-African trade is likely to increase by 52.3 percent under the AfCFTA and will double upon the further removal of non-tariff barriers.[662]

B. The AfCFTA prioritizes continental technological advancement but leaves ample room for interpreting and growing the continental vision for technology advancement.

Technology-based industries are the highest-yielding growth industries with relatively low upfront infrastructure investment. Technology, being a generative and non-extractive conglomerate of industries, if adequately funded now, can power Africa's continental

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[658] Katrin Kuhlmann and Akinyi Lisa Aguthu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 4, 4-7 (Forthcoming 2020).

[659] *Id* at 7 (explaining that "The AfCFTA's objectives include sustainable and inclusive socio-economic, gender equality, and food security, linking the AfCFTA with the SDGs, in line with Agenda 2063" itself citing AfCFTA Article 3 and comparing it to the Premable to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, available at https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

[660] *See* H. Charles J. Godfray et al., *Food Security: The Challenge of Feeding 9 Billion People*, 5967(327) AM. ASSOC. ADVANCEMENT OF SCIENCE (2010), https://science.sciencemag.org/content/sci/327/5967/812.full.pdf?casa_token=nWofYn5htBgAAAAA:Z0SGRI5CQLBhEBaeqkNTisrPJlLQLwMjJgjYyoefn3uGt3mUUqFqDm3tLW-rx_k4VKKr0P_Iq2m9ijjp; PedroConceição, *Toward a food secure future: Ensuring food security for sustainable human development in Sub-Saharan Africa*, 60 FOOD POLICY (2016), https://www.sciencedirect.com/science/article/pii/S030691921600021X?casa_token=XhgpNsAjj3sAAAAA:PI7ke0OcAWBa9QBGqPuUo5bkUmgqAaD0P2voh7MIepE9ms_cC_6r5C0e5p-j5fCyf08e--CehyfD.

[661] John Campbell, *African Continental Free Trade Area: A New Horizon For Trade in Africa ,* COUNCIL ON FOREIGN RELATIONS, June 10, 2019, https://www.cfr.org/blog/african-continental-free-trade-area-new-horizon-trade-africa (explaining, "Only 15 percent of African exports go to other African countries, compared to intra-trade levels of 58 percent in Asia and 67 percent in Europe. High tariffs and colonial-era infrastructure make it easier for African countries to export to Europe or the United States than to each other. Furthermore, overlapping membership in Africa's Regional Economic Communities (RECs) hinders trade standardization and enforcement. AfCFTA, which establishes a single continental market for goods and services, seeks to increase intra-African trade by cutting tariffs by 90 percent and harmonizing trading rules at a regional and continental level. If successful, AfCFTA is expected to boost intra-African trade by 52.3 percent by 2022.")

[662] *African Continental Free Trade Area - Questions & Answers*, UNITED NATIONS ECONOMIC COMMISSION ON AFRICA (UNECA) (2019), https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers.

economic development and integration project.[663] We have seen how technology markets have transformed certain economies in Africa; e.g. fintech platforms like Cameroon's *Ovamba*[664] and Kenya's *M-PESA*.[665] Once Africa avails technology hardware and software, and installs the telecommunications infrastructure on which they operate, the continent can add 700 million new consumers to the continental market and the world economy.[666]

So, what does the AfCFTA say about technology or telecommunications? The treaty instrument only mentions technology once in its preamble section, where countries agree to aspire toward "cooperation in the area of quality infrastructure, science and technology, the development and implementation of trade related measures."[667] This aspirational language may not have any textual teeth, but my textualist interpretation suggests not just a link between "quality infrastructure," "science and technology," and "the implementation of trade related measures"; but the appearance of these three parentheticals phrases in this precise order indicates a roadmap for implementation.[668]

Trade specialists in the academy and in government are left to ponder the details of such a massive agreement.[669] Trade experts contemplating the *Winners and Losers in* Africa's FTA acknowledge many wins like emergence of new markets, economic growth, foreign direct

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[663] *See* Ed Stoddard, Africa Is Still Way Too Dependent on Resources, REUTERS (Apr. 26, 2013), https://www.reuters.com/article/us-africa-investment/africa-is-still-way-too-dependent-on-resources-idUSBRE93P0HX20130426; *see also* Brian D. Schaefer, America's Growing Reliance on African Energy Resources, BACK-GROUNDER, THE HERITAGE FOUNDATION (June 20, 2016), www.heritage.org /research/africa/bg1944.cfm.

[664] Viola Llewellyn, *Winning in Africa's fintech: The Ovamba way*, BOOKINGS INSTITUTE, Feb 26, 2019, https://www.brookings.edu/blog/africa-in-focus/2019/02/26/winning-in-africas-fintech-the-ovamba-way/ (explaining "Ovamba's strategic focus is to offer businesses in the formal and informal sector short-term capital for the importation of wholesale/retail goods and to support exportation of commodities such as coffee, cocoa, and cashews."; "To date, Ovamba has funded approximately 270 small businesses with over 22 million euros ($25.4 million). Some of Ovamba's customers are on their seventh transaction. Some customers have seen their businesses grow almost 450 percent over an 18-month period. Access to global suppliers has brought new diversity of products to the wholesale space. Demand for cocoa financing is up by more than 25 percent. New funding partners have been identified to satisfy this pipeline.")

[665] M-Pesa is a mobile phone-based money transfer, financing, and microfinancing service launched by Vodafone for Safaricom and Vodacom, the pargest mobile network companies in Kenya and Tanzania in 2007. For information on MPesa's success, *See* Sanja Michael Mutong'Wa and Steve Wasilwa Khaemba, *A Comparative Study of Critical Success Factors (CSFS) in Implementation of Mobile Money Transfer Services in Kenya*, 2(2) EUROPEAN J. OF ENGINEERING AND TECH. 8 (2014), (available via http://www.idpublications.org/wp-content/uploads/2014/08/A-COMPARATIVE-STUDY-OF-CRITICAL-SUCCESS-FACTORS-CSFS-IN-IMPLEMENTATION-OF-MOBILE-MONEY-TRANSFER-SERVICES-IN-KENYA.pdf)

[666] John Campbell, Last Month, *Over Half-a-Billion African Accessed the Internet*, COUNCIL ON FOREIGN RELATIONS (Jul. 25, 2019), https://www.cfr.org/blog/last-month-over-half-billion-africans-accessed-internet (citing "525 million internet users in Africa" about 40% of the continent's population. The raw number of internet-users in Africa in one month dwarfs the number of daily internet-users in North America, Latin America and Europe combined).

[667] Agreement Establishing the African Continental Free Trade Agreement (AfCFTA), Mar. 21, 2018 (entered into force May 30, 2019), https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [hereinafter AfCFTA]. For more on the AfCFTA, see James Gathii, *Introduction to the Symposium on the African Continental Free Trade Agreement* (AfCFTA), AFRONOMICSLAW (Jan. 15, 2019), http://www.afronomicslaw.org/2019/01/13/introduction-to-the-symposium-on-the-african-continental-free-trade-agreement-afcfta/.

[668] *Id.*

[669] Archie Matheson, *The AfCFTA is laudable, but its imminent benefits are overstated*, AFRICAN ARGUMENTS, Jun. 28, 2019, https://africanarguments.org/2019/06/26/the-afcfta-is-laudable-but-its-imminent-benefits-are-overstated/ (articulating skepticism about the potential benefits of the AfCFTA in the absence of any substantive details).

investment, reduction of input costs, and increased efficiency in sales. [670] They also identify trouble-spots like increasing competitive pressure among African nations, choking out local small and medium-sized enterprises, engendering adverse working conditions and mass job losses, encouraging environmental depletion, as well as theft of intellectual property.[671] Skeptics of large-member trade treaties generally criticize AfCFTA for its uncertainty. African nations signing a legally binding treaty instrument of aspirational language without clear measures, guidelines, deadlines and jurisdictional limits raises red flags, especially when deadlines are not met and different countries request different exemptions that merely codify the mismatching of values.[672] Thus, the lack of specific language in the treaty, or robust public discourse about the advantages and disadvantages of key integration measures cause doubts about the agreements effectiveness in a continental project of this geographical and economic magnitude. However, this uncertainty presents opportunity for the technology and telecommunications sectors.

Integrated, state-of-the-art, redundant telecommunications will literally *pave the road* for tech entrepreneurship. Africa can learn lessons about telecom and technology market regulation from the U.S. examples. Thus, we will examine Prof. Anupam Chander's article *How Law Made Silicon Valley* for the legal innovations and regulatory strategies the U.S. government undertook within the last 30 years to glean key insights about what provisions should be included in the next round of the AfCFTA to awaken Africa's sleeping unicorns.

II. A Continental Silicon Valley: How Law Made Silicon Valley as Blueprint for How Law Can Make Africa's Technology Sector

A. Key American legal innovations like the liability safe harbor, strict intellectual property protection, and a limited privacy regime exponentially grew the American technology sector.

Georgetown Law Professor Anupam Chander tells a new legal history of the development of Internet enterprises.[673] He frames it by explaining that "[j]ust as 19th century American judges alter the common law in order to subsidize industrial development,[674] American [executives,] judges and legislators altered the law at the turn of the millennium to promote the development of Internet enterprise[s]."[675] Rather than making a simplistic narration of how entrepreneurs and corporate promoters use the law to create an enterprise, or merely

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[670] Rilwan Akeyewale, *Winners and losers in Africa's Continental Free Trade area*, 4 International Trade Forum, 14 (2018) (available at https://search-proquest-com.proxygt-law.wrlc.org/docview/2169600267?OpenUrlRefId=info:xri/sid:primo&accountid=36339).

[671] *Id.*

[672] Abdoul Salam Bello and Jonathan Gass, *Who are the winners and losers of Africa's new free trade agreement?*, ATLANTIC COUNCIL, https://www.atlanticcouncil.org/blogs/africasource/who-are-the-winners-and-losers-of-africa-s-new-free-trade-agreement/ (explaining, "One of the major challenges to harmonizing Africa's heterogeneous economies under one agreement is the wide variation that exists in their levels of development. For example, Egypt, Nigeria, and South Africa together account for well over 50 percent of Africa's cumulative GDP, while Africa's six sovereign island nations collectively account for just 1 percent. The AfCFTA has the greatest levels of income disparity of any continental free trade agreement, more than doubling the levels witnessed in ASEAN and CARICOM.")

[673] Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2013).

[674] *See* Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 11(1) J. TORT L. 71–143 (2018).

[675] *How Law Made Silicon Valley* at 639 [emphasis added] and same argument made at 669 (explaining "I have shown that, just as nineteenth-century American judges altered the common law in order to subsidize industrial development, judges and legislators at the turn of the Millennium altered the law to subsidize the development of Internet companies.")

navigate the legal landscape to achieve market success, Chander argues that "U.S. authorities . . . acted with deliberation to encourage new Internet enterprises by both reducing the legal risk they faced and largely refraining from regulating the new risks they introduced."[676] He emphasizes that the story of Silicon Valley is as much about the college dropout innovator CEOs as it is about a concerted tri-branch effort to fashion "a legal environment specifically shaped to accommodate their creations."[677] In other words, government actors campaigned for little to no regulation for emerging Internet-based technology companies.

In particular, Chander argues that legal innovations granting emerging tech companies (a) safe harbor from limited liability, (b) intellectual property protection, and (c) a strictly limited privacy regime, constitute the three seminal regulatory (or nonregulatory) acts that *made Silicon Valley*.

> "… Silicon Valley success in the Internet era has been due to key substantive reforms to American copyright and tort law that dramatically reduced the risks faced by Silicon Valley's new breed of global traders. Specifically, legal innovations in the 1990s that reduce liability concerns for Internet intermediaries, coupled with low privacy protections, created a legal ecosystem approved fertile for the new enterprises of what came to be known as Web 2.0. I will argue that this solicitude was not an accident – but rather a kind of cobbled industry policy favoring Internet entrepreneurs."[678]

Chander's narrative of the acts and accidents of lawmakers in fashioning a legally permissive environment for tech entrepreneurs it's not just an artifact of history, but a blueprint for the future. The story of America's rise to global tech dominance story serves as a blueprint for developing countries and continents who seek to construct their own vibrant tech sectors. It may even provide insight into how Africa can include broad technology regulations in the AfCFTA.

B. The AfCFTA should scale and adapting the American Blueprint for Tech Growth in Africa.

The Liability safe harbor, strict intellectual property protection, and a limited privacy regime are the key American legal innovations that caused the exponential growth of the US tech sector. In the AfCFTA technology negotiations, the African Union should adopt an adapted version of these innovations to promote the growth of its own tech sector.

Africa already has an immense concentration of tech entrepreneurship thriving in a deregulated environment. One vital, and obvious distinction between the two legal approaches is that the United States is a country, while Africa is a continent. The US tech sector is centered around Silicon Valley, while Africa's greatest concentrations of tech hubs are in the four corners of the continent; with 85 hubs in Nigeria, 80 hubs in South Africa, 56 hubs in Egypt, and 50 hubs in Kenya.[679] These locations align on social factors like population size and age, political factors like socio-political stability in a democratic system, and economic factors like market diversity, export-orientation, and market-consumption, making these four corners of

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[676] *Id.* at 645.
[677] *Id.*
[678] *Id.* at 642.
[679] Jurica Dujmovic, *Opinion: The next decade belongs to Africa as technology ripples through the continent: Among the world's 30 fastest-growing cities, 21 are in Africa*, MARKETWATCH, Dec. 17, 2019, https://www.marketwatch.com/story/the-next-decade-belongs-to-africa-as-technology-ripples-through-the-continent-2019-12-14/.

Africa ideal locations for foreign investment to incentivize tech entrepreneurship.[680] The African Union will need to "scale" and "adapt" its adoption of American legal innovations to the African context. To harness the power of these "four corners," the African Union will need to coordinate with local governments in these regions to grow simultaneous tech sectors, connect them together, and develop each one into a regional, multinational market, rather than insular, redundant, and exclusive markets.

C. *Some African nations err in regulating against certain uses of technologies before implementing and coordinating comprehensive legal approaches to harnessing the economic power of new technologies. They should make phase-to-phase comparisons instead of imitating U.S. political conversations on tech regulation now.*

African nations with emerging tech sectors are imposing regulations on certain technological uses even before they have established comprehensive legal strategies to tap into the economic potential of these technologies.

Some African States, riding the political waves of the United States, Europe, and Asia, are seeking to regulate emerging technologies like drones, 3D printing, robots and machine learning, and premature legislation could have detrimental effects on innovation.[681] Ghana, Kenya,[682] Nigeria,[683] Sierra Leone, South Africa, Uganda, Zambia, and Zimbabwe have begun regulating artificial intelligence and other emerging technologies, even before these markets have even reached a quarter of their growth potential.[684] The wisdom of the U.S. example is that regulators chose to retain jurisdictional power over regulating technologies, but decided not to levy strong regulation on tech companies. The U.S. executive, legislature, and judiciary

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[680] *Id.* ("However, Africa's mobile technology is starting to look like an exception despite efforts to create start-ups using emerging technologies and platforms such as drones, 3D printing, robots and machine learning.")

[681] *See* Calestous Juma, *Africa's regulators are smothering its innovators*, QUARTZ AFRICA (Sep. 22, 2016), https://qz.com/africa/788174/africas-regulators-are-smothering-its-innovators/.

[682] *Kenya Govt Unveils 11 Member Blockchain & AI Taskforce Headed by Bitange Ndemo*, THE KENYAN WALL STREET (Feb. 28, 2018), https://kenyanwallstreet.com/kenya-govt-unveils-11-member-blockchain-ai-taskforce- headed-by-bitange-ndemo, archived at https://perma.cc/6NTP-C36M. ("The task force "will provide the roadmap to contextualize on the application of these emerging technologies in the areas of financial inclusion, cybersecurity, land tilting [sic], election process, single digital identity and overall public service delivery.")

[683] *Regulation of Artificial Intelligence: Sub-Saharan Africa*, Regulation of Artificial Intelligence in Selected Jurisdictions, U.S. LIBRARY OF CONGRESS, Jan. 2019, https://www.loc.gov/law/help/artificial-intelligence/regulation-artificial-intelligence.pdf. ("Nigeria reportedly approved a robotics and AI agency in August 2018. S*ee* Nwakaego Alajemba & Chinedu James, *Nigeria to Set up New Agency for Robotics and Artificial Intelligence*, TEDGE NEWS (Aug. 6, 2018), https://itedgenews.ng/2018/08/06/nigeria-set-new-agency-robotics-artificial-intelligence/, archived at https://perma.cc/H2MF-GS4B. Sources at the country's Ministry of Science and Technology stated that the new agency "would leverage collaborations with international research bodies on robotics and AI" and enable a"research and teachings in more complex technology skills to thousands of young people." *Id.* During the official inauguration of an inter-ministerial committee tasked with the establishment of the agency, Christopher Ogbonnaya Onu, the Minister of Science and Technology, noted that "there is no way Nigeria can achieve effective industrialization without investment in Robotics and Artificial Intelligence because it is critical to manufacturing, health care delivery and transportation." *See* Olusegun Shogbola, *FG to Establish Two New Agencies*, FEDERAL MINISTRY OF SCIENCE AND TECHNOLOGY (Aug. 1, 2018), http://scienceandtech.gov.ng/2018/08/01/fg-to-establish-two-new-agencies/, archived at https://perma.cc/79WG-GH33. A source from the office of the country's president stated that "[t]he ultimate goal is to have an agency mandated solely on advancing our knowledge and usability of robots and AI across sectors in Nigeria. The idea is to leapfrog our growth." Alajemba & James, TEDGE NEWS.

[684] *Regulation of Artificial Intelligence: Sub-Saharan Africa*, Regulation of Artificial Intelligence in Selected Jurisdictions, U.S. LIBRARY OF CONGRESS, Jan. 2019, https://www.loc.gov/law/help/artificial-intelligence/regulation-artificial-intelligence.pdf.

recognized that any governmental interference in the sector's nascent years could destabilize and inhibit market forces from growing the sector to its full potential.

Instead, African nations should focus on working together to develop their own comprehensive legal approaches to tech regulation. This will allow them to harness the economic power of new technologies while also protecting their citizens from potential harms.

III. Recommendations to ignite a thriving Continental Media and Technology Ecosystem

The agreement establishing the AfCFTA outlined specific subject areas to be covered by two phases of negotiations. In Phase I, broadly referred to as "the goods and services liberalization" phase, the continent's delegations have successfully negotiated protocols on trading goods, trade-in services, and settlement of disputes.[685] Phase II, now postponed to 2021 due to the worsening COVID-19 pandemic, will involve negotiations for protocols on competition policy, intellectual property policy, and investment – "behind the border" regulatory issues.[686] There are whispers of including a protocol on e-commerce to usher in the Fourth Industrial Revolution.[687] Given this outlined agenda, I propose three recommendations for the forthcoming rounds of negotiations on how to introduce regulatory measures that encourage technological innovation and telecommunications adoption. In particular, I will discuss a telecommunications infrastructure project, a continental intellectual property regime specifically for media and entertainment technology companies, and a continental privacy regime that promotes safe, pro-democratic, intercontinental data-sharing while dissuading foreign exploitation.

A. The AfCFTA must prioritize a detailed intercontinental telecommunications infrastructure project.

Africa must first prioritize infrastructure. Interstate highways must connect rural countrysides to bustling cities. Cities must build higher and wider to house business, employees and commercial areas. Train systems and airports must be built to move people and goods throughout the continent.[688] There is unanimous understanding that developing soft and hard infrastructure is fundamental to staging economic growth and particular consensus around the immediate need for information and communications technology (ICT) infrastructure.[689] The need is so immediate that even during the COVID-19 pandemic, the AfCFTA negotiations

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[685] *See* TRALAC, *African Continental Free Trade Area: Questions and Answers*. Available at: *https://www.tralac.org/documents/resources/faqs/2377-african-continental-free-trade-area-faqs-june-2018-update/file.html*.. Landry Signé and Colette van der Ven, *Keys to success for the AfCFTA negotiations*, BROOKINGS INST. (May 2019), https://www.africaportal.org/publications/keys-success-afcfta-negotiations/.

[686] *Id. See also* Peter Fabricius, *The AfCFTA gets locked down for the year*, INST. FOR SECURITY STUDIES, Apr. 24, 2020, https://issafrica.org/iss-today/the-afcfta-gets-locked-down-for-the-year (explaining that newly elected Secretary-General of the AfCFTA secretariat Wamkele Mene hinted that negotiations to finish AfCFTA Phase I and begin Phase II "will probably be postponed until at least 1 January, depending on the severity of the COVID-19 impact on the continent").

[687] Landry Signé and Colette van der Ven, *Keys to success for the AfCFTA negotiations*, BROOKINGS INST. (May 2019), https://www.africaportal.org/publications/keys-success-afcfta-negotiations/.

[688] UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, Drivers for boosting intra-African investment flows towards Africa's transformation, https://www.uneca.org/sites/default/files/PublicationFiles/drivers_for_boosting_intra-african_investment_flows_towards_africas_transformation_eng_2020_web_version.pdf (2020).

[689] *See e.g. id. at 34*.

cannot resume through video conferencing because "trade officials ran into connectivity problems."[690]

Some trade experts suggest accounting proxies for hard ICT infrastructure, like mobile phone subscriptions and electricity-connectivity per capita, to measure the infrastructural runway more accurately for technology consumption.[691] However, I caution leap-frogging and overstating telecommunications infrastructural availability because it will inflate tech market expectations and lead to catastrophic failures. For instance, overstating internet connectivity with mobile phone use will not allow streaming sites to blossom because the mobile bandwidth is too low for high-fidelity, high-quality streaming. Therefore, there is no substitute for telecom infrastructure buildouts. Meaningful, specific provisions about intercontinental telecom structures must be decided in forthcoming rounds of AfCFTA negotiations if Africa's ICT Revolution will ever come to fruition.

Government trade officials should consider multi-use infrastructure projects. For example, the intercontinental railway and highway system should house an interconnected fiber-optic cable system. Since Africa's consumer telecommunications market really took off in the mobile phone age, many experts resign to over-reliance on mobile systems.[692] However, these experts are shortsighted, and shortcuts will lead to economic overreliance downfalls.[693]

Furthermore, as a logistics ecosystem blossoms, once trucks carrying goods and seamlessly travel throughout the continent safely and duty-free, digitizing supply chains – accurate, real-time consumption and travel metrics – must be a close second priority. As more people are connected to the internet with fiber-optic cable, reliable and readily available WiFi, and other redundant, reliable, and omnipresent, means of internet-connection, products can be advertised and consumed online. Cradle to grave metrics on, targeted advertisements[694], purchase[695], and supply chain movement[696] will tell investors, foreign and domestic, a story of boundless upward return on investment. In return, the more people connected to the internet and more streamlined, digitized and integrated the consumer-business interaction means higher efficiency and more speculation, more investment, and more growth for the entire continent.

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[690] *See* Peter Fabricius, supra note 32.

[691] *Id.* ("Infrastructure development: availability of infrastructure is important for emerging and developing countries. As a proxy to this variable, mobile phone subscribers per 100 people and electricity per capita are used;" at 29.)

[692] *See Cell Phones in Africa: Communication Lifeline*, PEW RESEARCH CENTER, Apr. 15, 2015, https://www.pewresearch.org/global/2015/04/15/cell-phones-in-africa-communication-lifeline/.

[693] As an analogy, see the American example unfolding right now during COVID-19 -- *e.g.* Blair Levin, COVID-19 proves we need to continue upgrading America's broadband infrastructure, BROOKINGS INST. (Mar. 30, 2020), https://www.brookings.edu/blog/the-avenue/2020/03/30/covid-19-proves-we-need-to-continue-upgrading-americas-broadband-infrastructure/ (I am referring to the study here because it highlights Americas over-reliance on Mobile connectivity, 4G and 5G deployment, public Wi-Fi, and other medians of telecommunications that are failing to keep most Americans connected during the COVID-19 pandemic. Broadband infrastructure is really the answer to the inequity of Internet access.) *See also generally Re: In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 19-285; Modernizing the FCC Form 477 Data Program, WC Docket No. 11-10; Establishing the Digital Opportunity Data Collection, WC Docket No. 19-195*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Feb. 4, 2020), https://ecfsapi.fcc.gov/file/10204103133427/Leadership%20Conference%20706%20Inquiry%20and%20Form%20477%20Letter%20Final%202-4-2020%20.pdf.

[694] *i.e.* views, social media engagements, ubiquity and marketing saturation.

[695] *i.e.* digital, cashless points of sale online.

[696] *i.e.* receipt of orders, manufacturing or warehousing, shipment routes and arrival times.

B. The AfCFTA must prescribe a continental intellectual property regime for media & technology companies.

Third, I recommend the AfCFTA prescribe a continental intellectual property (IP) regime for technology businesses. The United States has an established and internationally respected IP regime consisting of four main instruments, each recognized at the state and federal levels: trademark,[697] patent,[698] copyright,[699] and trade secret.[700] In his aforementioned paper, Professor Chander explains that U.S. lawmakers created copyright safe harbors and extended fare use exceptions for content hosting websites, but lawmakers did so within the context of a robust legal regime.[701] In a primary instance, Africa needs a robust intellectual property regime, and then build-in safe harbors for technology that minimize administrative burden, facilitate inner market license sharing, and above all, incentivize market actors in the informal economy to formalize their endeavors. The AfCFTA should incentivize content creation, technology invention, and licensing between all continental market actors.

AfCFTA already has competencies to build and administer an IP regulatory initiative. Article 4(c) states that "for the purposes of fulfilling and realizing the objectives of [the Agreement], State Parties shall cooperate on investment, intellectual property rights and competition policy."[702] Phase II negotiations, postponed indefinitely due to the proliferation of COVID-19, will include a draft legal text of the *AfCFTA Protocol on Intellectual Property Rights (IPR)* to be considered for adoption by the African Union Assembly.[703]

Africa does not have to invent an IP regime from scratch. Africa has two multinational IP organizations: (1) The African Regional Intellectual Property Organization[704] (ARIPO) tailored to a common law approach and (2) L'Organisation Africaine de la Propriété

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[697] A trademark is a word, symbol, slogan, color, product, packaging design (trade dress), or combination thereof that identifies the origin or a god or service and distinguishes that good or service from others in the marketplace.

[698] "A patent for an invention is the grant of a property right to the inventor, issued by the United States Patent and Trademark Office." It entails "the right to exclude others from making, using, offering for sale, or selling" the invention in the United States or "importing" the invention into the United States for about 20 years from the date on which the application for the patent was filed. A patent is only legally recognized within the United States, US territories, and U.S. possessions and administered by the U.S. Patent and Trademark Office (U.S.P.T.O.).

[699] "Copyright protection subsists, in accordance with this title, in original works of authorship [that are] fixed in any tangible medium of expression" to incentivize an inventor (patent) or an author (copyright) to create with a constitutional monopoly right. 17 U.S.C. § 102(a).

[700] The trade secrets designation encompasses "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Gerald B. Halt, Jr. *et al*, *Intellectual Property and Financing Strategies for Technology Startups* (2017) at 25. Generally, a trade secret encompasses a company's proprietary information that is not generally known to its competitors, and which provides the company with a competitive advantage. *See* U.S. PATENT AND TRADEMARK OFFICE, *Trade Secret policy*, Nov. 2019, https://www.uspto.gov/ip-policy/trade-secret-policy.

[701] *Id.* at 657-64; See also Kamil Idris, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 1 (2d ed. 2003), available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/888/wipo_pub_888_1.pdf.

[702] AfCFTA, art. 4(c), Specific Objectives.

[703] AfCFTA, art. 7, Phase II Negotiations.

[704] The ARIPO member states include Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, United Republic of Tanzania, Uganda, Zambia and Zimbabwe [ARIPO Member states]. Algeria, Angola, Burundi, Egypt, Eritrea, Ethiopia, Libya, Mauritius, Nigeria, Seychelles, South Africa and Tunisia have observer status in the main organs of ARIPO. This is in line with art IV of the Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization of 1976. [Lusaka Agreement].

Intellectuelle[705] (African Intellectual Property Organization – OAPI) for civil law jurisdictions.[706] Both organizations working closely with the World Intellectual Property Organization (WIPO). Some practitioners criticize these two regional IP organizations for being merely aspirational because they lack enforcement power and inter-regional acceptance.[707] Harmonization of IP laws and standards across borders is crucial for economic growth; precisely why the African Union endeavors to consolidate the regional IP organizations and expand a continent-wide IP organization called the Pan-African Intellectual Property Organization (PAIPO).[708]

Scholar-practitioners suggest that during the Protocol on Intellectual Property Rights negotiations, the AfCFTA must achieve both a tailored approach involving a *sui generis* system for certification and collection marks, prioritization for industries that directly impact geographic indicators of continent's development,[709] and a system for affective implementation and enforcement that corresponds to regional capacities and that targets technical assistance to stimulate technology products and services sectors.[710] The IP regulatory body to be born from Phase II should remedy the scarce resources in legal and certainty of the existing fragmented regime in Africa. The United Nations Economic Commission for Africa (UNECA), the African Union, African Development Bank, and United Nations Conference on Trade and Development prescribes three possible ways forward: (a) encouraging regional cooperation in IP (e.g., the approach under the AU); (b) founding a regional IP filing system (e.g., ARIPO's regional trademark filing system, which extends to its nineteen member states); and (c) developing one unified continental or regional law or unifying law (e.g., OAPI's system).[711] "A unified legal approach would be the most challenging to

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[705] *See Intellectual Property in Africa: An Overview*, SPOOR FISHER (May 2016), https://www.spoor.com/docs/4411/IAM%20-%20INTELLECTUAL%20PROPERTY%20IN%20AFRICA%20AN%20OVERVIEW.pdf (explaining: "The best-known of the regional registration systems is one that applies in much of French- speaking Africa. It is known by the French name Organisation Africaine de la Propriété Intellectuelle, or more commonly by its acronym OAPI. The following countries belong to OAPI: Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal, Togo and the Union of the Comoros.")

[706] *See* New Markets Lab, "Economic Impact Assessment and Legal Review and Analysis of the East African Community Seed and Fertilizer Legislation," Forthcoming East African Community, 2020 (explaining the utility and the efficacy of OAPI in a case study).

[707] *See generally e.g.* Y Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. OF AFRICAN L. 24 (2015). However, the OAPI implements a civil law-based approach to IP that functions with more authority in civil law jurisdictions. ARIPO is a common law-based IP approach that is generally less intrusive.

[708] Y Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. OF AFRICAN L. 24 (2015). *See also* Art 2 of the Final Draft Statute of the Pan-African Intellectual Property Organization,
available at: http://www.au.int/fr/sites/default/files/PAIPO%20Statute%20English.pdf (last accessed 2 December 2014). See also ARIPO "Recent intellectual property development in the African region and proposals for the harmonization of ARIPO and OAPI systems" (Council of Ministers 13th session held in Accra, Republic of Ghana, 1–2 December 2011) at 2.

[709] *See* Kuhlmann and Aguthu, *supra* note 9, at 30 (invoking United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the Continental Free Trade Agreement in Africa,* Addis Ababa, Ethiopia, 2019.)

[710] Kuhlmann and Aguthu, *supra* note 9, at 32.

[711] United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the Continental Free Trade Agreement in Africa,* Addis Ababa, Ethiopia, 2019.

achieve under the AfCFTA and would represent a departure from existing regional models, including ARIPO."[712]

Thus, I highly recommend consolidation of IP harmonization initiatives, and further argue that the AfCFTA should absorb PAIPO and implement a continent-wide IP framework for technology companies. Media and technology companies provide a new opportunity to test a continental IP framework because these industries are relatively new and growing and have a *regulatory elasticity* – meaning the industries are so new that new rules could be more easily absorbed into market dynamics than in traditional, already established industry marketplaces.[713] Regulatory elasticity overcomes common concerns with over regulation: (1) if the continental Agreement becomes too rigid, then it leaves no room for individual states adaptation; and if too loose with differentiated and staggered commitments, the Agreement would risk over-instruction and result in non-production or Black market circulation.[714]

Trade experts recommend technical assistance and compliance harmonization with existing major…

> "global intellectual property agreements like Trade Related Aspects of Intellectual Property Rights (TRIPS), the instruments of the World Intellectual Property Organisation (WIPO), the Paris Union, the Berne Convention…; international registration systems such as the Patent Co-operation Treaty (PCT), the Hague System regarding registration of designs, and the Madrid Protocol regarding the international registration of trade marks."[715]

The African Union must assure strong funding and IP enforcement cooperation among all nations to incentivize actors in the informal economy to formalize their businesses, assure their goods, and increase quality assurance of products to baseline levels of international acceptance to facilitate intra-African movement of goods and African consumption of goods.

Scholars also recommend that AfCFTA IP agreements consider traditional knowledge, genetic resources, and folklore as not to kill domestic markets that trade in goods and services of traditional knowledge. However, an IP regime should that incorporates traditional knowledge, genetic resources, and folklore in a 'flexible' way to capture a more accurate and inclusive picture of African economic activity at the granular, local level.[716] Such an action should not preclude assertive state actions, but it should harmonize state actions into an IP framework that encourages innovation and inclusion into the formal, regulated economy.

There is a body of scholarship that explores some informal economies in Africa and suggests ways that States can use IP to incorporate informal IP creators into a formal regulatory framework. For instance, Dr. Samuel Samiai Andrews published an in-depth comparative study of the Nigerian Nollywood Industry and the U.S. copyright regimes to

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[712] Kuhlmann and Aguthu, *supra* note 9, at 29.

[713] My neologism from intellectual property law concepts I have encountered in this section. *See generally* ES Nwauche, *An evaluation of the African regional intellectual property right systems*, 6(1) J. OF WORLD INTELLECTUAL PROP. (2003) at 103. *See also* C. Colston and J. Galloway, MODERN INTELLECTUAL PROP. L. (3rd ed, 2010, Routledge) at 13.

[714] Kuhlmann and Aguthu, *supra* note 9, at 29 (citing Landry Signe and Colette Van der Ven, *Keys to Success for the AfCFTA Negotiations,* Brookings Institution, May 2019 and LEX Africa, "Developments in Competition Law in Africa," 22 August 2018.) to warn the AU against over-aggressive approaches to IP harmonization.

[715] Abrie du Plessis, *The proposed AfCFTA Protocol on Intellectual Property Rights*, TRALAC, MAY 17, 2019, https://www.tralac.org/blog/article/14066-the-proposed-afcfta-protocol-on-intellectual-property-rights.html. *See also* Paul Kuruk, *The Role of Customary Law Under Sui Generis Framework of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67 (2007).

[716] *Id.*

extract key lessons for Nigeria and other African States to formalize their creative sectors and encourage artistry and innovation.[717] Generally, Andrews suggests Nigeria adopt the DMCA almost wholesale.[718] He posits that Nigerian copyright law should follow the sample of U.S. courts and adopt a balancing test for fair use because "[t]he fair use doctrine balances the public interest to access information, innovate, and not excessively harm the economic interest of copyright holders."[719] Further, Andrews recommends that "African needs a contact-wide or at least regional method for assessing viewership of content online and terrestrial, much like the Nielsen rating system."[720] Andrews concludes by bemoaning "revisiting international IP legal regimes and jurisprudence" for legitimacy in Nigeria's proposed copyright bill.[721] However, he does heavily suggest the country "collaborate with other African nations to proper an international IP regime that addresses the realities of present day digital, as well as traditional methods, of creativity."[722]

As Ghana, Kenya, Malawi, Nigeria, South Africa, and Uganda undertake domestic IP reforms for the new digital era, the AfCFTA Phase II negotiations present the perfect time for the establishment of a continent-wide intellectual property regime.[723] The AfCFTA IP regime must prioritize formalizing the informal media and technology economies, incentivizing innovation by remunerating creators and inventors, and stimulating foreign investment into entertainment media-based and technology-based industries. Dr. Andrews' case study of Nigeria and its copyright reforms convincingly shows why media and technology-specific IP provisions are vital to the forthcoming AfCFTA IP protocol.

C. The AfCFTA needs a continental privacy regime that promotes good-faith consumer data-sharing, yet punishes anti-democratic and foreign exploitation of such consumer data.

Since Africa's first data protection laws 20 years ago, roughly 25 of the 55 countries have laws in place for the collection, processing, storage, dissemination, and handling of their respective citizens' data.[724] Ethiopia, Egypt, Nigeria, and Uganda have the most recent bills.[725] And two key regional organizations have some sort of data regime as well: the Economic

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[717] Samuel Samiai Andrews, *Reforming Copyright Law for a Developing Africa*, 66 J. OF THE COPYRIGHT SOCIETY OF THE U.S.A. 501 (2019).

[718] *Id.* at 532 (fair use doctrine, especially as interpreted by the Judiciary), 533-53 (technical protection and anti-trafficking provisions), 536-40 (Digital safe harbor and takedown rules), 551 (general praise for the law. *See also* Andrews' calls for strategic divergences from the DMCA e.g. putback clauses at 540.

[719] Samuel Samiai Andrews, *Reforming Copyright Law for a Developing Africa*, 66 J. OF THE COPYRIGHT SOCIETY OF THE U.S.A. 501 (2019) at 532-33.

[720] *Id.* at 546.

[721] *Id.* at 556.

[722] *Id.*

[723] *See* Aubrey Hruby, *Tap Creative Industries to Boost Africa's Economic Growth*, FINANCIAL TIMES (Mar. 22, 2018), https://www.ft.com/content/9807a468- 2ddc-11e8-9b4b-bc4b9f08f381.

[724] Aissatou Sylla, *Overview of Data Protection Laws in Africa* (Oct. 14, 2019), HOGAN LOVELLS, https://www.engage.hoganlovells.com/knowledgeservices/insights/overview-of-data-protection-laws-in-africa (available also at https://technologymirror.com.ng/overview-of-data-protection-laws-in-africa/).

[725] *See e.g. Egypt: A New Data Privacy Law* (2019), PWC, https://www.pwc.com/m1/en/services/tax/me-tax-legal-news/2019/new-egyptian-data-privacy-law-nov-2019.html; Alexander Asuquo, *The Principles of Nigerian Data Protection Law*, TABANA & UVOCK, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408775; and The Data Protection and Privacy Act, 2019, THE REPUBLIC OF UGANDA (commencement May 1, 2019), https://ulii.org/system/files/legislation/act/2019/1/THE%20DATA%20PROTECTION%20AND%20PRIVACY%20BILL%20-%20ASSENTED.pdf; Muluneh Bayabill Dessie, *Legal Aspects of Electronic Commerce: The Case in Ethiopia*, ABYSSINIA LAW BLOG (Feb. 24, 2020), https://www.abyssinialaw.com/blog-posts/item/1917-legal-aspects-of-electronic-commerce-the-case-in-ethiopia#h3-2-e-commerce-law.

Community of West African States (ECOWAS) adopted a Supplementary Act on Personal Data Protection and the Supplementary Act on Cybercrime in 2013 and 14 respectively[726]; while the Southern African Development Community (SADC) promulgated the Model Data Protection Act for individual adoption of its members states.[727] The African Union has even adopted the Convention on Cyber Security and Personal Data Protection (The Malabo Convention) in 2014.[728]

These bills range on a continuum of legal effects: from model bills with no legal effect to multilateral treaties with the full weight of the law. Despite the Malabo Convention being a significant step toward harmonized reform, its provisions do not have the textual potency, nor the enforcement power that some national data protection agencies have. The AfCFTA can build upon the commonalities in legislation. In particular, practitioners call attention to four universal concepts in the African laws: (1) consent of the data subject is a default condition for processing, (2) establishment of a data protection agency, (3) obligation to notify the regulator about processing activities, and (4) regulator authorization for third-party data transfers.[729] The AfCFTA should and must make use of these commonalities as the starting place, including the establishment of a continental data authority. The authority must have adequate funding, regulatory power, and establish a meaningful rapport with States' existing data agencies. The relationships between the continental data authority and states' analogues must not be defined by hierarchy, but redundancy.

Practitioners also note that highly detailed data protection regimes overburden small and medium-sized enterprises (SMEs).[730] This is not just a persistent problem in the African context; this is a reoccurring problem in technology regulation writ large.[731] Many SMEs in Africa gamble on data privacy because it hearing to the ever-growing body of rules would bankrupt them. The only companies that can follow every data rule are American- and European-, and Asian-based multinational companies with armies of lawyers and technologists.[732] Overregulating *ex-ante* is a rookie regulatory mistake that the AfCFTA Phase II or Phase III negotiators should avoid.[733] AfCFTA should not merely publish a lengthy treatise of rules only observable by foreign multinational corporations. Rather, the negotiators

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[726] Supplementary Act on Personal Data Protection within ECOWAS, THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf. *See also* Graham Greenleaf, Global Data Privacy Laws 2019: New Eras for International Standards, 157 PRIVACY L. & BUSINESS INT'L. REP. 19-20. (2019),

[727] Data Protection: Southern African Development Community (SADC) Model Law, HARMONIZATION OF ICT POLICIES IN SUB-SAHARAN AFRICA (HIPSSA) (2013), https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf; *See also* Alex Makulilo and Kuena Mophethe, Privacy and Data Protection in Lesotho (2016).

[728] African Union Convention on Cyber Security and Protection of Personal Data, (adopted Jun. 27, 2014), https://au.int/sites/default/files/treaties/29560-treaty-0048_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf [hereinafter Convention on Cyber Security and Protection of Personal Data].

[729] Aissatou Sylla, *Overview of Data Protection Laws in Africa* (Oct. 14, 2019), HOGAN LOVELLS, https://www.engage.hoganlovells.com/knowledgeservices/insights/overview-of-data-protection-laws-in-africa (available also at https://technologymirror.com.ng/overview-of-data-protection-laws-in-africa/). *See generally* Alexander B. Makulilo, *African Data Privacy Laws* (2016).

[730] *Id.*

[731] *See e.g.* Craig McAllister, *What about Small Businesses: The GDPR and Its Consequences for Small, U.S.-Based Companies*, 12 BROOK. J. CORP. FIN. & COM. L. 187 (2017).

[732] Sylla, *Overview of Data Protection Laws in Africa* (2019).

[733] *See* discussion and ex ante and ex post approaches to regulation in Gary E. Marchant & Yvonne A. Stevens, *Resilience: A New Tool in the Risk Governance Toolbox for Emerging Technologies,* 51 UC Davis L. Rev. 233 (2017).

should clearly codify the aforementioned consensus positions to encourage an African privacy framework that ultimately balances and advances consumer protection and entrepreneurship simultaneously. The AfCFTA privacy framework should adopt a progressive regulatory approach to privacy utilizing competition law principles. Specifically, internet platforms that meet certain thresholds of monthly active users, market capitalization, yearly revenue (actual or projected), monthly advertisements, and/or advertisers, should be held fully accountable for breaking the privacy law. Conversely, smaller platforms should be required to adhere to stringent, but fewer, privacy regulations until they grow to certain thresholds.

Finally, given the state of our world, I am deeply concerned about anti-democratic African and non-African governments misusing consumer data from the continent to surveille their citizens, to collect revenue without consent, to target propaganda and disrupt social awareness, to eliminate political dissent and maintain power, and to automate discrimination with artificial intelligence.[734] In reflection of these realities, I urge the African Union to negotiate a comprehensive, continental trade agreement, and in particular a continental privacy regime therein, which centers individual fundamental rights and freedoms in its regulation and enforcement mechanisms. At risk of false accusations of Eurocentrism, I acknowledge that the European Union's General Data Protection Regulation (GDPR), while not perfect, contemplates and incorporates civil and human rights in a globally palpable way beyond the U.S. American paradigm.[735] In essence, AfCFTA's eventual privacy regime must outlaw any conspiracy by Union government members to exploit consumer data to abuse government authority, to commit violations against human rights, and in the commission of war crimes. The law should mandate that the African Union refer any credible allegations of war crimes to the International Criminal Court (ICC)[736], and credible allegations of human rights violations[737] (that may fall short of the high legal burden of war crimes) to The United Nations'

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[734] *See* Antoine Prince Albert III, *Digital Alchemy and the Decline of Democracy*, (forthcoming 2024), presented at Georgetown University Law Center on November 12, 2019, https://youtu.be/LA2eQujdoYo, my JD writing requirement research paper titled "Digital Alchemy: The Decline of Privacy & Democracy" in my Trade, Money, Trust: The Law and Policy of Globalization class. Herein, I tell a compelling tale about how data analytics are disappearing civil rights and human rights. I journey to the dark side of the international trade in data, weaving discussions of the Cambridge Analytica Scandal, the Rohingya Genocide, the WhatsApp NSO Malware Scandal, international Data Brokers, Data Breaches, Identity Theft, and Cybercrime.
I ask a daring question... what can the international trade regime do about the subversion of consumer privacy and the strategic erosion of democracy? Can Data Balkanization actually advantage trade predictability and give countries latitude for sovereignty online? Can we protect civil rights and human rights through the international trade regime?

[735] Hielke Hijmans and Charles Raab, Ethical Dimensions of the GDPR, J. OF COMMENTARY ON THE GENERAL DATA PROTECTION REGULATION (Mark Cole & Franziska Boehm, eds.), Edward Elgar, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3222677

[736] *See* Rome Statute of the International Criminal Court, July 17, 1998 (last amended 2010), 2187 U.N.T.S. 90, arts. 8(2)(a)-(e), 3, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (referencing war crimes such as murder, torture, attacking civilians, enlisting child soldiers, unjustifiable destruction of property and important civilian cites, employing chemical weapons, expanding munitions, and other acts committed during international armed conflicts (art. 8, referencing the Geneva Conventions) and non-international armed conflicts (art. 3)). *See also* Geneva Conventions of 12 August 1949, 75 U.N.T.S. 31, 85, 125, 287 (having been incorporated into the Rome Statutes).

[737] United Nations General Assembly, International Bill of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (Dec. 10, 1948), https://www.ohchr.org/sites/default/files/Documents/Publications/Compilation1.1en.pdf (*i.e.*, arbitrary detention and imprisonment without charge or trial; torture and ill-treatment of detainees; denial of fair trial guarantees; restrictions on freedom of expression, association, and assembly; persecution on the basis of race, ethnicity, religion, gender, sexual orientation, or other protected grounds; forced labor and human trafficking; and violations of economic, social, and cultural rights, such as the right to education, healthcare, and housing).

International Court of Justice (ICJ)[738] and the Office of the United Nations High Commissioner for Human Rights (OHCHR). I encourage the African Union to require its continental data regulator to publish confidential reports about governments misusing consumer data in Africa to the United Nations' Office of the High Commissioner for Human Rights (OHCHR) – regardless of their African Union membership status. Without unequivocal prohibitions against governmental abuse, mandatory reporting requirements, reporting to supranational bodies like the ICC, the ICJ, and the UN Human Rights Commission baked into the AfCFTA's privacy regime, I fear that amoral expansion of technology and telecommunications may exacerbate immoral abuses of power, entrench socioeconomic disparity, and optimize exploitation for another few centuries. Therefore, the AfCFTA's tech and telecom provisions, especially its privacy regime, must secure private economic incentives and fundamental, human rights protections as a matter of law.

IV. Conclusion

The African Continental Free Trade Agreement, unprecedented in scale, design, and public will, has in enormous potential to bring a market of 55 countries to life.[739] If done wrong, the AfCFTA will usher in another century of mineral extraction and labor exploitation that has over-simplistically characterized the continent since the 15th century.[740] Africa has the world's fast-test growing economies, youngest workforce, and most natural resources on earth. Africa has all the makings to be an astonishing incubator of technological genius, and the AfCFTA can harness that genius in the fine teeth of exquisitely crafted provisions that adequately fund in detail multipurpose telecommunications infrastructure projects, continental intellectual property regime tailored expressly for the growth of domestic media and technology companies, and craft and adopt a smart continent-wide privacy regime that promotes intercontinental use of consumer data, but dissuades continental and foreign exploitation of consumer data. Should Africa craft the continental agreement with its non-extractive technology-based industries top-of-mind, harness the wealth from the blossoming technology sector to fund these grand informational technology infrastructure projects, and build a resilient union of member nations that hold each other accountable to these lofty goals, then the African Free Trade Area will lead the world in sustainable development and socioeconomic empowerment by 2035.

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[738] Statute of the International Court of Justice art. 38, 33 U.N.T.S. 993 (1945).
[739] Kuhlmann and Aguthu, *supra* note 9.
[740] *See* UNESCO, General History of Africa (GHA), https://www.unesco.org/en/general-history-africa.

CHAPTER 11: CLOSING THE DIGITAL GENDER DIVIDE IN INTERNATIONAL TRADE AGREEMENT PROVISIONS

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Abstract

The gender gap is a significant issue in trade. As e-commerce increases, it brings new concerns since women do not enjoy the benefits of digitalization equal to men due to limited access to the internet, lack of technical knowledge, and insufficient awareness of online threats. Some trade agreements have started incorporating gender; however, digital trade provisions do not deal with gender inequality issues. Only the Digital Economy Partnership Agreement (DEPA), UK-Singapore Digital Economy Agreement (UKSDEA), and Partnership Agreement between the EU and Members of the Organisation of African, Caribbean, and Pacific States (OACPS-EU) set up minimal obligations for gender-inclusion.

To bridge or even eliminate the digital gender gap, understanding how current international trade agreements address gender and e-commerce issues is the first step. Then, evaluating the current digital inclusion provisions in trade agreements is vital. Providing new views and options for adapting current provisions to make them more gender-responsive should also follow. Further, paying attention to how the law is applied or implemented in practice, especially with regard to integrating gender considerations in the present e-commerce regulations, is critical.[741] *Nevertheless, adjusting gender-inclusion provisions in trade agreements alone will not be able to close the digital gender gap entirely. Therefore, other international instruments design and domestic law reform must also come into play. Together, these approaches could provide a blueprint for countries to close the digital gender divide.*

I. Introduction

It is well-recognized that the impact of trade on women and men is different, although some may argue that trade rules and regulations are "gender neutral."[742] Women have faced many barriers across their roles in trade, even before the rise of e-commerce. The term gender gap in trade encompasses the structural differences between women and men in terms of (i) the gendered composition of the labor force, (ii) women's primary responsibility for reproductive work, and (iii) women's differential access to and control over resources relative to men. Although this paper generally talks about the differences or barriers between women and men, it should be noted that inequalities are faced by groups other than women, as reflected in the broader concept of gender equality, which is sensitive to sex, status, and other socio-economic norms.[743]

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741 Yasmin Ismail & Hiral Hirani, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, CUTS INT'L, GENEVA (2021), at 24, https://www.cuts-geneva.org/pdf/KP2021-Study-Gender_Dimension_of_E-Commerce.pdf.

742 Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113 (2008), 116, https://scholarship.law.wm.edu/wmjowl/vol15/iss1/ 5.; Ally Brodsky, Jasmine Lim, William Reinsch, *Women and Trade: How Trade Agreements Can Level the Gender Playing Field*, CTR. FOR STRATEGIC & INT'L STUD. (May 27, 2021), https://www.csis.org/analysis/women-and-trade-how-trade-agreements-can-level-gender-playing-field.

743 Amalie Giødesen Thystrup, *Gender Inclusive Governance for E-Commerce*, GENEVA: GRADUATE INST. OF INT'L AND DEV. STUDIES: CTR. FOR TRADE AND ECON. INTEGRATION (CTEI) (Dec. 2018), 2,

The Global Gender Gap Index measures economic participation and opportunity, educational attainment, health and survival, and political empowerment.[744] Such statistics indicate that there is still a long way to meet gender parity worldwide.[745] These areas are trade-related, as women perform different roles in commerce, including entrepreneurs, workers, and consumers.

First, women are less likely than men to own and manage a business,[746] and the businesses tend to be smaller and younger.[747] This could be attributed to gender-held stereotypes related to operating a business.[748] Cultural expectations in different industry sectors also impact business models.[749] Furthermore, compared to men, women lack access to finance.[750]

Regarding women as workers, several considerations are relevant, including women's participation in the labor market, sectoral concentration, the share of direct or indirect export-dependent jobs, wage gaps, and job quality.[751] Although studies indicate that women's labor share and industry sector participation in exporting goods or services has increased,[752] women still engage less than men in jobs related to exporting or manufacturing.[753] In addition, the jobs created for women remain confined to low-paid activities or occur in the informal sector, such as working without a contract,[754] and women are more likely to encounter involuntary leave from labor markets to focus on household issues.[755]

Another way to differentiate the impact on women and men is to compare their purchasing power.[756] Studies point out that women are more likely to be poor; for instance,

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https://repository.graduateinstitute.ch/record/296706?_ga=2.55250082.806786154.1650306464-752415259.1650306464.

744 *Global Gender Gap Report 2022*, WORLD ECON. F. (July 2022), 5, https://www3.weforum.org/docs/WEF_GGGR_2022.pdf.

745 *Id.*, at 13. (If progress towards gender parity proceeds at the same pace observed between the 2006 and 2022 editions, the overall global gender gap is projected to close in 132 years.)

746 Alexander Ward, Brizeida R. Hernández-Sánchez, Jose C. Sánchez-García, *Entrepreneurial Potential and Gender Effects: The Role of Personality Traits in University Students' Entrepreneurial Intentions*, FRONT. PSYCHOL. (Dec. 4, 2019), 1, https://doi.org/10.3389/fpsyg.2019.02700.

747 Jane Korinek, Evdokia Moïsé, Jakob Tange, *Trade and Gender: A Framework of Analysis*, OECD Trade Policy Papers No. 246, OECD PUBL'G (March 26, 2021), 27, https://doi.org/10.1787/6db59d80-en.

748 Lakshmi Balachandra, Tony Briggs, Kim Eddleston, Candida Brush, *Don't Pitch Like a Girl!: How Gender Stereotypes Influence Investor Decisions*, 43(1) ENTREP. THEORY PRACT. 116 (Sept. 26, 2019), 117, https://doi.org/10.1177/1042258717728028.

749 *Why are women-owned businesses overall smaller than men-owned businesses?*, OFF. ON THE ECON. STATUS OF WOMEN (Aug. 2016), 1, https://www.oesw.mn.gov/PDFdocs/Why%20do%20women%20start%20disproportionately%20fewer%20businesses%20than%20menv2.pdf.

750 In several EU countries, men are 1.5 times more likely than women to report that they could access capital or loans for starting up a business, and these challenges are even more pronounced in other economies. *See* David Halabisky, *Policy Brief on Women's Entrepreneurship*, OECD SME and Entrepreneurship Papers No. 8, OECD PUBL'G (Jun. 14, 2018), 14, https://www.oecd.org/cfe/smes/Policy-Brief-on-Women-s-Entrepreneurship.pdf.

751 Jane Korinek, *Trade and Gender: A Framework of Analysis*, *supra* note 7, at 10.

752 *Women and Trade: The Role of Trade in Promoting Gender Equality*, WORLD BANK; WTO (2020), 26-29, http://hdl.handle.net/10986/34140.

753 Jane Korinek, *Trade and Gender: A Framework of Analysis*, *supra* note 7, 11-12.

754 Axèle Giroud et al., *Investment by TNCs and Gender: Preliminary Assessment and Way Forward*, UNCTAD (Oct. 14, 2014), vii, https://unctad.org/system/files/official-document/webdiaeia2014d4_en.pdf.

755 Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, CTR. FOR AM. PROGRESS: REP. (May 10, 2019), https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm/.; Wolfgang Keller & Hâle Utar, *Globalization, Gender, and the Family*, NBER Working Paper No. 25247, NAT'L BUREAU OF ECON. RSCH. (Nov. 2018), 2,12, https://www.nber.org/system/files/working_papers/w25247/revisions/w25247.rev3.pdf.

756 Jane Korinek, *Trade and Gender: A Framework of Analysis*, *supra* note 7, at 21.

the poverty rates of single-parent families headed by a woman are higher than those headed by a man and more than six times higher than in two-parent families.[757] Moreover, there is implicit discrimination for women as customers through "gender-specific pricing," also known as the pink tax.[758] In 2015, the New York City Department of Consumer Affairs released a study comparing the prices for 794 products from 91 brands sold throughout the city.[759] Besides the pink tax, there are also specific taxes on sanitary products and other medical devices used only by women.[760]

The above examples show that the problem of unequal ability between genders is severe and reflects issues of fairness and sustainable development. Furthermore, the gender gap also impacts trade relations, outcomes, and economic growth, as gender-based inequalities influence patterns of resource allocation and competitive advantage.[761]

A. The Rise of Digital Trade

The gender gap interacts with several other divides. In the last twenty years, technological improvements and advancements in Information and Communication Technology (ICT) have significantly changed how goods, services, and information are bought, sold, and exchanged through digital markets and platforms,[762] resulting in the terms digital trade or e-commerce. Digital trade and e-commerce are often used interchangeably; digital trade has been assumed to have a broader scope that encompassing digitally enabled transactions of trade in goods and services that can either be digitally or physically delivered[763] but also includes data flows.[764]

The e-commerce trend has experienced a sharp boost since the COVID-19 pandemic, as digital trade provides consumers access to goods and services when physical presence is impossible. E-commerce creates new opportunities for entrepreneurs, consumers, and workers to expand or explore new markets via the Internet. However, the benefits of e-commerce are not evenly allocated and can only be achieved with access to the Internet, with

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[757] *National Snapshot: Poverty Among Women & Families, 2023*, NAT'L WOMEN'S LAW CTR. (Feb. 16, 2023), 4, https://nwlc.org/wp-content/uploads/2023/02/2023_nwlc_PovertySnapshot-converted-1.pdf.

[758] Candice Elliott, *The Pink Tax: The Cost of Being a Female Consumer*, LISTENS MONEY MATTERS (March 15, 2022), https://www.listenmoneymatters.com/the-pink-tax/.

[759] Anna Bessendorf, *From Cradle to Cane: The Cost of Being a Female Consumer: A Study of Gender Pricing in New York City*, NYC DEP'T OF CONSUMER AFF. (Dec. 18, 2015), 5, https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf. (showing that on average across five industries, such as toys and accessories, children's clothing, adult clothing, personal care products, and senior/home health care products, products that market to women and girls cost 7 percent more than similar products for men).

[760] Jessica Wakeman, *Pink Tax: The Real Cost of Gender-Based Pricing*, HEALTHLINE (Aug. 6, 2020), https://www.healthline.com/health/the-real-cost-of-pink-tax.

[761] Penny Bamber & Cornelia Staritz, *The Gender Dimensions of Global Value Chains*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. (ICTSD) (Sept. 2016), 7, https://www.tralac.org/images/docs/10585/the-gender-dimensions-of-global-value-chains-ictsd-september-2016.pdf.; *see also* Marzia Fontana, *Survey of research on gender and trade: insights, gaps and coverage*, UNIV. OF WARWICK: GENDER IN GLOB. AND REG'L TRADE POLICIES: CONTRASTING VIEWS AND NEW RSCH. CSGR (April 5-7, 2006), 2, 7-8, https://www.tralac.org/images/docs/10585/the-gender-dimensions-of-global-value-chains-ictsd-september-2016.pdf.

[762] Eddy Bekkers, Robert Koopman, Giulia Sabbadini & Robert Teh, *The Impact of Digital Technologies on Developing Countries Trade*, *in Adapting to the Digital Trade Era: Challenges and Opportunities*, WTO: CHAIRS PROGRAMME (Maarten Smeets et al., 2021), 38, https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf.

[763] *Digital Trade*, OECD: TRADE, TOPICS, https://www.oecd.org/trade/topics/digital-trade/ (last visited April 7, 2022)

[764] Katrin Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, U.N.: TRADE, INV. AND INNOVATION DIV. (Sept. 24, 2021), 101, https://www.unescap.org/sites/default/d8files/knowledge-products/Handbook%20FINAL%204Nov2021%28edited%29.pdf.

some groups excluded from these new opportunities.[765] As a result, the issue of "digital divide" becomes paramount, i.e., "[the] inequality in the power to communicate and to process information digitally,"[766] and, thus, the concept of digital inclusion has emerged to ensure that all individuals and communities, including the most disadvantaged, have access to and use of ICT.[767]

B. The Digital Gender Divide

The situation of unequal ability to participate in the digital economy is especially severe with respect to the access, use, and ownership of digital tools across genders.[768] That is, as the trends of e-commerce rise, new concerns about gender inequality pop out.[769]

The "digital gender divide" frequently focuses on gender inequality in resources and capabilities to access and effectively use ICT within and between countries, regions, sectors, and socio-economic groups.[770] Similar to the term gender gap, the digital gender divide does not solely focus on the inequality between "women" and "men," it is a broader concept that encompasses other gender identities and sexual orientation.

Digitalization opens new opportunities to empower women socially and economically by creating new employment and entrepreneurial possibilities, enhancing access to finance and information, and optimizing business processes.[771] However, some factors caused or increased the digital gender divide. For instance, the disparities in internet access between men and women stop women from thoroughly enjoying the opportunities and benefits of e-commerce. In 2022, 63 percent of all women were using the internet, compared to 69 percent of all men.[772]

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[765] As of January 2021, 62.5 percent of the global population has access to the internet. The number of internet users has climbed from 2.18 billion to 4.95 billion over the past ten years; nevertheless, there are 2.96 billion people around the world who remain "unconnected" to the internet and hundreds of millions of people across lower- and middle-income countries are still unaware of the existence of the internet. *See* Simon Kemp, *Digital 2022 Global Overview Report*, DATAREPORTAL (in partnership with WE ARE SOCIAL & HOOTSUITE) (Jan. 26, 2022), at 9, https://datareportal.com/reports/digital-2022-global-overview-report; *id.*, at 21 and 25. *See also* Anne Delaporte et al., *The State of Mobile Internet Connectivity 2021*, GROUPE SPECIALE MOBILE ASSOCIATION (GSMA) INTELLIGENCE (Sept. 2021), at 6, 23-24, https://www.gsma.com/r/wp-content/uploads/2021/09/The-State-of-Mobile-Internet-Connectivity-Report-2021.pdf.

[766] Martin Hilbert, *Digital Gender Divide or Technologically Empowered Women in Developing Countries? A Typical Case of Lies, Damned Lies, and Statistics*, 34(6) WOMEN'S STUD. INT'L F. 479-489 (Nov. 2011), 480, http://dx.doi.org/10.1016/j.wsif.2011.07.001.

[767] NAT'L DIGIT. INCLUSION ALL. (NDIA): DEFINITION, https://www.digitalinclusion.org/definitions/ (last visited Oct. 22, 2023).

[768] *Bridging the Digital Gender Divide Include, Upskill, Innovate*, OECD (2018), 22, https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf.

[769] Marie Sicat, Ankai Xu, Ermira Mehetaj, Michael Ferrantino, & Vicky Chemutai, *Leveraging ICT Technologies in Closing the Gender Gap*, WORLD BANK (Feb. 13, 2020), 4, https://elibrary.worldbank.org/doi/abs/10.1596/33165, ("Despite …, women's, access and use of ICTs and digital technologies tend to lag in contrast to men.").

[770] *See Women2000 and Beyond: Gender Equality and the Empowerment of Women through ICT,* U.N. ENTITY FOR GENDER EQUAL. AND THE EMPOWERMENT OF WOMEN (UN Women) (Sept. 2005), 2, https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UN/en/w200009DOT05icte.pdf. ("There is a gender divide, with women and girls enjoying less access to information technology than men and boys.").

[771] Christiane Krieger-Boden & Alina Sorgner, *Labor market opportunities for women in the digital age*, 12(1) ECON. (2018-28), 1–2, http://dx.doi.org/10.5018/economics-ejournal.ja.2018-28; Marie Sicat, *Leveraging ICT Technologies in Closing the Gender Gap*, *supra* note 29, at 2.

[772] *Measuring digital development Facts and figures 2022*, ITU (2022), 3, https://www.itu.int/hub/publication/d-ind-ict_mdd-2022/.

The divide remains widest in the least developed countries (LDCs), where only 30 percent of women use the internet, compared to 43 percent of all men.[773]

Nevertheless, the factors affecting the digital gender divide do not only include access to the internet. Issues of affordability, quality of coverage, and the technical skills needed to get online are also barriers to the equality of digital tools.[774] Moreover, traditional beliefs and social norms push women into traditional roles,[775] such as the unequal sharing of housework and childcare responsibilities and stereotypes that technologies are within the realm of men,[776] which are also biases and barriers that have affected women negatively. Not to mention the gap and gender-specific professional expectations in education and skills in the fields of "Science, Technology, Engineering, and Mathematics" (STEM), which is an important starting point for doing business related to digital sectors.[777]

Gender discrimination or unconscious biases towards female sellers and freelancers remain common.[778] For example, in online platforms, workers' evaluations are correlated with gender based on the judgment of profile images.[779] On the eBay platform, female sellers tend to receive less than men when selling the same product, even though female sellers receive higher reviews than male sellers.[780] In addition, women face more difficulties accessing finance and investment in digital platforms. Evidence shows that bankers' analysis of a borrower's creditworthiness has a more significant gender bias against women when they make their loan decisions solely based on data and papers than when they meet the borrower.[781] That is, women entrepreneurs are more in need of additional information than men to transcend the gender stereotype to prove their capability of operating a business. These examples demonstrate the problem of the digital gender divide as it impacts not only women but also worldwide economic growth. As a result, closing or even eliminating the digital gender divide has gained more and more attention, and the global are making efforts to find the solution.

II. International Trade Agreement Provisions on Gender and E-commerce

Although gender has become a topic increasingly covered in international trade agreements, the digital dimension is missing from current provisions on gender, and gender

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[773] *Measuring digital development Facts and figures: Focus on Least Developed Countries*, ITU (March 2023), 3, https://www.itu.int/hub/publication/d-ind-ict_mdd-2023/.

[774] Kelly Krick, Jason S. Boswell, Scott Poretsky, *Bridging the digital divide for an inclusive digital economy*, ERICSSON: BLOG (May 4, 2021), https://www.ericsson.com/en/blog/6/2021/bridging-the-digital-divide-for-an-inclusive-digital-economy.

[775] Alan Jope, *Gender equality is 170 years away. We cannot wait that long*, WORLD ECON. FORUM (Jan. 19, 2017), https://www.weforum.org/agenda/2017/01/gender-equality-is-170-years-away-we-cannot-wait-that-long.

[776] Amy Antonio & David Tuffley, *The Gender Digital Divide in Developing Countries*, 6(4) FUTURE INTERNET 2014 673-687 (Oct. 31, 2014), 679-680, https://doi.org/10.3390/fi6040673; Behshid Hosami, *Digital gender divide and empowering women in the digital age: A critical approach in Iranian society*, LINNAEUS UNI. INFORMATICS DEP'T (2019), 16-17, https://www.diva-portal.org/smash/get/diva2:1285233/FULLTEXT01.pdf.

[777] Marie Sicat, Ankai Xu, Ermira Mehetaj, Michael Ferrantino, Vicky Chemutai, *Leveraging ICT Technologies in Closing the Gender Gap*, *supra* note 29, at 29-30.

[778] *Bridging the Digital Gender Divide Include, Upskill, Innovate*, *supra* note 28, at 28.

[779] Anikó Hannák, Claudia Wagner, David Garcia, Alan Mislove, Markus Strohmaier, Christo Wilson, *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr*, ASS'N FOR COMPUTING MACH. (Feb. 25, 2017), 1914-1933, 1915, https://doi.org/10.1145/2998181.2998327.

[780] Tamar Kricheli-Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Market*, 2(2) SCI. ADVANCES (Feb. 19, 2016), 1, https://www.science.org/doi/abs/10.1126/sciadv.1500599.

[781] Malin Malmstrom & Joakim Wincent, *Research: The Digitization of Banks Disproportionately Hurts Women Entrepreneurs*, HARVARD BUS. REV. (Sept. 19, 2018), https://hbr.org/2018/09/research-the-digitization-of-banks-disproportionately-hurts-women-entrepreneurs.

equality is generally missing from e-commerce provisions as well. Further, the concept of digital inclusion merely scratches the surface of bridging the digital gender divide.

A. International Trade Agreements' Provisions on Gender

Until recently, gender had historically not been addressed in trade agreements, which have tended to focus exclusively on economic interests[782] and primarily ignored any of the societal effects that a liberalized trade regime may cause.[783] At the 11th WTO Ministerial Conference in Buenos Aires in December 2017, Members endorsed the Joint Declaration on Trade and Women's Economic Empowerment ("Buenos Aires Declaration on Women and Trade"), which aims to increase women's participation in international trade, cultivate their economic empowerment, and remove the barriers facing them in the process.[784] The Buenos Aires Declaration on Women and Trade also referenced Goal 5 of the Sustainable Development Goals (SDGs) in the UN 2030 Agenda for Sustainable Development, which mainly focuses on achieving gender equality and empowering all women and girls.[785]

In addition to these shifts at the multilateral level, there has been a trend toward incorporating gender considerations in bilateral and regional trade and investment agreements.[786] As of September 2022, out of 353 in-force Regional Trade Agreements (RTAs) notified to the WTO, 101 include at least one explicit reference to gender issues.[787] There are different ways for these RTAs to include gender considerations, either in the main text of the agreements, i.e., in the preamble, article, or chapter, or in the side documents to the agreements.[788] However, the current gender-inclusion provisions merely scratch the surface of what is possible.[789] Most provisions on gender contain soft obligations and do not establish binding legal standards, which can be important for small enterprises and vulnerable communities.[790] Further, gender provisions often fall short of enhancing equity and inclusiveness by not directly addressing the concrete challenges women face and the sectors in which they work. [791]

B. International Trade Agreements' Provisions on Digital Trade

Disparities in internet access and connectivity and lack of uniform regulations governing e-commerce have caused differences in how countries can benefit from the advantages of e-

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[782] Constance Z. Wagner, *Looking at Regional Trade Agreements Through the Lens of Gender*, 31 ST. LOUIS U. PUB. L. REV. 497, 504 (2012), https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1069&context=faculty.

[783] Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, *supra* note 2, at 113.

[784] *Trade and Gender*, GENEVA TRADE PLATFORMS (last visited Oct. 22, 2023), https://wtoplurilaterals.info/plural_initiative/trade-and-gender/.

[785] *Sustainable Developments Goals*, U.N.: DEV. OF ECON. AND SOCIAL AFFAIRS (2015), https://sdgs.un.org/goals.

[786] José-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreements*, WTO ECON. RSCH. AND STAT. DIV. (Dec. 18, 2018), 14, https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

[787] *Informal Working Group on Trade and Gender: Trade and Gender-related Provisions in Regional Trade Agreements*, WTO, (Sept. 19, 2022) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TGE/COM_4.pdf&Open=True. *See also* José-Antonio Monteiro, *The Evolution of Gender-Related Provisions in Regional Trade Agreements*, WTO ECON. RSCH. AND STAT. DIV. (Jan. 2021), 2, https://www.wto.org/english/res_e/reser_e/ersd202108_e.pdf. (providing an updated analysis of 577 RTAs as of Dec. 2020 reveals that 83 RTAs include at least one provision mentioning explicitly gender or women).

[788] José-Antonio Monteiro, *The Evolution of Gender-Related Provisions in Regional Trade Agreements*, *supra* note 47, at 14.

[789] Katrin Kuhlmann, Resetting the Rules on Trade and Gender? A Comparative Assessment of Gender Approaches in Regional Trade Agreements in the Context of a Possible Gender Protocol Under the African Continental Free Trade Area (Nov. 26, 2021) (Pre-publication draft), 3.

[790] *Id.*

[791] *Id.*

commerce. This, in turn, has impacted and disrupted international trade. Countries, therefore, have tried to negotiate bilaterally and regionally to harmonize rules between countries and update national laws to adapt to changing global developments. The WTO Joint Statement Initiative (JSI) on E-Commerce aims to establish standard rules in areas related to e-commerce, including enabling electronic commerce, promoting openness and trust in e-commerce, cross-cutting issues, telecommunications, and market access for e-commerce firms.[792]

The text of the E-Commerce JSI is still undergoing negotiation; however, there has been movement on the bilateral and regional fronts. Singapore, Chile, and New Zealand were pioneers in addressing e-commerce issues through trade instruments, and, using the text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as a foundation, they signed the first digital-only trade agreement, the DEPA.[793] DEPA establishes new approaches and collaborations in digital trade issues, promotes interoperability between different regimes, and addresses new issues brought about by digitalization.[794] The DEPA's most distinctive structure is its modular design, which could be used in whole or part in future trade accords. The three countries have each agreed to the DEPA in its entirety; however, they have structured their agreement to contain separate subject-specific categories, or "modules," for different topics relating to digital trade.[795] As other countries join the DEPA, they can choose to accept the different levels of commitments contained in each of these modules, which provides countries with more options.[796] For instance, South Korea and China have expressed interests in joining the DEPA.[797]

The DEPA has set the gold standard for a new group of digital trade agreements. The United States and Japan have concluded a digital trade agreement that includes requirements for non-discriminatory treatment, commitments to prohibit or limit data localization, restrictions on cross-border data flows, and transfer of source code or algorithms as conditions of market access.[798] Australia and Singapore also entered a Digital Economy Agreement on December 8, 2020.[799] The UKSDEA, building on the DEPA in some areas, has gone even further. The UKSDEA includes binding disciplines on crucial issues in the digital economy, such as data and the free flow of digital content, as well as cooperative elements in a wide range of emerging and innovative areas, such as Artificial Intelligence, fintech, digital identities,

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[792] *Joint Statement Initiative on Electronic Commerce*, GENEVA TRADE PLATFORM: PLURILATERALS: E-COMMERCE, https://wtoplurilaterals.info/plural_initiative/e-commerce/. (last visited Oct. 22, 2023).

[793] James Bacchus, *The Digital Decide: How to Agree on WTO Rules for Digital Trade*, CTR. FOR INT'L GOVERNANCE INNOVATION (CIGI) (Aug. 16, 2021), 1, https://www.cigionline.org/static/documents/TheDigitalDecide-Bacchus.pdf.

[794] *Digital Economy Partnership Agreement (DEPA)*, MINISTRY OF TRADE AND INDUS. SINGAPORE (MTI): IMPROVING TRADE: DIGIT. ECON. AGREEMENTS, https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement (last visited Oct. 22, 2023).

[795] James Bacchus, *The Digital Decide: How to Agree on WTO Rules for Digital Trade*, *supra* note 53, at 7.

[796] Giridharan Ramasubramanian, *Building on the modular design of DEPA*, EAST ASIA FORUM (EAF) (July 10, 2020), https://www.eastasiaforum.org/2020/07/10/building-on-the-modular-design-of-depa/.

[797] Zach Marzouk, *Why does China want to join the Digital Economy Partnership Agreement (DEPA)?*, ITPRO: BUS.: POL'Y & LITIG. (March 10, 2022), https://www.itpro.co.uk/business/policy-legislation/365814/why-does-china-want-to-join-the-digital-economy-partnership.

[798] Cathleen D. Cimino-Isaacs & Brock R. Williams, *U.S.-Japan Trade Agreement Negotiations,* CONG. RSCH. SERV. (CRS) (Nov. 9, 2022), https://crsreports.congress.gov/product/pdf/IF/IF11120.

[799] *Australia-Singapore Digital Economy Agreement (DEA)*, AUSTRALIAN GOVERNMENT DEPT. OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement (last visited Oct. 22, 2023).

and legal technology.[800] Moreover, UKSDEA creates a pathway for the UK and Singapore to share best practices and develop governance and policy frameworks for the responsible development and use of emerging technologies.[801] UKSDEA has become one of the most innovative digital trade agreements that is in force.

C. Digital Inclusion in International Trade Agreements

The provisions about gender in current international trade agreements do not cover e-commerce issues. Moreover, as digitalization of trade involves many different legal instruments and issues, current agreements and policies on e-commerce usually focus on the commercial interests that digitalization of trade could bring. Such regulations, therefore, concentrate on adopting transparent and facilitative regulations to encourage digital trade,[802] setting up rules for trusted cross-border data flows and data protection,[803] and online customer protection and online transaction validation.[804] In other words, they generally pay no attention to bridging the gender gap in e-commerce, with the exception of the DEPA, which explicitly addresses the concept of digital inclusion and the digital divide,[805] and the UKSDEA[806] and draft negotiated text of the OACPS-EU,[807] which also mention digital inclusion provisions.

III. Bridging and Eliminating the Digital Gender Divide

To bridge the digital gender gap, existing agreement models will need to be adjusted or modified, and new agreement models may also be needed.[808] This includes an examination of (A) international trade instrument designs that aim to bridge the digital gender divide and (B) the current digital inclusion provisions in international trade agreements. However, fixing PTAs alone cannot eliminate the digital gender gap. Consequently, other innovations, such as international trade instrument design, could help strengthen gender inclusion provisions.

A. International Trade Instruments Designs to Bridge Digital Gender Divide

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[800] UK-Singapore Digital Economy Agreement (UKSDEA), MTI: IMPROVING TRADE: DIGIT. ECON. AGREEMENTS, https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/UKSDEA (last visited October 22, 2023).

[801] *UK-Singapore Digital Economy Agreement: final agreement explainer*, GOV. UK: BUS. AND INDUS.: TRADE AND INV.: DIGIT. TRADE (Feb. 25, 2022), https://www.gov.uk/government/publications/uk-singapore-digital-economy-agreement-explainer/uk-singapore-digital-economy-agreement-final-agreement-explainer#tech-partnerships.

[802] *DEPA*, *supra* note 54.

[803] Katrin Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, supra note 24, at 109-110.

[804] *Id.*, at 120-123.

[805] Digital Economy Partnership Agreement (DEPA), Module 11, Jun. 12, 2020, https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Digital-Economy-Partnership-Agreement.pdf.

[806] Digital Economy Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Singapore (UKSDEA), art. 8.61-P, Feb. 25, 2022, https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/UKSDEA/Text-of-the-UKSDEA/2022-02-25---UK-Singapore-Digital-Economy-Agreement.pdf.

[807] 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 (OACPS-EU), Part II Title III art. 48, April 15, 2021, https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf.

[808] Amalie Giødesen Thystrup, *Gender Inclusive Governance for E-Commerce*, *supra* note 3, at 16.

First, there is a need to collect, review, and improve gender-disaggregated data as a foundation to build gender-responsive policies.[809] The digital inclusion provisions of DEPA and UKSDEA also mention the importance of cooperation and developing datasets.[810] While establishing gender-disaggregated data, public consultation and cooperation with civil society organizations are essential to collect accurate information and data.[811] Moreover, most gender-disaggregated data takes a female/male woman/man binary approach.[812] It will not be enough to focus on "sex" to bridge the digital "gender" divide without addressing other discrimination and barriers, including gender identity.

Another mechanism for evaluating the implementation of the gender-responsiveness of PTAs is to reference other instruments, such as the work of U.N. Women,[813] including its annual report, and the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Moreover, establishing a Digital Trade and Gender Committee under PTAs, which could incorporate reports or documents from other international committees and review and adjust work plans annually to revisit priorities in light of changing circumstances,[814] could directly address the difficulties that women face in real life and eventually meet their actual needs.

In addition, creating a division of the WTO Informal Working Group on Trade and Gender focused on e-commerce in the WTO will be even better to ensure the policy will guarantee gender inequality.[815] In 2020, the WTO established the Informal Working Group on Trade and Gender ("Working Group"). The Working Group collects and analyzes the data and assesses the impact of trade agreements on women.[816] Moreover, it also contributed to the Aid for Trade work programme and other supportive programs to promote women's participation in trade and e-commerce. For instance, "'SheTrades Connect' provides technical training on digital skills and networks to female entrepreneurs in Africa."; "The 'E-Commerce Aid-for-Trade Fund' builds the e-commerce capabilities of developing countries in Southeast Asia and the Pacific."; "Japan supports to improve financial inclusiveness by promoting digital financial services targeting low-income women in Viet Nam."[817] Such work programmes are great for making the provisions in PTAs, such as access to the internet, capacity building, and

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[809] World Trade Organization, Joint Ministerial Declaration on the Advancement of Gender Equality and Women's Economic Empowerment Within Trade, WTO Doc. WT/MIN(21)/4 (Nov. 10, 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/4.pdf&Open=True.

[810] DEPA, *supra* note 65, Module 11.1(3)(e).; UKSDEA, *supra* note 66, art. 8.61-P(2)(c).

[811] *Toolkit for Mainstreaming and Implementing Gender Equality*, OECD: GOV'T: ASSESSMENT OF GENDER IMPACT: GENDER-DISAGGREGATED DATA (last visited April 23, 2022), https://www.oecd.org/gender/governance/toolkit/government/assessment-of-gender-impact/disaggregated-data/.

[812] Chenai Chair & Ana Rodriguez, *Leave No One Behind Why Gender Disaggregated Data Matters*, U.N. WORLD DATA F. (Oct. 14, 2020), https://unstats.un.org/unsd/undataforum/blog/leave-no-one-behind-why-gender-disaggregated-data-matters/.; *see also* Press Release, New ITU data reveal growing Internet uptake but a widening digital gender divide, ITU (Nov. 15, 2019), https://www.itu.int/en/mediacentre/Pages/2019-PR19.aspx. (stating that the proportion of all women using the Internet globally is 48 percent, against 58 percent of all men).

[813] U.N. Women, Annual report (last visited Oct. 22, 2023), https://www.unwomen.org/en/digital-library/annual-report.

[814] *Third Trade and Gender Committee meeting under the Canada-Chile Free Trade Agreement (CCFTA) Trade and Gender Chapter*, GOV. OF CANADA (last visited Oct. 22, 2023), https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/report-third-gender-troisieme-reunion-comite.aspx?lang=eng.

[815] Lyndsay J. Montour, *Connecting the Spheres of Trade and Gender: Creating a Gender-Conscious World Trade Organization*, 47(2) SUFFOLK UNIV. LAW REV. 397, 415 (2014).

[816] Informal Working Group on Trade and Gender, *Progress Report on WTO Members and Observers Technical Work on Women's Economic Empowerment*, WTO Doc. INF/TGE/R/1 (Nov. 9, 2021).

[817] *Id.*

digital skills training, more concrete. Therefore, PTAs could explicitly incorporate this Working Group in the provision for gender equality commitments and scrutinize the work programmes in the progress reports or documents to find the best fit for the country, either for itself or for cooperation, to foster women's empowerment.

B. Digital Inclusion Provisions in International Trade Agreements

The above section analyzes the existing international trade instrument designs and provides possibilities and options for fostering gender equality. The next step is examining the existing digital inclusion provisions that are binding or under negotiation. Based on Katrin Kuhlmann's three approaches for assessing gender and trade rules, as applied to the digital trade area, it is crucial to examine not only (A) the structure of the provisions on gender inclusion but also (B) to evaluate whether the provisions are gender-responsive, and (C) to consider the equity and inclusivity dimension of gender and digital trade provisions.[818] The reason for using such approaches is that it goes beyond evaluating the provisions' structure and includes an analysis of other relevant considerations and legal instruments that could be used to address women's actual needs. Together, with consideration of current core provisions of e-commerce, these recommendations could provide a comprehensive blueprint for future adoptions of gender-inclusive governance in digital trade agreements.

The section below, thus, builds on the three-approach assessment addressing the three PTAs, DEPA, UKSDEA, and OACPS-EU, that include digital inclusive provisions and discusses additions and changes in these agreements.

1. Structure of the PTAs' Gender Inclusive Provisions

Structurally, the concept of gender inclusive provisions has appeared in the DEPA's and OACPS-EU's preamble and objectives, and all of the agreements specifically mention supporting women in their digital inclusion article.[819] As the OACPS-EU does not only cover digital trade regulations, it has specific articles on women empowerment about other trade issues; there are no other specific articles or chapters on gender with regard to e-commerce among these agreements.

According to the three PTA digital inclusion provisions, the gender commitment in these agreements includes (i) recognition of the importance of promoting gender equality; (ii) acknowledgment to remove barriers to participate and enable easy access to ICTs; (iii) cooperation on digital gender inclusion; and (iv) sharing methods and procedures for collection of gender-disaggregated data and conducting analyses related to the participation in digital trade.[820]

2. Gender Responsiveness of PTA Provisions

Besides the structure of trade agreements, gender responsiveness is also an important consideration in examining the PTAs approaches.[821] The Gender-Responsiveness Maturity Framework has categorized PTA provisions based on gender responsiveness into five levels:

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[818] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 5-11.
[819] DEPA, *supra* note 65, Module 11.1.; OACPS-EU, *supra* note 67, Part II Title III art. 48.; UKSDEA, *supra* note 66, art. 8.61-P.
[820] *Id.*
[821] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 6.

limited, evolving, acceptable, advanced, and optimizing.[822] These benchmarks and levels measure the PTA provisions beyond the structure by identifying the actual interaction and impact on gender, which include qualitative, cumulative, and progressive.[823]

Applying this framework to the DEPA, UKSDEA, and OACPS-EU, all of them reached benchmark III: Cooperation & Advocacy. It means that not only were these PTAs aware of the role of women in digital trade and development (benchmark I: Awareness),[824] but they also affirmed the importance of reducing the barriers women face in e-commerce (benchmark II: Affirmations).[825] In particular, the DEPA and OACPS-EU reaffirmed their commitments under UN sustainable development goals.[826] Furthermore, they demonstrated their minimal willingness to cooperate on various issues to benefit women, either as employees, consumers, or entrepreneurs.[827]

For instance, the UKSDEA stated that it would promote labor protection for workers, improve digital skills, and access to online business tools from capacity building initiatives;[828] the OACPS-EU showed support for digital entrepreneurship by women.[829] However, it should be noted that these provisions neither include committees to monitor the implementation of gender-inclusive provisions nor consultation mechanisms to resolve conflicts arising from gender-related concerns. In addition, since the provisions are based on countries' willingness, under current provisions, there are no binding or enforceable methods to require countries to do specific actions to guarantee gender equality, which is to say that these agreements did not reach benchmark IV of Institutionalization or V of Legally-binding Obligations & Enforcement.[830]

3. Inclusive Legal Design Approaches

Another vital aspect of evaluating the design of the PTA involves both understanding the rules in context and taking a deep dive into other relevant legal designs encompassing other instruments such as treaties, soft law for sustainable development goals, and domestic laws, creating diverse legal and regulatory innovations; and focusing on the needs of vulnerable and marginalized stakeholders,[831] i.e., women and others. Kuhlmann's "Inclusive Legal and Regulatory" approach presents an analytical framework that covers seven dimensions: (i) special and differential treatment (S&DT); (ii) flexibility; (iii) sustainable development; (iv) equity; (v) engagement, inclusiveness, and transparency; (vi) legal and regulatory gateways; and (vii) implementation and impact.[832] It should be noted that these dimensions are not mutually exclusive, just as is valid with the benchmarks in Bahri's article, and they can overlap in several

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[822] Amrita Bahri, *Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self- Evaluation Maturity Framework*, 14 (11/12) GLOB. TRADE AND CUSTOMS J. 517 (2019), 521, https://wtochairs.org/sites/default/files/Article%20Draft%2022%20Aug%202019.pdf.
[823] *Id.*, at 520.
[824] *Id.*, at 522.
[825] *Id.*, at 522-523.
[826] DEPA, *supra* note 65.; UKSDEA, *supra* note 66.
[827] Amrita Bahri, *Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self- Evaluation Maturity Framework*, *supra* note 82, at 523-524.
[828] UKSDEA, *supra* note 66, art. 8.61-P(1), 2(d) & (e).
[829] OACPS-EU, *supra* note 67, Part II Title III art. 48(3).
[830] Amrita Bahri, *Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self- Evaluation Maturity Framework*, *supra* note 82, at 524-526.
[831] Katrin Kuhlmann, *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, 2 AF. J. INT'L. ECON. L. 2ND ED. 48 (Aug. 27, 2021), 51-52, https://www.afronomicslaw.org/download/file/317. *See also* Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 8-9.
[832] *Id.*

situations. The following paragraphs address options and recommendations for current PTAs in accordance with each dimension.

S&DT are special rights for developing countries, and, as Katrin Kuhlmann proposed in her article, S&DT and LDC service waivers could apply in a gender context.[833] For example, prioritizing women's businesses as suppliers of e-commerce goods and services, [834] especially for small and medium enterprises, as women entrepreneurs mostly start and run for such enterprises. To be more specific, provisions could also call on developed countries to aid and build capacity in developing countries.[835] As for *flexibility in the design and application of rules*, the DEPA and UKSDEA do not include "review and revise" mechanisms for the agreement, which may be less flexible for emergency circumstances, such as the COVID-19 impact on women's employment.[836] Moreover, the consultation mechanism mentioned in the UKSDEA could be used as an instrument to reassess whether commitments meet the needs, which also allows countries to keep some policy space and monitor the agreement to adapt to changes. Although the current PTA provisions did embrace the concept of *sustainable development* for gender, they only include a few substantial measurements to bridge the uneven capacity between genders. Such provisions, for instance, could provide technical training and financial support for women on e-commerce applications or business establishments.

In addition, while the DEPA, UKSDEA, and OACPS-EU include digital inclusion provisions that could be considered to incorporate *equity considerations*, they need more details and implementation. To be more specific, they could be expanded to include minimum legal standards for the protection of equal pay for equal work and penalizing violations of those standards or providing permissible subsidies or tax reductions subject to national law and regulations. It is also important to note that there are several concerns that the internet reinforces power dynamics that increase the marginalization of women and gender-diverse groups.[837] As the internet is becoming a daily necessity for everyone, it is urged to include gender-specific provisions imposing penalties for illegal use of women's personal data for abuse, harassment, and discrimination in the context of customer protection, data privacy, and cybersecurity.[838] *Inclusiveness and engagement* often led to the indication of the degree to which affected communities can participate in the rulemaking process.

In contrast, *transparency* relates to how regulations and policies are shared publicly, which adds vulnerability since these could change quickly.[839] It is common for trade agreements to be developed with limited vulnerable stakeholders' participation. Therefore, to bridge the digital gender divide by enhancing the gender-inclusion provisions in international trade

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[833] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 9.

[834] DEPA, *supra* note 65, Module 10.

[835] Jean-Frédéric Morin & Rosalie Gauthier *Nadeau, Environmental Gems in Trade Agreements: Little-Known Clauses for Progressive Trade Agreements*, CTR. FOR INT'L GOVERNANCE INNOVATION (CIGI), CIGI Papers No. 148 (Oct. 2017), 4, https://www.cigionline.org/sites/default/files/documents/Paper%20no.148.pdf

[836] Carmen De Paz, Isis Gaddis, Miriam Muller, *COVID-19 highlights unfinished business of ensuring equality for women entrepreneurs*, WORLD BANK BLOGS (Sept. 7, 2021), https://blogs.worldbank.org/voices/covid-19-highlights-unfinished-business-ensuring-equality-women-entrepreneurs.

[837] Chenai Chair, *Shaping the future of multilateralism: Does data protection safeguard against gender-based risks in Southern Africa?*, HEINRICH BÖLL STIFTUNG (July 8, 2021), 6-7, https://us.boell.org/sites/default/files/2021-07/HBS-e-paper%203%20-%20Chenai%20chair%20V3.pdf.

[838] Adriane van der Wilk, *Protecting Women and Girls from Violence in the Digital Age: The Relevance of the Istanbul Convention and the Budapest Convention on Cybercrime in Addressing Online and Technology-facilitated Violence Against Women*, COUNCIL OF EUROPE (Dec. 2021), 13, 17, https://rm.coe.int/prems-153621-gbr-2574-study-online-a4-bat-web/1680a4cc44.

[839] Katrin Kuhlmann, *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, 2 *supra* note 91, at 84-86.

agreements, including women in decision-making processes is vital, both at the initial negotiating stage and in the context of a "review and revise" mechanism to jointly enable the agreement provisions to reflect the groups' needs. Additionally, including a certain number of women in joint committees, in the role of experts,[840] or even in dispute resolution mechanisms (arbitration or mediation) is an option to strengthen engagement and inclusiveness.

Mapping legal and regulatory gateways point out hurdles women face and seeks to find an ideal design for the situation.[841] For example, the current process and design of electronic payments present several barriers for women, whose trust in e-payments is limited and who are more vulnerable to online fraud due to a lack of digital knowledge and awareness of precautions.[842] In addition, inequality between genders in accessing finance can be attributed to the requirement of collateral, from which traditional cultures often exclude women.[843] Provision, thus, should focus on promoting online payment knowledge and awareness among women of financing, microcredit, and crowdsourcing for women's businesses.[844] Lastly, provisions could be incorporated to *evaluate gender impact review and assess its implementation* in areas where women are actively involved or are generally discriminated against or abused.[845]

IV. Framing a Holistic Approach for Gender-Inclusion in E-Commerce

While calling for gender equality, it should be borne in mind that e-commerce is complicated since it cuts across several areas.[846] "This means that the fruits of a carefully designed gender-responsive policy in one area can be nullified by another gender-blind or gender-neutral policy in another area."[847] Therefore, beyond structure gender-responsiveness, the analysis of relevant legal designs to ensure the implementation works effectively is another aspect to consider in the current core e-commerce provisions.[848] To be more specific, transferring these provisions into gender-inclusive terms would make every policy in e-commerce embrace gender equality. According to the DEPA, UKSDEA, and other trade agreements, the provisions of e-commerce usually cover areas such as (i) trade facilitation and market access; (ii) electronic payments; (iii) business and customer trust such as online consumer protection, data privacy and localization, and cybersecurity; (iv) transparency; and (v) cooperation.[849] Some of the suggestions were covered when discussing the seven dimensions of relevant legal designs. To avoid repetition, the below section will only illustrate those not mentioned.

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[840] DEPA, *supra* note 65, Module 14c.8.

[841] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 11.

[842] Yasmin Ismail, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, *supra* note 1, at 25.

[843] Caroline Kende-Robb, *To Improve Women's Access to Finance, Stop Asking Them for Collateral*, WORLD ECON. F.: GLOB. AGENDA: EDUC., SKILLS AND LEARNING: BANKING AND CAP. MKTS.: ECON. PROGRESS (Jun. 18, 2019), https://www.weforum.org/agenda/2019/06/women-finance-least-developed-countries-collateral/.

[844] Yasmin Ismail, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, *supra* note 1, at 25.

[845] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 11.

[846] Yasmin Ismail, Fezeka Stuurman, Leslie Sajous, and Julien Grollier, *Mainstreaming Gender in Key ECommerce Policy Areas: Possible Lessons for AfCFTA,* CUTS INT'L, GENEVA. (2020), 24, http://www.cuts-geneva.org/pdf/eAfCFTA-Study-Mainstreaming_Gender_in_E-Commerce.pdf.

[847] *Id.*, at 14.

[848] *Id.*, at 24.

[849] *See* Yasmin Ismail, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, *supra* note 1, at 25-26.; Amalie Giødesen Thystrup, *Gender Inclusive Governance for E-Commerce*, *supra* note 3, at 14-15.

In terms of *trade facilitation and market access*, including the utilization of e-procurement systems,[850] focus in this area could not only enhance transparent information toward consumers and standardize the procurement process,[851] but it could also help support the purchase of goods or services from women. As for the *business and customer trust* section, increasing the coverage of mobile devices and internet access among women is the first step, and, using DEPA as an example, Article 6.4: Principles on Access to and Use of the Internet could be strengthened to explicitly mention strengthening women's ability to access and use of the internet. Furthermore, promoting technology knowledge, digital skills, and improving awareness of online threats, including how to tackle the problem, should also be covered in the provision.[852] The current corporation plan in trade agreements' provisions and the whole gender-inclusion provision are based on the Parties' willingness;[853] thus, the provision may include minimum women labor wages for specific digital trade areas, for instance. In the Agreement between the United States of America, the United Mexican States, and Canada ("USMCA"), there are provisions requiring 40 percent of production to meet certain minimum wage in the auto sector by July 1, 2023.[854] This labor minimum wage from USMCA could be adapted to women's circumstances, which provide a minimum wage requirement for women participating in particular e-commerce fields. In addition, the provision could include economic sanctions if a Party violates gender equality, which would be an enforcement mechanism that currently is missing from most gender provisions.[855]

The existing gender-inclusive provisions in e-commerce are often soft language, soft law, and target voluntary cooperation and collection of data. Based on the three-approach assessment and the analysis of current central values in digital trade, the above options and recommendations could strengthen PTAs in the realm of digital inclusion. However, gender inclusive commitments are sometimes criticized as disguised protectionism for political objectives.[856] This concern is valid; hence, options for different treatments and measurements in trade agreements are important for States to evaluate the best fit for themselves and maintain appropriate policy space.[857]

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[850] Daniel Morris, *Public procurement as a tool to realize gender equality*, OPEN GLOB. RTS. (Apr. 30, 2021), https://www.openglobalrights.org/public-procurement-as-a-tool-to-realize-gender-equality/.

[851] Yifan Chen et al., *Using e-procurement systems to accommodate multiple sustainability objectives*, THE LONDON SCHOOL OF ECON. AND POL. SCI. (Sept. 22, 2021), https://blogs.lse.ac.uk/businessreview/2021/09/22/using-e-procurement-systems-to-accommodate-multiple-sustainability-objectives/.

[852] Lisa Staxäng, Sonia Jorge, Mariana Lopez, *Women's Digital Inclusion: The Risks of Going Too Fast and Not Fast Enough*, BUS. FOR SOC. RESP.: OUR INSIGHTS: BLOGS (May 14, 2021), https://www.bsr.org/en/our-insights/blog-view/womens-digital-inclusion-the-risks-of-going-too-fast-and-not-fast-enough.

[853] DEPA, *supra* note 65, Module 11.1.; OACPS-EU, *supra* note 67, Part II Title III art. 48.; UKSDEA, *supra* note 66, art. 8.61-P.

[854] Agreement between the United States of America, the United Mexican States, and Canada ("USMCA"), art. 4-B. 7., Nov. 30, 2018, H.R.5430 (ratified by all three countries by March 13, 2020).

[855] Suzanne Zakaria, *Fair Trade for Women, At Last: Using a Sanctions Framework to Enforce Gender Equality Rights in Multilateral Trade Agreements*, 20(1) GEO. J. OF GENDER AND THE LAW 241, 262-263 (2018), https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2019/01/GT-GJGL180039.pdf.

[856] Amrita Bahri, *Making Trade Agreements Work for Women Empowerment: How Does It Help, What Has Been Done, and What Remains Undone?*, 4(11) LATIN AM. J. OF TRADE POL'Y 6 (Dec. 31, 2021), 20, https://lajtp.uchile.cl/index.php/LAJTP/article/view/65667/69298.

[857] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 11.; *see also* Ananya Singh, *Explained: India's Refusal to Back WTO Declaration on Gender Equality in Trade,* QRIUS (Dec. 15, 2017), https://qrius.com/explained-india-refusal-gender-equality-trade/; Suresh Prabhu, INDIAN MINISTER OF INDUSTRY AND COM. (Indian Press Conference, WTO Ministerial Conference, Buenos Aires), Dec. 17, 2017.

As this paper has focused on international trade agreement provisions to bridge the digital gender divide, it also strongly demonstrates that to make the adjustments of provisions in international trade agreements effectively, we need support at the national level. These options in PTAs should collaborate with national levels: domestic laws, which can provide support and a further stable mechanism to address the specific circumstances that States may encounter.[858]

An example of trade agreements is the USMCA, which led Mexico to reform its labor law, such as including a new labor justice system which created a neutral autonomous center for union registrations, and verifying elections in cases of competition between unions to take away the government's power to interfere.[859] Although this labor law reform is not exclusively for gender equality, this is still a highlight since most of the international trade agreements could not let countries make such commitments.

National governments could work on three aspects to bridge the digital gender divide by reforming their domestic law: education, labor law, and engagement from local communities. There are many positive effects of education to enhance gender equality, in particular for women to have enough knowledge and skills to compete in the labor market.[860] Furthermore, discussing the barriers for women to participate in e-commerce that increase the digital gender divide circumstances, cultural expectations, and social norms cannot be ignored. Gender socialization begins early in one's lifetime, which makes children learn, refine, and assume gender roles and norms, thereby confirming gender stereotypes and causing gender inequality.[861] Therefore, country policies should go beyond establishing gender parity in enrollment and attainment rates at schools[862] and ensure children are educated in a gender-equal classroom and school. Such assurance can not only break the cycle of gender stereotypes but can also improve women's participation in e-commerce and bring the possibility of closing the gender gap.

In addition, provide gender awareness lessons not only to children but also to the faculty. To encourage more women to engage in STEM-related studies and high-technology sectors, the government may establish funds, grants, and scholarships for women enrolling in STEM-related degrees and provide incentives such as awards and prizes for achievement in STEM-related sectors.[863] Through these actions, gender-specific expectations for professional aspirations and gender biases in digital trade/e-commerce made by cultural and social norms may be mitigated.

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[858] A similar approach in bilateral investment treaties where South Africa law incorporate with UNCITRAL Model Law to balance and protect South African's people's rights. *See* Fabio Morosini, *Rethinking the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian Experiences*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 163-170 (Alvaro Santos, Chantal Thomas, & David Trubek eds., 2019), 164, https://doi-org.proxygt-law.wrlc.org/10.2307/j.ctvk8w1rz.20.

[859] Tatiana Clouthier Carrillo & Luisa María Alcalde Luján, *USMCA at One: Mexico's Labor Reform*, WILSON CTR.: INSIGHT & ANALYSIS (May 14, 2021), https://www.wilsoncenter.org/article/usmca-one-mexicos-labor-reform.

[860] Anushna Jha & Mehrin Shah, *Leveraging Education as a Tool to Achieve Gender Equality – Strategies and Signposts*, LSE DEP'T OF GENDER STUD. (April 8, 2020), https://blogs.lse.ac.uk/gender/2020/04/08/leveraging-education-as-a-tool-to-achieve-gender-equality-strategies-and-signposts/.

[861] Nikola Balvin, *What is Gender Socialization and Why Does it Matter?*, UNICEF: RSCH. SYNTHESIS (Aug. 18, 2017), https://blogs.unicef.org/evidence-for-action/what-is-gender-socialization-and-why-does-it-matter/.; *see also How to Encourage Gender Equity and Equality in the Classroom*, WATERFORD ORG.: EDU. (July 16, 2020), https://www.waterford.org/education/gender-equality-in-the-classroom/. (mentioning a survey which shows children ages 4 to 16 make assumptions that confirm gender stereotypes and learn how to think about themselves and others from the messages they hear in society).

[862] Anushna Jha, *Leveraging Education as a Tool to Achieve Gender Equality – Strategies and Signposts*, *supra* note 120.

[863] *Bridging the Digital Gender Divide Include, Upskill, Innovate*, *supra* note 28, at 16.

Country policies also need to focus on increasing women's participation in the labor market. Gender-inclusion labor law could take a page out of Mexico's new labor law. The equity payment between genders should be included in the domestic laws. Currently, unpaid childcare, elder care, and unequal housework distribution have a vast difference between genders,[864] significantly impacting on women's engagement in e-commerce. Thus, domestic policies must try to provide gender-neutral parent-leave-taking and childcare allowances, which could enable more women to participate in the labor markets.[865] Governments could create centers for union registrations and promote digital trade focus unions, especially for women.[866] The centers could offer training programs for technical and digital skills and other assistance related to applications for starting up e-commerce businesses or e-commerce regulations.[867]

Lastly, although strengthening the right to regulate gender equality issues is critical, it is not enough. Taking local communities affected, such as women, into account[868] is essential to understanding what concrete problems need to be fixed and whether their implementation leads to women's empowerment, which could further close the gender gap. That is, not only should women be included in the rules-making process, but efforts should be made to include those women who are currently facing challenges, either by research, survey, consultation, or even ensure a certain number of women participate in committees for decision-making.

It is also vital to make women's participation visible at the domestic level. Only 26 women serve as Heads of State and or Government in 24 countries and only 25 percent of all national parliamentarians are women.[869] It should be noted that including women in rulemaking and negotiation processes is the best way to hear their voices and understand their needs,[870] and having all genders represented in decision-making could broaden perspectives, increase innovations, diversify talent pools and competencies, and reduce conflicts.[871]

Aside from getting help from other countries and international organizations for capacity building, countries themselves should try to build their capacity. Governments could cooperate with corporations, funding companies to hold campaigns or workshops and conduct women's career sharing to encourage female students to engage in digital and

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[864] Shera Avi-Yonah, *Women Did Three Times as Much Child Care as Men During Pandemic*, BLOOMBERG (June 25, 2021), https://www.bloomberg.com/news/articles/2021-06-25/women-did-three-times-as-much-unpaid-child-care-as-men-during-covid-pandemic.

[865] *Bridging the Digital Gender Divide Include, Upskill, Innovate*, *supra* note 28, at 14.

[866] Ken Green, *The Role of Unions in Addressing Gender Equity*, UNIONTRACK BLOG (Sept. 28, 2021), https://uniontrack.com/blog/unions-gender-equity.

[867] Yasmin Ismail, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, *supra* note 1, at 25.

[868] Nicolás M. Perrone, *Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequences of Foreign Investment?*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 171-180 (Alvaro Santos, Chantal Thomas, & David Trubek eds., 2019), 174, https://doi-org.proxygt-law.wrlc.org/10.2307/j.ctvk8w1rz.21.

[869] U.N. Women calculation based on information provided by Permanent Missions to the U.N. *See* U.N. WOMEN, I*n Brief: Women's Leadership and Political Participation* (Jan. 15, 2021), https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/12/UN%20WomenLGThemBriefUSwebrev2%20pdf.pdf.

[870] U.N. WOMEN, I*n Brief: Women's Leadership and Political Participation*, *supra* note 129.

[871] *See* Paola Profeta, *Gender Equality in Decision-Making Positions: The Efficiency Gains*, 52(1) INTER ECON. 34, 34 (2017), https://www.intereconomics.eu/contents/year/2017/number/1/article/gender-equality-in-decision-making-positions-the-efficiency-gains.html#footnote-32050-7.; Jennifer Asuako, *Women's Participation in Decision Making: Why it Matters*, UNDP GHANA: PRESS CTR.: ART. (Dec. 4, 2020), https://www.gh.undp.org/content/ghana/en/home/presscenter/articles/2020/women_s-participation-in-decision-making--why-it-matters.html.

technology fields. Take Taiwan Microsoft for example, they have been holding Coding Angels, a female tech workshop, annually since 2013, which could be an opportunity for young women to discover their potential in the tech industry[872] and encourage them to participate in the digital area. Such workshops could be a way to bridge the digital gender divide by eliminating gender stereotypes. Moreover, country policy should explicitly include "Corporate Digital Responsibility" (CDR),[873] where multinational or big technology companies and service providers shall enhance the public, and especially women's access to ICT hardware and the internet, as one way to eliminate the digital gender divide.

V. Conclusion

Most of the agreements' provisions regarding trade and gender only scratch the surface of the gender equality issue.[874] Notably, in digital trade, only two in-force trade agreements, the DEPA and UKSDEA, and the other trade agreement, OACPS-EU, which are still under negotiation or in process, contain gender-inclusion provisions,[875] which merely call for attention and awareness of gender equality but without solid content. Including digital inclusion provisions in agreements is undoubtedly essential for bridging the digital gender divide. Nevertheless, there is more space to embrace gender in digital trade, especially turning the core regulations of e-commerce into "gender-specific." This paper has also mentioned some possibilities for the current trade regime to innovate gender-inclusive governance, particularly domestic law reform.

Using Katrin Kuhlmann's three-approach assessment, with an examination to ensure each of the primary regulations on e-commerce favors gender equality and considering other innovations can remove the digital gender divide and even bring economic benefits to the current trade circumstances. First, the approach reveals the weak spots in the existing provisions, that is, the tendency to use soft language, soft law, and voluntary participation. In addition, there is a pathway for the core regulations in e-commerce to turn into gender-specific and gender-responsive for assurance of the implementation of gender equality.[876] Lastly, these options and innovations can provide the negotiators with an idea for future trade agreements and country policies that promote gender equality and further eliminate the digital gender divide. While every country should find a suitable way to foster gender equality in e-commerce, such options and possibilities could be deemed as an entry point to rethink gender-inclusion provisions in digital trade, and with appropriate adjustments, these options could benefit every country.

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[872] Microsoft Student Program (last visited April 26, 2022), https://www.microsoft.com/taiwan/campus/news/191223.aspx.

[873] Lara Lobschat, Benjamin Mueller, Felix Eggers, Laura Brandimarte, Sarah Diefenbach, Mirja Kroschke,J ochen Wirtz, *Corporate Digital Responsibility*, 122 J. OF BUS. RSCH. 875, 875 (2021), https://doi.org/10.1016/j.jbusres.2019.10.006.

[874] Katrin Kuhlmann, Resetting the Rules on Trade and Gender?, *supra* note 49, at 3.

[875] DEPA, *supra* note 65, Module 11.1.; OACPS-EU, *supra* note 67, Part II Title III art. 48.; UKSDEA, *supra* note 66, art. 8.61-P.

[876] Yasmin Ismail, *Addressing the Gender Dimension of E-commerce: Towards a Holistic Analytical and Policy Framework*, *supra* note 1, at 25-26.

PART II

SOCIAL INCLUSION

PART II

SOCIAL INCLUSION

Part II focuses on social inclusion, an area that is gaining focus in international trade law but has traditionally been treated as the primary domain of other areas of law, such as human rights and labor law. The papers in this section focus on issues of gender and trade, Indigenous Peoples, informality, small businesses, labor, food security, and fisheries subsidies. These issues correspond to a number of the Sustainable Development Goals (SDGs), including SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 5 (Gender Equality), SDG 8 (Decent Work and Economic Growth), SDG 10 (Reduced Inequalities), SDG 14 (Life Below Water), and SDG 17 (Partnership for the Goals), among others.

The first sub-section of Part II includes papers on gender and trade. Chapter 12, "Walking the Talk: Improving the Role of Civil Society in the Implementation of Gender-Responsive EU Trade Agreements," examines the gender-responsiveness of civil society mechanisms (CSMs) within European Union (EU) trade agreements. Chapter 13, "The Pink Trojan Horse: Inserting Gender Issues into Free Trade Agreements," assesses whether gender chapters included in the free trade agreements (FTAs) between Chile and Canada, Chile and Argentina, and Canada and Israel can effectively contribute to gender equality.

Chapter 14, "Preserving Traditions: Navigating the Intersection of International Trade and Indigenous People," delves into the issue of protecting Indigenous Peoples and their traditional knowledge by exploring how international trade and investment agreements could protect indigenous rights and traditional knowledge. Chapter 15, "Trade Barriers and Technological Solutions for Nigerian MSMEs," explores treatment of the informal sector, with important lessons for future trade instruments. Chapter 16, "The Global Wine Trade and Small Wine Producers: Exploring Challenges to SME Economic Sustainability," takes a sectoral approach to inclusion of micro, small, and medium-sized businesses, analyzing how the global wine industry and the legal regime surrounding it present opportunities and challenges for small producers.

Several chapters focus on labor, which has been linked to trade through various Regional Trade Agreements (RTAs). Chapter 17, "International Trade and Labor in the U.S.-Mexico Context: Is There Room for More Development?," proposes to apply a bottom-up, rights centered approach to labor provisions under the United States–Mexico–Canada Agreement (USMCA), with proposals for a more balanced approach to labor rights across parties to the agreement. Chapter 18, "Addressing Forced Labor in International Trade with a Cooperative and Comprehensive Approach," analyzes whether U.S. economic sanctions for forced labor in the Xinjiang Uyghur Autonomous Region are the appropriate tools to address human rights issues in the context of international trade. Chapter 19, "A Race to the Bottom Line and the Bottom Line: Making the Case for Workers' Rights in Trade Agreements," makes the case for using trade agreements to advance workers' rights globally, linking economic and social considerations.

The final chapters in Part II focus on food security and fisheries subsidies. Chapter 20, "Promoting Food Security Through the Multilateral Trading System: Assessing the WTO's Efforts, Identifying Its Gaps, and Exploring the Way Forward," explores how an incremental approach applied to the WTO Agreement on Agriculture and other agriculture-related instruments at the WTO could be adopted to advance food security. Chapter 21, "How the

Agreement on Fisheries Subsidies Can Deal with Social and Developmental Concerns of Coastal Communities," proposes an enhanced approach to Special and Differential Treatment (S&DT) provisions in the context of the Fisheries Subsidies Agreement, with a periodic review mechanism and an institutional arrangement to address the potential impacts that arise from removing subsidies granted to small-scale fisheries. The final chapter in this section, Chapter 22, "Opportunities with the WTO Agreement on Fisheries Subsidies," examines S&DT provisions in the Agreement on Fisheries Subsidies and the impact that they could have on the livelihood and food security of developing economies.

PART II

SOCIAL INCLUSION

Trade and Inclusion

CHAPTER 12: WALKING THE TALK: IMPROVING THE ROLE OF CIVIL SOCIETY IN THE IMPLEMENTATION OF GENDER RESPONSIVE EU TRADE AGREEMENTS

EMILIE KERSTENS*

Abstract

Efforts to incorporate gender considerations into regional trade agreements (RTAs) have gained momentum globally. The European Union (EU) has pursued gender mainstreaming in its RTAs through gender provisions and Trade and Sustainable Development (TSD) chapters, charging Civil Society Mechanisms (CSMs) with the monitoring of their enforcement. However, the lack of balanced representation within these mechanisms, co-opting of dialogue by business interests, operational and logistical challenges, and lack of impact have hindered their effectiveness in enforcing gender-responsive RTAs. This paper examines the gender-responsiveness of civil society mechanisms (CSMs) within EU trade agreements to ensure the effective implementation of gender commitments. It analyzes the link between gender and trade, the incorporation of gender provisions in EU RTAs, and highlights the significance of CSMs in engaging women. The paper identifies weaknesses in existing mechanisms, emphasizing the lack of gender responsiveness. It evaluates the EU-Chile Advanced Framework Agreement as a blueprint for incorporating gender-responsive CSMs in future EU RTAs, providing recommendations to enhance these mechanisms. By bridging the gap between gender commitments and civil society engagement, meaningful progress can be made toward achieving gender equality and sustainable development in trade.

I. Introduction

The participation of women in trade is integral to achieving sustainable development.[877] This is recognized under Goal 5 of the United Nations (UN) Sustainable Development Goals (SDGs) and the 2017 Joint Declaration on Trade and Women's Economic Empowerment (The Buenos Aires Declaration) signed by 118 World Trade Organization (WTO) members.[878] Globally there has been a growing effort to incorporate sustainable development considerations into regional trade agreements (RTAs).[879] Since 2011, the European Union (EU) has included chapters on Trade and Sustainable Development (TSD chapter) in its

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[877] See for example United Nations Conference on Trade and Development (UNCTAD), 'Linking Trade and Gender towards Sustainable Development: An Analytical and Policy Framework' (2022) UNCTAD/DITC/2022/1.

[878] The World Trade Organization, Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017; UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, Goal 5.

[879] See Katrin Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (2023) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), available at https://www.unescap.org/kp/2023/handbook-provisions-and-options-inclusive-and-sustainable-development-trade-agreements.

RTAs.[880] These TSD chapters cover a range of sustainable development goals but have primarily focused on labor and environmental issues.[881]

Parallel to the inclusion of TSD chapters, there has been a trend to mainstream gender[882] into EU trade agreements as part of the EU's Gender Action Plan III and its dedication to reaching *"SDG 5 in all EU internal and external policy areas."*[883] Gender mainstreaming efforts have included the incorporation of gender explicit provisions into RTAs.[884] These provisions exist predominantly within the TSD chapters but vary in form, content and degree of bindingness.[885] However, many of these efforts have been criticized as "pink washing" or a "Potemkin facade" due to their failure to make a real impact on gender equality.[886]

One key shortcoming has been the absence or weakness of implementation mechanisms to enforce the TSD chapters and their gender provisions.[887] These RTA chapters and provisions depend largely on an institutionalized mechanism for civil society participation to discuss and monitor their sustainable development dimension.[888] The civil society mechanisms (CSMs) are supposed to ensure the monitoring of these commitments and help promote sustainable development within RTAs. However, they have largely remained "stuck at the bottom" due to logistical and resource constraints.[889] Moreover, they are not designed to be gender-responsive, i.e., sensitive, informed and committed to gender equality.[890]

This Chapter examines how the gender-responsiveness of CSMs within EU trade agreements can be improved to ensure the implementation of gender commitments. It looks broadly at the link between gender and trade and its incorporation in EU RTAs and analyzes how civil society mechanisms in RTAs function to monitor these commitments. It examines the extent to which these mechanisms are gender-responsive and provides recommendations for further improvement, with a view to improving the implementation of gender-responsive trade agreements.

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[880] Jan Orbie et al, 'Promoting Sustainable Development or Legitimizing Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) Third World Thematics 1(4), 526.

[881] Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1), 45.

[882] In the context of the EU's Gender Action Plan, the term 'gender' refers to the socially constructed roles, behavior, activities and attributes that a given society considers appropriate for women and men.

[883] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *EU Gender Action Plan (GAP) III – An Ambitious Agenda for Gender Equality and Women's Empowerment in EU External Action*, (25 November 2020), available at https://international-partnerships.ec.europa.eu/system/files/2021-01/join-2020-17-final_en.pdf , 2.

[884] Gender mainstreaming is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres to achieve gender equality. See UN Economic and Social Council, Gender Mainstreaming (18 September 1997) A/52/3.

[885] See Amrita Bahri, 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples' (2021) Gender, Social Inclusion and Trade Knowledge Product Series.

[886] See Katrin Kuhlmann and Amrita Bahri, 'Gender Mainstreaming in Trade Agreements: "A Potemkin Façade"' (2022) publication forthcoming; Third World Network, "'Pink Washing" WTO with Draft Women's Declaration?'(14 December 2017), available at https://www.twn.my/title2/unsd/2017/unsd171205.htm.

[887] Ibid.

[888] European Commission, *Communication from the Commission: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, (12 December 2002) COM(2002)704, 6.

[889] See Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf.

[890] International Trade Centre, 'Mainstreaming Gender in Free Trade Agreements' (2020) available at https://intracen.org/resources/publications/mainstreaming-gender-in-free-trade-agreements, 3.

II. Gender in EU Trade Agreements

A. Linking Gender and Trade

For better or worse, trade and gender equality are connected. Women represent half of the world's workforce and consumer market, and have the potential to act as engines of growth when they participate in international trade.[891] For women, liberalized trade can open up new economic opportunities, create new jobs and increase consumer choice. However, women are also the most vulnerable to the negative effects of trade liberalization and have not benefited from trade to the same extent as men due to the systemic inequality that exists in society and the additional challenges they face by virtue of the traditional roles they take up in the economy.[892] For example, women face bias in education and training, disparities in wages and inequitable access to resources such as credit, land and technology, which can prevent them from participating in international trade to the same extent as men or accessing its gains.[893] Trade agreements are largely not designed with these particular challenges in mind and the interests of women continue to be underrepresented in the design of trade rules and policy.[894]

B. Gender in EU RTAs

Gender equality is a fundamental right and objective of the EU.[895] The Treaty on the Functioning of the European Union (TFEU) provides that *"the Union shall aim to eliminate inequalities, and to promote equality, between men and women"* in all its activities.[896] This includes the Union's external policy and trade agreements.[897] At present, the EU has 45 trade agreements with more than 70 countries and territories.[898] Of these agreements, 36 contain a gender-explicit provision, mostly relating to education, employment, family, health and safety.[899] These provisions are generally broad and formulated with vague and non-binding language focusing largely on cooperation and information sharing, with more than half lacking identification of any institutions, procedures or mechanisms for implementation.[900]

Gender provisions are most often located in the TSD chapters of EU RTAs.[901] Labor and environmental commitments have been at the foreground of these chapters, with minimal

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[891] The World Bank and World Trade Organization, 'Women and Trade: The Role of Trade in Promoting Gender Equality' (2020), 3.

[892] Cecilia Malmström, 'WTO makes progress but could do more for women' (23 June 2022) Peterson Institute for International Economics Blog, available at https://www.piie.com/blogs/realtime-economics/wto-makes-progress-could-do-more-women.

[893] International Trade Centre (ITC), '*Unlocking Markets for Women to Trade'* (2015) ITC, available at https://www.un-ilibrary.org/content/books/9789210579407/read.

[894]European Commission, '2023 Report on Gender Equality in the EU' (2023), available at https://commission.europa.eu/system/files/2023-04/annual_report_GE_2023_web_EN.pdf, 33.

[895] Clair Gammage, 'Empowering Women in Trade: How Responsive are the EU's Trade Agreements?' in Elaine Fahey and Isabella Mancini (eds), *Understanding the EU as a Good Global Actor* (Edward Elgar 2022), 160.

[896] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union(TFEU) (2016 OJ C202/1), Article 8.

[897] The EU has linked commerce and gender since 1957, by providing a binding commitment on equal pay for equal work for women and men in the original Rome Treaty.

[898] See World Trade Organization, 'Regional Trade Agreements Database' (WTO, 15 May 2023), available at https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

[899] WTO Informal Working Group on Trade and Gender*, Trade and Gender-Related Provisions in Regional Trade Agreements*, (2022) WTO Doc. INF/TGE/COM/4, 20.

[900] Ibid.

[901] The 2011 EU-Korea Agreement served as a "blueprint" for the inclusion of sustainable development considerations in modern EU RTAs

acknowledgment of gender equality as an integral part of achieving sustainable development.[902] Moreover, the TSD chapters, and the gender commitments therein, have lacked enforceability.[903] These chapters are subject to a separate dispute settlement mechanism (DSM) to the exclusion of the general one, involving government-to-government consultations and where unsuccessful, recourse to a Panel of Experts.[904] However, there are no sanctions available to enforce the decisions of the Panels when a breach of the obligations under the TSD chapter occurs.[905] Instead, enforcement is dialogue- and collaboration-based, relying on CSMs as one of the primary mechanisms for the monitoring of commitments, including those related to gender equality.[906]

III. Civil Society Mechanisms in EU Trade Agreements

There is no legal definition of 'civil society' or even 'civil society organization'.[907] However, the EU takes a broad approach including labor-market players such as trade unions and employers federations; organizations representing social and economic players such as consumers organizations; non-governmental organizations (NGOs); community-based organizations (CBOs); and religious communities.[908] The inclusion of CSMs within the TSD chapters is part of a broader and global trend to enhance the inclusiveness of the international trading system.[909] At present, ten of the EU's RTAs have CSMs.[910] However, studies have shown that including CSMs has not necessarily resulted in more inclusive trade, and they have received strong criticisms related to their added value and effectiveness.[911]

A. The Importance of Engagement with Civil Society for Gender-Responsive RTAs

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[902] Amrita Bahri, 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples' (2021) Gender, Social Inclusion and Trade Knowledge Product Series, 25.

[903] See Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf.

[904] Paolo Mazzotti, 'Stepping up the Enforcement of Trade and Sustainable Development chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions' (2021) European Law Institute.

[905] Ibid.

[906] Other monitoring mechanisms for the TSD chapters in EU FTAs include Contact Points and Committees on Trade and Sustainable Development.

[907] Beatriz Alvarez et al, 'Working Better Together with CSOs to Address Gender Inequality and Champion Women's and Girls' Voices and Agency' (2022) EU Gender Equality, Human Rights and Democratic Governance (INTPA.G.1), 19.

[908] European Commission, *Communication from the Commission: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, (12 December 2002) COM(2002)704, 6.

[909] Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4), 581.

[910] These are RTAs with Canada, CARIFORUM, Central America, Georgia, Japan, Moldova, Peru-Colombia–Ecuador, South Korea, Ukraine and Chile.

[911] See Jan Orbie et al, 'Promoting Sustainable Development or Legitimizing Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) Third World Thematics 1(4); Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1); Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf; Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4).

Non-state actors play an important role in realizing the SDGs.[912] At their most basic level, CSMs provide a platform for dialogue between governments and non-state actors.[913] They serve as an information channel and contribute to the awareness that stakeholders have about the rules and policies that ultimately impact them.[914] When these mechanisms are effective and inclusive, they may lend themselves to a more bottom-up approach to the rule-making process by involving different stakeholders, such as women, instead of remaining exclusively government-to-government.[915] Women and organizations representing women are the best placed to provide insight into the challenges that they face and the impact that trade rules have on their daily lives. Therefore, to ensure that trade agreements are gender-responsive, a process or mechanism for engagement with relevant stakeholders is critical.[916]

In 2018, the European Parliament adopted a resolution that highlighted the importance of promoting gender equality in the EU's trade agreements.[917] This resolution calls on the Commission and the Council to ensure that trade consultations are inclusive of women, women's rights organizations, trade unions, businesses, civil society, and development organizations.[918] In addition, the European Parliament calls for the inclusion of gender perspectives and expertise in the negotiation of trade agreements and states that *"the participation of women and girls' rights groups and civil society in the follow-up monitoring (of trade agreements) should be transparent and guaranteed."*[919] Similarly, a 2019 resolution "*Stresses the importance of dialogue with external stakeholders such as civil society women's organizations, grassroots women's rights and gender equality groups, women's movements, international institutions, academia and national parliaments"* and *"recalls that their mobilization is important in improving EU gender mainstreaming processes and in fostering reciprocal exchanges to promote best practices"*[920]

The EU has been a front-runner in institutionalizing the participation of civil society stakeholders in its trade policy.[921] At a policy level, this has included consultations and civil society dialogues in the negotiation of new agreements.[922] However, the inclusion of specific CSMs within RTAs themselves only became a standard feature with the introduction of TSD chapters.[923]

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912 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, para 41.

913 Commission Services, 'Non Paper of the Commission Services: Feedback and Way Forward on improving the Implementation of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018) available at https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf, 5.

914 See Katrin Kuhlmann, 'Mapping Inclusive Trade and Development: A Comparative Agenda for Trade and Development.' (2021) African Journal of International Economic Law 2.

915 Ibid, 35.

916 Ibid.

917 European Parliament, Resolution of 13 March 2018 on Gender Equality in Trade Agreements, P8_TA(2018)0066, 13 March 2018.

918 Ibid.

919 Ibid, Explanatory Statement.

920 European Parliament, Resolution of 15 January 2019 on Gender Mainstreaming in the European Parliament, P8 TA(2019)0010, 15 January 2019, para 13.

921 Nadia Ashraf and Jeske van Seters, 'Making it count: civil society engagement in EU trade agreements' (July 2020) The Centre of Africa-Europe Relations Discussion Paper No. 276, 1.

922European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022, 9-10.

923 Jan Orbie et al, 'Promoting Sustainable Development or Legitimizing Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) Third World Thematics 1(4), 528.

B. Features of CSMs in EU RTAs

The way in which civil society engagement is incorporated into RTAs varies across agreements.[924] However, in their study, *Martens, Van Den Putte, Oehri and Orbie* identify three recurrent features of civil society involvement in EU trade agreements.[925] First is a national mechanism or 'Domestic Advisory Group' (DAG) with civil society representatives from three core constituencies: labor, environment, and business.[926] For example, Article 13.12(4) of the EU-Republic of Korea FTA provides that *"Each Party shall establish a Domestic Advisory Group(s) on sustainable development with the task of advising on the implementation of this chapter."* DAGs are tasked with monitoring the implementation of TSD commitments and providing advice and recommendations to their respective RTA Members on how to better achieve these objectives.[927]

Second, is a transnational mechanism or 'Civil Society Forum' (CSF) where the members of the DAGs meet with other civil society members from the EU or its trading partners annually.[928] For example, Article 16.16 of the EU–Japan Economic Partnership Agreement provides that *"The Parties shall convene the Joint Dialogue with civil society organizations situated in their territories, including members of their domestic advisory groups referred to in Article 16.15, to conduct a dialogue on this chapter."* CSFs generally have a broader representation of stakeholders and their proceedings are open to the public.[929]

Third is some kind of interaction between these two mechanisms and an intergovernmental body, like a Committee on Trade and Sustainable Development (TSD Committee).[930] These intergovernmental bodies are composed of senior officials from the relevant ministries on trade, environment and labor of each Member.[931] TSD Committees are more broadly charged with the implementation of TSD chapters. For example, Article 16.13 of the EU–Japan EPA provides that one of the functions of the TSD Committee is *"interacting with civil society on the implementation of this chapter."* The meetings of the CSF are generally followed by a meeting of the TSD Committee, which includes a session where the Committee reports on the implementation of the TSD chapter to the CSF.[932] However, the member countries and TSD Committee are generally not required to provide any kind of feedback on how the input of the CSMs has been taken into consideration.[933]

C. Shortcomings of CSMs in EU RTAs

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[924] See Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1).
[925] Ibid.
[926] Ibid.
[927] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 247.
[928] Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1), 46.
[929] Ibid.
[930] Ibid.
[931] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 245.
[932] Ibid, 248.
[933] Ibid.

The role of CSMs in RTAs is specifically linked to the implementation and enforcement of TSD commitments.[934] However, while civil society involvement has been somewhat successful at the level of information sharing, its monitoring capacity has been insufficient, and the impact on policy-making has been limited.[935] Many of the shortcomings of existing CSM mechanisms were highlighted in a Non-Paper prepared by a collection of EU DAGs in 2021 on *"Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups."*[936]

1. Composition of DAGs

The first key criticism of CSMs in EU RTAs is that their composition is not sufficiently representative, with women and other vulnerable and disadvantaged stakeholders being vastly underrepresented.[937] This is due to several reasons. First, the composition of DAGs is largely unmonitored within RTAs.[938] Some RTAs include a broad provision calling for a balanced representation of economic, social, and environmental stakeholders within the DAG.[939]. However, the appointment of members to the DAG is largely left to the Parties. This has resulted in the exclusion of important civil society voices, such as those of women, particularly in countries where non-business civil society organizations are weak and fragmented due to a strong anti-union climate.[940]

Membership in a DAG is also usually restricted to established organizations, which leaves informal workers and minority groups that are weak and unorganized unrepresented.[941] Women make up a disproportionate percentage of workers in the informal sector, and organizations representing women often struggle to establish themselves due to judicial harassment, bureaucracy and a severe lacking of funding. [942] This also affects their capacity to attend meetings.[943] In addition, women participating in civil society organizations such as labor unions face stigmatization, physical and online harassment and intimidation in conducting

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[934] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022, 9-10.

[935] Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4), 591.

[936] See EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf.

[937] Nadia Ashraf and Jeske van Seters, 'Making it count: civil society engagement in EU trade agreements' (July 2020) The Centre of Africa-Europe Relations Discussion Paper No. 276, 5.

[938] See EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf , 2.

[939] See for example Article 13.12 (5) of the EU-Korea FTA and Article 294(5) of the EU-Central America Association Agreement.

[940] See Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf, 55-60.

[941] Nadia Ashraf and Jeske van Seters, 'Making it count: civil society engagement in EU trade agreements' (July 2020) The Centre of Africa-Europe Relations Discussion Paper No. 276, 5.

[942] Beatriz Alvarez et al, 'Working Better Together with CSOs to Address Gender Inequality and Champion Women's and Girls' Voices and Agency' (2022) EU Gender Equality, Human Rights and Democratic Governance (INTPA.G.1), 10.

[943] ibid.

their work.[944] Studies of the CSMs in EU FTAs with Moldova, South Korea and CARIFORUM noted that issues faced by women workers and/or temporary workers were not raised in CSMs.[945] This was due to a focus on core labor standards but also due to the low participation of irregular workers and women in trade unions, resulting in a lack of influence in DAG meetings.[946]

2. Co-opting of dialogue within CSMs

The imbalance in representation within CSMs also affects the dialogue that takes place within meetings. The composition of CSMs has focused on representatives from labor, environment and business constituencies, who each have their own priorities.[947] While gender issues intersect with all three of these interest groups, women have particular challenges that need to be accounted for and addressed within CSMs. Additionally, different civil society members will have conflicts of interest and disagreements occur between and within the different constituencies.[948] This can make it difficult to agree on recommendations or joint statements and lead to the drowning out of minority voices such as those of women in favor of business interests, which generally represent the majority of DAG members.[949] The lack of a mechanism for mediating conflicts and reaching consensual statements was highlighted as a concern by the EU DAG Members in their Non-Paper.[950] It is important that CSMs are able to balance and address different when it comes to trade policy influence.[951]

3. Operational and logistical challenges

From an organizational perspective, there is also a lot of room for improvement. Most perspectives in their recommendations and that they do not further exacerbate the asymmetries that exist between businesses and non-profit organizations of the institutional structure and procedures for the CSMs are left to the discretion of the parties to the RTAs and are not clearly established in the TSD chapters.[952] The lack of procedural rules, clear timelines, and agendas interfere with the ability of civil society organizations to prepare for meetings and leads to logistical issues taking up discussions at the expense of substantive

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[944] ibid, 35.

[945] See Adrian Smith et al, Free Trade Agreements and Global Labour Governance. The European Union's Trade-Labour Linkage in a Value Chain World (Routledge: 2021); Nadia Ashraf and Jeske van Seters, 'Making it count: civil society engagement in EU trade agreements' (July 2020) The Centre of Africa-Europe Relations Discussion Paper No. 276, 5.

[946] ibid.

[947] Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1), 42-43.

[948] See EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 3.

[949] ibid.

[950] ibid.

[951] Jan Orbie et al, 'Promoting Sustainable Development or Legitimizing Free Trade? Civil Society Mechanisms in EU Trade Agreements' (2016) Third World Thematics 1(4), 540.

[952] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 253.

issues.[953] DAG meetings occur twice a year on average, which is insufficient to have a meaningful dialogue on a wide range of issues, especially those of underrepresented stakeholders like women.[954] Additionally, many of the CSMs, especially non-EU DAGs, lack resources and administrative support, preventing them from functioning properly.[955] Studies evaluating the impact of CSMs have noted that the lack of resources undermines the effectiveness of CSMs to promote compliance with TSD commitments.[956] Organizations representing women and gender equality are severely underfunded.[957] When these mechanisms are not effective, it discourages these organizations from allocating their already limited resources to attending these meetings.[958]

4. Lack of impact and accountability

Within EU trade agreements, the purpose of CSMs is specifically linked to monitoring the implementation and enforcement of TSD chapters.[959] However, this purpose is undermined by the lack of accountability that governments have to these mechanisms. In most RTAs that have CSMs, the Parties are not required to take civil society recommendations into account or even respond to them.[960] Therefore, these dialogue mechanisms are insufficiently linked to actual decision-making.[961]

In terms of dispute settlement, the DAG's involvement is limited to 'advising' and 'submitting views or recommendations' to their respective TSD Committees, and they cannot formally trigger dispute settlement mechanisms.[962] There is also no formal procedure for investigating complaints, and the TSD Committees are not required to act on concerns raised by DAGs or provide a reasoned motivation when deciding not to initiate dispute settlement procedures.[963] This lack of impact, and the general non-enforceability of TSD and gender provisions, leads to frustration and diminished engagement of civil society groups, which

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[953] See Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf, 4.

[954] EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 3.

[955] Ibid.

[956] Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4), 591-592.

[957] Beatriz Alvarez et al, 'Working Better Together with CSOs to Address Gender Inequality and Champion Women's and Girls' Voices and Agency' (2022) EU Gender Equality, Human Rights and Democratic Governance (INTPA.G.1), 35.

[958] Ibid.

[959] For example, see Article 294 of the EU-Central America Association Agreement.

[960] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 254.

[961] Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4), 591; Deborah Martens et al, 'Mapping Variation of Civil Society Involvement in EU Trade Agreements: A CSI Index' (2018) European Foreign Affairs Review 23(1), 51.

[962] Ibid, 583.

[963] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 249.

further weakens the impact of both the mechanisms and the implementation of these commitments.[964]

IV. The Future of CSMS in EU Trade Agreements

In June of 2022, the European Commission published a communication identifying key action points to enhance the approach to TSD chapters, with a focus on strengthening implementation and enforcement.[965] It followed a review of TSD chapters and a resolution based on a Non-Paper published by the Commission in 2018 which identified a 15-point action plan on trade and sustainable development.[966] One of the key elements of this reform is reinforcing the role of civil society within these chapters. The proposed action points included making it easier for civil society and DAGs to lodge complaints on sustainability commitments, as well as timelines for the commission to address these complaints.[967] The Commission commits to improving transparency in the work of DAGs and the involvement of these groups in meetings with EU Member states. Finally, it commits to focusing on strengthening the role of EU DAGs by extending their scope to the whole agreement and providing technical assistance and additional resources for their functioning.[968] However, while the importance of advancing women's economic empowerment and gender equality is broadly acknowledged within the Commission's communication, it fails to consider how CSMs could be improved with a view to gender equality specifically.

A. The EU–Chile FTA

The EU–Chile FTA was concluded in December 2022 and it represents the first in a new era of EU RTAs.[969] The new agreement includes the first dedicated Trade and Gender chapter, one of the most comprehensive to exist thus far globally.[970] By establishing a separate chapter on Trade and Gender, these issues are distinguished from the 'environmental' and 'labor' focus of the TSD chapter, acknowledging that women have specific needs and issues. However, much like the TSD chapters, the provisions under this chapter do not establish binding commitments or mandatory actions.[971] Moreover, instead of establishing dedicated institutional arrangements, the agreement extends those of the TSD chapters to this chapter.

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[964] Ibid, 254.

[965] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022.

[966] Commission Services, 'Non Paper of the Commission Services: Feedback and Way Forward on improving the Implementation of Trade and Sustainable Development chapters in EU Free Trade Agreements' (2018) available at https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf.

[967] See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022.

[968] Ibid.

[969] Renew Europe, 'Gender and Trade Position Paper' (February 2021) available at https://reneweuropegroup.app.box.com/s/4fi63i3lnz24ful6o9inbzs9dv94asj2, 3.

[970] The chapter includes reaffirmations of parties' commitment to effectively implement the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (Article 27.2) and recalls SDG goal 5. It also provides a commitment not to derogate from gender equality in favor of encouraging trade or investment (Article 27.3) and priority areas for information sharing and joint initiatives, including policies on maximizing the positive impacts of women's participation in trade.

[971] Article 27(5) of the EU Chile Advanced Framework Agreement.

The EU–Chile FTA[972] claims to incorporate a role for civil society at every stage, and, in a joint statement on trade and sustainable development by the EU and Chile, the parties recognize that *"an inclusive involvement of civil society in the implementation of the Agreements is essential for a timely identification of challenges, opportunities and priorities, and to monitor respective agreed actions."*[973] Considering that much of the institutional and enforcement structure of the TSD chapter will extend to the gender chapter, it is highly relevant to consider which improvements have been made to the CSMs and provide recommendations where these mechanisms are still lacking gender-responsiveness.[974]

B. Improving CSM mechanisms in EU RTAs

1. Balanced representation

One of the key elements to ensuring meaningful civil society engagement is ensuring that DAGs and CSFs are balanced and representative of different economic, social and environmental interests, including gender interests. The EU-Chile agreement provides that Chile and the EU shall promote a balanced representation within both the DAG and CSF.[975] Furthermore, Article 27.5(2) provides that within the CSM mechanisms of the agreement *"the Parties shall encourage the participation of organizations promoting equality between men and women."* While using the word "shall" indicates a binding commitment, the use of the term "encourage" and the lack of specificity as to how this should be done weaken this commitment.[976] A more meaningful way of incorporating civil society organizations with gender expertise would be to have a set percentage of gender-concerned organizations or adding a gender constituency to the DAGs.

More generally, there should be clear, precise, and binding rules of procedure on the appointment and composition of DAGs to ensure that they are independent, representative, and balanced.[977] This is especially important in countries that do not have an established architecture for appointing representatives to DAGs or countries where civil society organizations representing minority interests, such as those of women, are weak and fragmented.[978] The EU DAG under the EU–Japan EPA adopted rules of procedure in 2020

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[972] Negotiations for an EU-Chile Advanced Framework Agreement were concluded on 9 December 2022 and include an Interim Free Trade Agreement. The Agreement has not been adopted but the text of the iFTA, including Chapter 27 'Trade and Gender Equality' have been published. The iFTA will expire and become part of the Advanced Framework Agreement when it enters into force. It should be noted that the agreement has been signed but not adopted or ratified and is therefore subject to changes.

[973] European Union and Chile, 'Joint Statement on Trade and Sustainable Development by the European Union and Chile' (2 December 2022), preamble.

[974] This is also important as the Parties have committed to a review of the TSD aspects of the commitment after its entry into force.

[975] Article 33.6 and 33.7 of the EU-Chile Advanced Framework Agreement.

[976] See Katrin Kuhlmann, 'Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic' (2023) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), available at https://www.unescap.org/kp/2023/handbook-provisions-and-options-inclusive-and-sustainable-development-trade-agreements.

[977] EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available athttps://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 2.

[978] See Deborah Martens et al, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich-Ebert-Stiftung, available at https://library.fes.de/pdf-files/iez/17135.pdf, 55-60.

which set out detailed rules for the composition and membership of the EU DAG.[979] However, these rules did not apply to their non-EU counterparts. It is essential to ensure that both the EU and non-EU CSMs have an independent, representative and balanced composition and that their appointment happens in an independent and transparent way.[980] Therefore, procedural rules on composition and appointment should be established within RTAs for both EU and non-EU CSMs.[981] Additionally, providing guidelines on the appointment and composition at an EU level would facilitate the participation of women's organizations or gender-concerned NGOs with limited resources by promoting consistency in procedures across RTAs.[982]

2. Financial Support

The EU DAGS considered secretarial support to be *"one of the most important aspects determining DAGs' proper operations."*[983] While EU DAGS and some non-EU DAGs are supported by the European Economic and Social Committee, most non-EU DAGS lack a functioning secretariat to provide support.[984] In its Non-Paper of 2018, the Commission committed to 3 million euros to supporting DAGs and CSFs in their role. One way to extend this support to non-EU DAGS with weak institutional support is to encourage common projects between the EU and non-EU DAGs.[985] Financial assistance could also be used to offer support to organizations that want to be active in DAGs but lack the capacity or funds to participate, such as civil society organizations focused on gender equality.[986]

3. Institutional Support

Extending the TSD institutional arrangements to the gender chapter ensures that gender issues are not siloed from other sustainable development discussions. However, even where the composition of CSMs is balanced, women's organizations or gender-concerned NGOs will represent a minority voice. Therefore, it is also important that there is a forum, such as a Working Group on Gender and Trade, which is focused on the implementation of the Trade and Gender chapter and engages with society members representing the interests of women.[987] This would allow gender stakeholders to collectivize their priorities and strengthen their positions within the broader mechanisms. Any institutional arrangements should be

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[979] EU Domestic Advisory Group under the EU-Japan Economic Partnership Agreement, *Rules of procedure of the EU Domestic Advisory Group created pursuant to the Trade and Sustainable Development chapter* (chapter 16 –Article 16.15) of the EU-Japan Economic Partnership Agreement (EPA), Adopted 10 January 2020.

[980] EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 2.

[981] Ibid, 2.

[982] Ibid, 3.

[983] Ibid.

[984] Ibid.

[985] Ibid.

[986] Beatriz Alvarez et al, 'Working Better Together with CSOs to Address Gender Inequality and Champion Women's and Girls' Voices and Agency' (2022) EU Gender Equality, Human Rights and Democratic Governance (INTPA.G.1), 37.

[987] William Alan Reinsch, 'Negotiating Trade Agreements: Gender as a Priority?' (4 May 2021) Center for Strategic and International Studies, available at https://www.csis.org/analysis/negotiating-trade-agreements-gender-priority.

accompanied by the provision of administrative and logistical support with adequate budget allocations.[988].

4. Improving communication and governance

Another way to improve the effectiveness of CSMs is to establish better communication between CSMs and the Parties or other monitoring mechanisms. This could involve increasing the frequency of DAG and CSF meetings as well as increasing the frequency and communication of meetings between the DAGs, CSF, and TSD Committee to encourage communication between CSMs, the TSD Committees, and the Parties.[989] The EU–Chile FTA provides that the Parties *"shall promote the interaction between their respective Domestic Consultative Groups, through the means they consider appropriate."*[990] However, to truly encourage these practices it is necessary to clearly set out these arrangements in the institutional and procedural rules within the TSD chapters, as highlighted by the EU Commission in its Non-Paper of 2018 and the 2019 Opinion of the European and Social Committee.[991] This could include making it obligatory for meetings between DAGs and between the CSFs and TSD Committee to take place.[992] In addition to increasing the frequency of meetings, there must be clear procedures for the operation of the meetings, including clear agendas, dates and communications.[993]

5. Strengthening accountability

The lack of impact of CSMs can partly be attributed to the lack of obligations on Parties to consider or at least respond to the recommendations of their CSMs. Article 33.6 of the EU–Chile FTA states that *"Chile and the European Union may consider views or recommendations submitted by its respective Domestic Consultative Group."* The use of the "may" and lack of any specifics on how this must be done make this commitment weak, leaving discretion to each Member to consider the views of their DAG.

One way to improve this would be to establish a formal feedback mechanism through which the RTA parties inform stakeholders how their recommendations have been addressed or not, including reasoned explanations as well as clear and reasonable timeframes for response.[994] In 2020, the European Commission launched the Single Entry Point, a new mechanism for reporting complaints including those related to breaches of TSD commitments.[995] This mechanism is open to parties but also to civil society organizations and

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[988] Ibid

[989]Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 254.

[990] Article 33.6 EU-Chile Advanced Framework Agreement.

[991] Alberto Mazzola (ECOSOC), 'Opinion: The Role of Domestic Advisory Groups in Monitoring Implementation of Free Trade Agreements' (2019) European Economic and Social Committee REX/510, para 1.14.

[992] Ibid.

[993] EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 3.

[994] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 254.

[995] European Commission, 'Commission launched new complaints system to fight trade barriers and violations of sustainable trade commitments' (16 November 2020) European Commission Press Release, available at https://ec.europa.eu/commission/presscorner/detail/en/ip.

individual EU citizens.[996] However, it leaves discretion on whether to investigate complaints to the Commission and does not require time-limited responses.[997] The accountability of the European Commission to provide reasoned and timely responses must be improved in this mechanism and others.

Increasing the transparency of CSMs could have the effect of encouraging good practices and naming and shaming parties where they do not take the recommendations of their CSMs into account.[998] This can be done by setting guidelines for transparency, such as the publishing of meeting reports to make meetings more efficient and limit time wasted on procedural and logistical matters at the expense of substantive issues.[999]

6. A whole of agreement approach

In most of the EU RTAs providing for a DAG and CSF, the scope of discussion and advice is limited to the TSD chapter.[1000] However, the relevance of issues in RTAs to civil society is not limited to those under the TSD chapters, and, equally, sustainable development and gender considerations should not be limited to discussion under these chapters. The European Commission also recommended that their substantive scope should cover the entirety of trade agreements.[1001] This was already the case in the EU-UK Trade and Cooperation agreement and is also the case in the new EU–Chile FTA, which provides under Article 33.5 that Parties *"shall promote the participation of civil society in the implementation of this Agreement"* rather than "this chapter."

Not only should the substantive scope of CSMs within RTAs be wider, civil society actors should also be involved at every stage in the lifecycle of a trade agreement.[1002] Implementation is only one part of creating gender-inclusive trade agreements. Engagement with stakeholders should be a continuous process and women's interests should be represented at every stage of the policy and rulemaking process from negotiation to implementation.[1003] Since 1999, the EU has conducted independent Sustainability Impact Assessments on every trade agreement including stakeholders in both the EU and the partner countries.[1004] For the EU–Chile FTA,

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[996] Ibid.

[997] EU Domestic Advisory Groups, 'Non-Paper: Strengthening and Improving the Functioning of EU Trade Domestic Advisory Groups' (October 2021) CNV International, available at https://www.cnvinternational.nl/_Resources/Persistent/b/1/8/f/b18f21c2f3007be3974e41d8fec1594f72e20af6/CNVI-0311%20-%20Non-paper%20Strengthening%20__Domestic%20Advisory%20Groups_FINAL.pdf, 7.

[998] Ibid.

[999] Ibid.

[1000] For example Article 295 of the EU-Central America Association Agreement provides "The Civil Society Dialogue Forum shall conduct dialogue encompassing sustainable development aspects of trade relations between the Parties, as well as how cooperation may contribute to achieve the objectives of this Title."

[1001] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022, 10.

[1002] Ibid.

[1003] Susan Joekes, 'A Primer on Gender and Trade' (2020) Gender, Social Inclusion and Trade Knowledge Product Series, 25; See Katrin Kuhlmann, 'Mapping Inclusive Trade and Development: A Comparative Agenda for Trade and Development.' (2021) African Journal of International Economic Law 2, 16-17.

[1004] Amrita Bahri, 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples' (2021) Gender, Social Inclusion and Trade Knowledge Product Series, 27.

this included those representing the interests of women and involved an analysis related to gender equality, a novelty compared to previous SIAs.[1005]

7. Beyond CSMs in RTAs

This paper focuses on improving the functioning and gender-responsiveness of CSMs present within EU RTAs. However, improving the balanced representation, functioning, capacity and funding of CSMs within RTAs is not enough.[1006] It is also important that civil society engagement is strengthened more broadly within the EU and its partners with a view to achieving gender equality and women's economic empowerment.[1007] In addition to capacity building and funding, governments should work on addressing the stigmatization, judicial harassment, bureaucracy, physical and online harassment and intimidation that civil society organizations working on gender equality face in conducting their work.[1008] They should work jointly on ending violence against women and girls and creating safe spaces for engagement by women.[1009] Strengthening civil society organizations and their engagement in national and EU policy more broadly is an integral part of improving gender-responsiveness of the mechanisms in place within the EU's RTAs.

V. Conclusion

The EU has placed the implementation and monitoring of its sustainable development chapters and gender commitments into the hands of civil society. However, it has not adequately equipped these CSMs with the necessary resources or guidelines to ensure their effectiveness. Moreover, it has failed to ensure the accountability of Parties to take the recommendations of these mechanisms into account leaving them "stuck at the bottom," lacking in impact and undermining the desire of civil society to get involved in the first place.[1010] While the new EU–Chile FTA incorporates a Trade and Gender chapter for the first time, it fails to sufficiently establish CSMs that are sensitive, informed and committed to gender equality. To contribute meaningfully to the implementation of gender commitments, RTAs must provide for institutions, procedures and resources with a view to promoting the participation of organizations representing the interests of women and ensuring gender issues are an integral part of these mechanisms.[1011] In addition, the accountability of Parties to these mechanisms must be strengthened and the scope of civil society involvement should expand to the whole of RTAs, involving women in every stage of these agreements, from negotiation

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[1005] See list of stakeholders consulted in European Commission, *European Commission Services' Position Paper on the Sustainability Impact Assessment in Support of Negotiations for the Modernization of the Trade Part of the EU-Chile Association Agreement*, (June 2020), Appendix A.

[1006] Katrin Kuhlmann, 'Mapping Inclusive Trade and Development: A Comparative Agenda for Trade and Development.' (2021) African Journal of International Economic Law 2, 16.

[1007] Ibid.

[1008] Beatriz Alvarez et al, 'Working Better Together with CSOs to Address Gender Inequality and Champion Women's and Girls' Voices and Agency' (2022) EU Gender Equality, Human Rights and Democratic Governance (INTPA.G.1), 10.

[1009] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM(2022) 409, 22 June 2022.

[1010] Lotte Drieghe et al, 'Participation of Civil Society in EU Trade Policy Making: How Inclusive is Inclusion' (2022) New Political Economy 27(4), 591.

[1011] Denise Prévost and Iveta Alexovičová, 'Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union's free trade agreements' (2019) International Journal of Public Law and Policy 6(3), 248.

to impact assessment and implementation. Finally, strengthening the gender-responsiveness of CSMs in EU RTAs is only one part of promoting gender equality and women's economic empowerment through civil society engagement. These mechanisms should be complemented by broader action on a national level to build the capacity of civil society organizations representing women and address the discrimination, harassment and intimidation that they face in their work. These improvements would allow civil society to contribute meaningfully toward achieving gender equality and sustainable development in trade through RTAs.

CHAPTER 13: THE PINK TROJAN HORSE: INSERTING GENDER ISSUES INTO FREE TRADE AGREEMENTS

MAYA S. COHEN*

Abstract

In 2019 three transformative free trade agreements (FTAs) between Chile-Canada, Chile-Argentina and Canada-Israel were updated, including with them for the first time, individual chapters exclusively dedicated to gender. This paper aims to highlight possible successes and failures of the gender chapters through a review of human rights and labor chapters as examples of best practices that would demonstrate elements necessary to establish an effective gender chapter that would successfully tilt the scales towards gender equality. The research conducted highlighted potential areas of weakness in the gender chapters in terms of lack of specific indicators, lack of specific country analyses of the respective gender equality conditions and industries predominantly employing women in each country, and lack of effective monitoring and evaluation (M&E) mechanisms and subsequent dispute resolution mechanisms. Overall, if policy makers and trade negotiators wish to create effective gender chapters in future agreements, or in subsequent amendments to the 2019 gender chapters, there must be specific attention to the gender sensitivity of trade and the identified areas of weakness.

Introduction

International trade has long been understood as being 'gender neutral', in other words simply conferring a benefit on all of society in an indiscriminatory manner. However, gender and legal experts have increasingly dispelled that assumption and have shown that trade affects gender differently depending on industry variation, wealth disparity and specific country models. In response to increased awareness of the need for gender equality and the heightened effect of trade on gender inequality, several countries have recently begun including chapters specifically and exclusively dedicated to gender (gender chapters) in their FTAs. Specifically, in 2019 three FTAs with individual gender chapters were concluded: the Canada–Chile FTA (CCFTA), the Chile–Argentina FTA, and the Canada–Israel FTA (CIFTA). The United States-Mexico-Canada Agreement (USMCA) also included a novel provision on gender and sexual orientation. This paper seeks to understand whether these gender chapters are designed to effectively contribute to increasing gender equality and will address the issue in eight parts. Parts I-V set the stage for the creation of the 2019 gender chapters while Parts VI-VII analyze the 2019 chapters themselves and their effectiveness. Part I looks at what the international community has defined as 'gender' and "gender discrimination." Based on these definitions Part I explores the effects of trade on gender. Part II is an employment snapshot, breaking down women's participation in various sectors. This is particularly important, as without an understanding of what industries women predominantly work in there will be little to no understanding of how individual trade measures affect women. Part III argues that there is a need for a "gendered" approach to trade, one that considers the role of gender in a given economy, its impact in trade negotiations and implements "flanking measures" to mitigate its

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impact on gender. Part IV analyzes previous international agreements that have included gender provisions and shows the steady increase of gender provisions throughout the late 20th and early 21st centuries. Part V explains the political, social and economic developments that led to this increase and the creation of three separate gender chapters in 2019. Part VI focuses on the necessary markers that could determine an effective gender chapter, highlighting the need for broad as well as narrow indicators, analyses of the effect of trade on gender by industry, monitoring and evaluation of the implementation of the gender chapter, an effective and all-encompassing dispute resolution mechanism, and, finally, the ability of such dispute resolution mechanism to result in sanctions against parties breaching the provisions of the gender chapter. Part VII assesses the 2019 gender chapters in chronological order, starting with the 2016 Chile–Uruguay FTA, which was the first FTA to include a gender chapter followed by the CCFTA, the Chile–Argentina FTA, the CIFTA, and the USMCA. Finally, Part VIII assesses the effectiveness of the existing gender chapters, based on the markers for an effective gender chapter set out in Part VI, and highlights their strengths and weaknesses. Gaps include the lack of specific indicator and country specific analyses as well as unclear parameters for the dispute resolution mechanism. Overall, this paper aims to demonstrate that, while the gender chapters are revolutionary in their existence and signify a move in international trade policymaking towards considering the effects of trade on gender, they lack the basic elements needed to be truly effective in combating gender inequality.

I. Gender, Discrimination, and the Effect of Trade

In order to understand the effect of trade on gender it is important to establish the meaning of gender as opposed to sex, gender discrimination and how it manifests itself in the world and finally the lack of gender neutrality in international trade.

Gender is different than 'sex', while sex refers to biology, gender instead refers to "how a person's biology is culturally valued and interpreted."[1012] Gender influences everyday life, how people behave and who they associate with and people's relationship to the state in society generally.[1013] The gender role of women and men is deeply engrained in social structures evinced through traditional household roles, the existence of laws affecting men and women differently, what constitutes acceptable behavior by either gender in society and the overall societal expectations with regards providing for the family both through remunerated employment outside the home and unpaid work within the home.[1014]

As highlighted by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), under Article 1:

> "[T]he term 'discrimination against women' shall mean any distinction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the politics, economic, social, cultural, civil or any other field."[1015]

[1012] Isabel Coche, Barbara Kotschwar, Jose Manuel Salazar-Xirinachs, *Gender Issues in Trade Policy-Making*, OAS Trade Series, Department of Trade, Tourism and Competitiveness Executive Secretariat for Integral Development (SEDI), June 2006.

[1013] *Id.*

[1014] *Id.*

[1015] Convention on the Elimination of Discrimination Against Women (CEDAW), art 1, Dec. 18, 1979c 1249 U.N.T.S 13 [hereinafter CEDAW].

The effect of trade on gender is more complex, as generally speaking, trade traditionally has been understood as being "gender neutral,"[1016] with the belief that the effect of trade and its policies equally offer the same opportunities to both men and women.[1017] However, increasing research into the effects of trade by trade and gender specialists has shown that this is in fact not the case.[1018]

To understand the effect of trade on gender an analysis of the economic effect of trade is vital. In general, trade works to enhance certain activities and diminish others depending on the efficiency of the product.[1019] This refers to the situation where the removal of trade barriers and increased competition creates a situation where products that are the most efficient in terms of allocation of resources and labor benefit from the removal of trade barriers.[1020] Industries or activities which cannot survive the pressures from other parties who produce such activities in a more efficient way will in turn be diminished, and the resources will move towards an activity with increased efficiency as a result of the reduction of trade barriers.[1021]

The introduction of a tariff on its face does not appear to affect gender. The tariff is not applied on a gendered basis and there is no direct-action affecting men and women in different ways. However, what needs to be analyzed is who are the displaced workers, how are they being helped to find new employment, and is the new employment even available in relation to their previous skill set, part-time or full time ability, body build etc.[1022] For example, the apparel industry is heavily dominated by women,[1023] if the reduction of the apparel industry results in, for example, the increase of the timber industry, creating increased jobs in heavy manual labor, the reality may likely be that women are unable to supply the necessary physical labor necessary to meet these new demands. As a result, many women will be unemployed. Further, studies have shown that even if women are working in the industry that is positively affected by international trade, there may still be a negative impact. With the growth of production of an industry there will likely be increased need for work force increase, which typically favors full time workers.[1024] Women are more likely to work part-time than men due to familial obligations[1025] and as a result may be sidelined by the increased production and need for full time labor.[1026]

It must be also noted that trade can also have a positive effect on gender. In general, formal employment in export industries tends to operate at a higher pay and higher working

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[1016] Padideh Ala'l and Renata Vargas Amaral, *The Importance (and Complexity) of Mainstreaming Gender in Trade Agreements*, CIGI (Oct. 10, 2019) https://www.cigionline.org/articles/importance-and-complexity-mainstreaming-gender-trade-agreements.

[1017] *Id.*

[1018] UN Women Watch, *Resource Paper: Gender Equality & Trade Policy,* 3 (2011).

[1019] *supra* note 1012.

[1020] *Id.*

[1021] Brad McDonald, *International Trade: Commerce among Nations,* International Monetary Fund (Feb. 24, 2020) https://www.imf.org/external/pubs/ft/fandd/basics/trade.htm.

[1022] *Id.*

[1023] World Trade Organization, *Gender Aware Trade Policy: A Springboard for Women's Economic Empowerment*, 6 (2017).

[1024] United Kingdom Parliament, Trade and Gender (Nov. 28, 2018), https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/667/66708.htm; *see also* UN Women, *Gender Equality & Trade Policy*, https://www.un.org/womenwatch/feature/trade/Effects-of-Trade-on-Gender-Equality-in-Labour-Markets-and-Small-scale-Enterprises.html#20.

[1025] Suzanne Zakaria, *Fair Trade for Women, at Last: Using a Sanctions Framework To Enforce Gender Equality Rights in Multilateral Trade Agreements*, 20(1) Georgetown Journal of Gender and the Law 244, 246 (2018).

[1026] *Id.*

conditions,[1027] this in turn affects women's income and status.[1028] Referring back to the apparel industry, while women can be affected if their employment is threatened by the industrialization of the sector or the increased need for full time employment, there can also be many benefits. For example, in Lesotho, the increase of international trade in the appeal industry let to the creation of 38,000 new jobs between 1999-2004 with the majority of these jobs given to women.[1029] Overall, it is important for trade negotiators and policy makers to consider the potential positive or negative impacts of trade on gender and to adjust accordingly.

II. Employment Snapshot: Women's Participation in Labor

The previous example of the effect of a tariff on different industries and specifically on a female dominated industry such as the apparel industry raises the need to explore industries that are predominantly geared towards female workers.

Globally, studies have shown that women are less likely to participate in the labor market than men. In 2018, a study by the International Labor Organization (ILO) found that only 48.5%[1030] of women participated in the global labor market, a figure 26.5% less than the participation of men.[1031] Additionally, this gap has only reduced by 2% since 1990 and studies have argued that this already marginal rate of approval is expected to halt and possibly even reverse in the next decade.[1032]

The reason for the large difference in labor participation between genders is due to the amount of unpaid work in which women engage. There is an increased likeliness for women to engage in domestic and family work, often unpaid, and even if paid this work is likely to be part time[1033] or temporary. In fact, it has been found that women shoulder 2.5 times more unpaid work than men do[1034] and comparably spend only half as much time doing paid work as men.[1035]

Other than the difference between paid and unpaid participation there is also a difference in women's participation depending on industry. The three predominantly female dominated industries are services, the informal (non-agricultural) sector, and agriculture. A study in 2015 found that globally 62% of women were engaged in the services industry.[1036] This figure changes depending on the region, for example in Latin America, the Caribbean, Eastern Europe, and Southern Europe women's participation in the services industry is 70%.[1037] Women are heavily engaged in the agriculture industry however, some studies attribute over 60% of the global labor force in agriculture to women while others that argue that the figure

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[1027] The World Bank, *Brief: Trade and Gender*, (Mar. 8, 2019) https://www.worldbank.org/en/topic/trade/brief/trade-and-gender.

[1028] Gurushri Swamy, *International Trade and Women*, Economic and Political Weekly 39(45) 4885-4889, 4885 (Nov. 6 – 12, 2005).

[1029] *supra* note 1027.

[1030] *supra* note 1025 at 245.

[1031] International Labor Organization, *World Employment Social Outlook: Trends for Women 2018 Global Snapshot* 6 (2018).

[1032] *supra* note 1025 at 245.

[1033] Camila Arza, *The Gender Dimensions of Pension Systems: Policies and Constraints for the Protection of Older Women,* UN Women, Discussion Paper No. 1, 2 (July 2015).

[1034] United Nations Women, *Facts and Figures: Economic Empowerment* (July 2018) https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures.

[1035] *Id.*

[1036] *supra* note 1023 at 5.

[1037] *Id.*

is closer to 40%.[1038] Perhaps most importantly in relation to gender equality, women tend to engage in the agricultural industry for the purpose of subsistence production to ensure food security rather than for production to gain profit.[1039] The focus on food security by women in agriculture further increases their dependence on employment and increases the possible negative impact of trade provisions affecting agriculture.[1040]

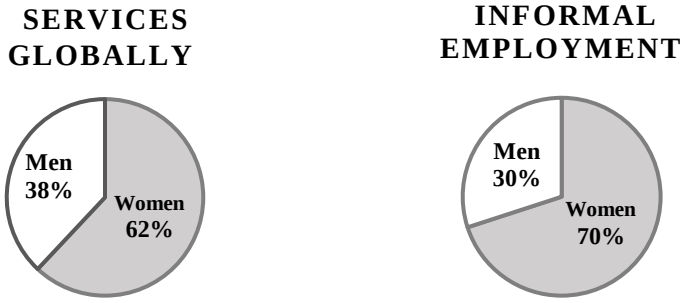

Figure 1: Women's Representation in Services and the Informal Sector[1041]

Finally, women are also more likely to be engaged in the informal (excluding agriculture) sector than men, and the informal sector is currently dominated 70% with women[1042] (*see* Figure 1: Women's Representation in Services and the Informal Sector). The informal sector exists outside the purview of government regulation without the social protections offered through formal jobs in the formal economy.[1043] The lack of formal regulation in the informal sector increases the likelihood of women working in unsafe working conditions and increases their exposure to sexual harassment.[1044]

III. Argument for a Gendered Approach to Trade

In light of the previous arguments explaining the differences in effect of trade on men and women there is a clear need for a gendered approach to trade, namely a trade policy that considers the different effects of trade on genders and adjusts accordingly.[1045] There are two main arguments in favor of adopting a gendered approach to trade, an economic argument, and a human rights argument.

The economic argument is rooted in the goal of trade liberalization of promoting economic growth, development, and prosperity among nations.[1046] This can be seen in the preamble to the Agreement Establishing the World Trade Organization, in that trade relations shall be conducted:

[1038] SOFA Team and Cheryl Doss, Working Paper on The Role of Women in Agriculture, FAO No. 11-02, at 3 (2011).
[1039] Constance Z. Wagner, *Looking at Regional Trade Agreements through the Lens of Gender*, 31 St. Louis U. Pub. L. Rev. 497, 514 (2012).
[1040] *Id.*
[1041] *supra* note 18 at 5.
[1042] *supra* note 1018 at 3.
[1043] *supra* note 1039 at 521.
[1044] *Id.*
[1045] *supra* note 1012.
[1046] *supra* note 1039 at 507.

> "[W]ith 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 trade in goods and services… in accordance with the objectives of sustainable development."[1047]

As numerous studies have shown, economic growth is undermined by gender inequality.[1048] In general terms, gender equality leads to inefficient allocation of resources and restricts access of resources.[1049] The inclusion of equal opportunities for women could enhance a country's overall competitiveness and performance.[1050] Quantitatively, in 2015, McKinsey found in a study that advancing women's equality through increased participation in the work force could contribute $12 trillion to the global GDP by 2025 based on a conservative approach.[10511052] When McKinsey analyzed a "full potential" scenario in which women and men had full gender equality and held identical roles in the labor market, they concluded that GDP could rise by as much as $28 trillion, or 26% globally by 2025.[1053]

To put it simply, "the more involved [women] are, the more economies grow."[1054] This is mainly due to the "power of the purse."[1055] Research has shown that when women have increased access to their own income, their status and bargaining power increase and, in turn, they invest on average 90% of their incomes back into their families through health and education[1056] and their communities.[1057] The "power of the purse" as a result creates a "snowball" effect throughout society and universally increases living standards and reduces poverty.[1058]

The human rights argument focuses on quality of life rather than the impact of gender equality on the economy and economic growth. Gender equality has been recognized as a human right[1059] by the international community in several multilateral conventions and declarations such as the previously mentioned CEDAW, the Universal Declaration of Human

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[1047]Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 [hereinafter Marrakesh Agreement].

[1048] Christian Gonzales, Sonali Jain-Chandra, Kalpana Kochhar and Monique Newiak, *Fair Play: More Equal Laws Boost Female Labor Force Participation*, IMF Staff Discussion Note, SDN/15/12, 27 (Feb. 2015).

[1049] *Id.*

[1050] Simonetta, *International Trade is at Risk of Leaving Women Behind*, UNCTAD (Apr. 10, 2018) https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1741.

[1051] Jonathan Woetzel, Anu Madgavkar, Kweilin Ellingrud, Eric Labaye, Sandrine Devillard, Eric Kutcher, James Manyika, Richard Dobbs, and Mekala Krishnan, *The Power of Parity: How Advancing Women's Equality Can Add $12 Trillion to Global Growth,* McKinsey Global Institute, 1 (Sep. 2015).

[1052]*Id.* The $12 trillion assessment was dependent on states following a 'best in the region' approach and matching their rate of improvement of gender equality to the fastest-improving country in their region.

[1053] *Id.*

[1054] *supra* note 1023.

[1055] World Trade Organization, *Women and Trade: Sustainable Development Goal on Gender Equality* https://www.wto.org/english/tratop_e/womenandtrade_e/gendersdg_e.htm.

[1056] *supra* note 1018 at 3.

[1057] *supra* note 1055.

[1058] *Id.*

[1059] *supra* note 1050.

Rights[10601061] and the European Convention of Human Rights.[1062] Gender equality increases access to health care, education and enables both genders to enjoy a decent standard of living.

Both the economic and human rights arguments have shaped the UN's Agenda 2030 adopted in 2016, with gender and trade reflected in numerous sustainable development targets.[1063]

IV. The Inclusion of Gender in International Trade Agreements

While the primary focus of this paper is the introduction of gender chapters in FTAs in 2019, the existence of gender in international trade agreements is not a completely new phenomenon. The first gender chapter agreed to in an FTA was in 2016 under the Chile–Uruguay FTA, and the first gender related article in an international trade agreement was agreed to in 1957 in the Treaty establishing the European Economic Community.[1064] The treaty required each member state to guarantee the application of the principle of equal pay for men and women. More than 25 years later, in a different continent in 1983, the Treaty Establishing the Economic Community for Central African States (ECCAS)[1065] was the first Regional Trade Agreement (RTA) signed by developing countries to include a gender provision. The gender provision, under the social affairs section of the agreement, committed the member states to develop collective research and policies towards increasing the economic, social, and cultural status of women both in urban and rural areas.[1066] Finally, the gender provision called for increased efforts towards the integration of women in development activities. 1992 marked the first gender provision relating to the general principle of equality between genders[1067] in the EU Maastricht Treaty.[1068] That same year, the North American Free Trade Agreement (NAFTA) [1069] established a side agreement on labor cooperation which included provisions focused on the elimination of employment discrimination based on sex and equal pay for men and women.[1070]

More recently, there has been a slow but steady increase in the inclusion of gender-related provisions in Regional Trade Agreements (RTAs). In 2018, the World Trade Organization (WTO) conducted a study showing that of 74 RTAs analyzed each included at least one

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[1060] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). [hereinafter UDHR]

[1061] UDHR Article 2: "everyone is entitled to all the rights and freedoms set forth in this Declarations, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion…"

[1062] European Convention of Human Rights and Fundamental Freedoms, 213 UNTS 222 (Sep. 3, 1953) [hereinafter ECHR]; *see also id.* at Art. 1 ("the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion…").

[1063] Josephine A. Odera and Judy Mulusa, *SDGs, Gender Equality and Women's Empowerment: What Prospective for Delivery,* 2 (November 2019).

[1064] Treaty of Rome: Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.

[1065] Treaty Establishing the Economic Community of Central African States, 18 October 1983. [herein after EECAS].

[1066] EECAS, Article 60(2)(b): develop collective research by appropriate policies aimed at improving the economic, social and cultural status of *women* in urban and rural areas and increasing their integration in development activities."

[1067] Maastricht Treaty, TEU or Union Treaty: Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253. [Hereinafter TEU]

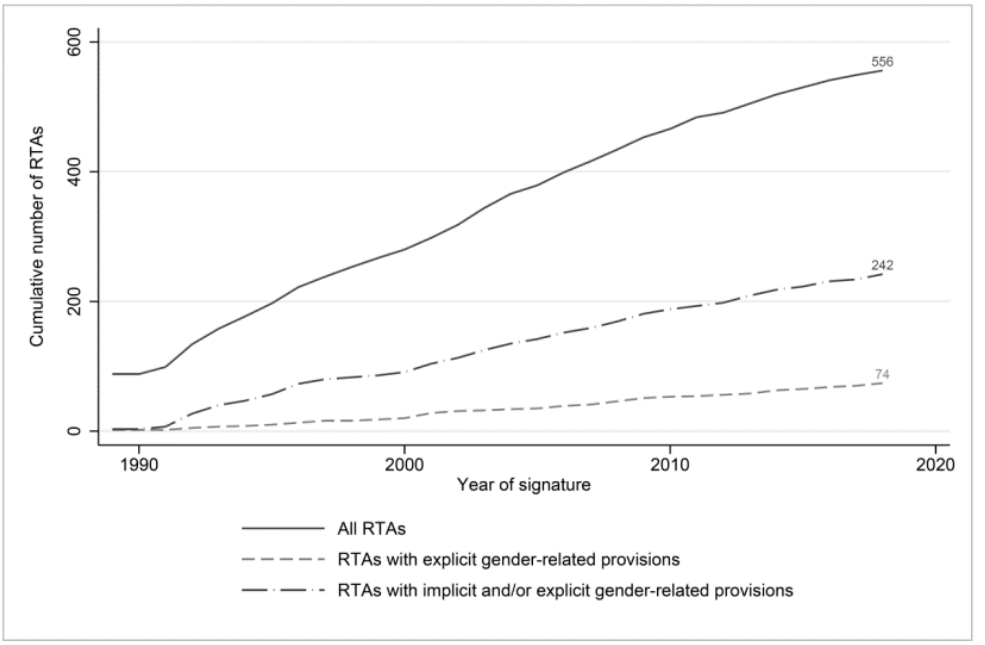
[1068] TEU Article 6: Each Member Shall ensure that the principle of equal pay for male and female work is applied.

[1069] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289. [hereinafter NAFTA].

[1070] NAFTA, Article 49(g): elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; (h) equal pay for men and women.

provision explicitly referring to gender or a gender-related matter.[1071] Outside of these 74 RTAs with explicit gender provisions, many more were found to address gender through other cross-cutting issues such as through the protection of human rights, labor[1072], sustainable development or the protection of vulnerable groups.[1073] The steady increase of the inclusion of implicit and explicit gender related provisions in RTAs is depicted in Figure 2 below.

Figure 2: Evolution of RTAs with Gender Related Provisions[1074]



V. The Spark Leading to the Inclusion of Gender Chapters

The evolution of gender provisions in RTAs and other international agreements is clearly indicative of an upward trend. However, up until 2016, there was never an explicit separate chapter relating to gender in a free trade agreement,[1075] and, up until 2019, the 2016 Chile-Uruguay FTA was the single exception to the almost universal application of mere references to gender in international agreements.

[1071] Jose-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreement,* World Trade Organization, Economic Research and Statistics Division, 4 (Dec. 2018).
[1072] Damian Raess and Dora Sari, *Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset*, Global Policy 9, 451-466 (2018).
[1073] *supra* note 1071 at 4.
[1074] *Id* at 5.
[1075] Maria Panezi, *The Case for Developing a Model Chapter on Gender and Trade*, CIGI, (Apr. 5, 2018) https://www.1075online.org/articles/case-developing-model-chapter-gender-and-trade.

The question is, therefore, what sparked the inclusion of gender chapters in FTAs. Overall, there has been an increased approach towards gender mainstreaming in domestic and international policy making.[1076] Gender mainstreaming refers to a strategy employed by policy makers and public interest groups as a means to achieve gender equality through ensuring the inclusion of gender perspectives in areas associated with development, including the implementation and monitoring of government policies, programs, projects and agreements.[1077]

More generally, gender theorists and legal scholars have argued that the inclusion of gender chapters in FTAs is due to five factors. These factors include the fact that more women are now engaged in trade policy making at senior levels.[1078] There has also been an increase of women trading on international markets and owning and managing export firms.[1079] Advocacy campaigns concerning gender issue have continued to grow and have, as such, highlighted the relevance of gender equality and its issues pertaining to development.[1080] As previously demonstrated there has been an increase in awareness and research on the effect of trade policy on gender by international organizations and academia resulting in increased knowledge and commitments to gender.[1081] Finally, as demonstrated by the McKinsey report, there has been an increasingly widespread belief that gender inclusivity in trade is vital for long-term economic growth and development.[1082]

VI. Elements of a Strong and Effective Gender Chapter

Before analyzing the substance of the new gender chapters, it is important to first understand what is needed in order to create a gender chapter that will have positive effects on gender equality and that will achieve the goals it was supposedly set out to achieve.

Drawing on previous examples from labor and human rights chapters and provisions this section seeks to argue that for a gender chapter to be effective it must include (A) a combination of broad and narrow indicators of gender equality, (B) an industry-specific analysis of the effect of trade on gender, (C) monitoring and evaluation, (D) an effective dispute resolution mechanism, and (E) the ability of such dispute resolution to impose sanctions.

A. Broad and Narrow Indicators of Gender Equality

In order to effectively achieve gender equality through a gender chapter there needs to be an understanding of the areas affecting gender equality. Determining areas of gender inequality has generally been addressed through indicators. Indicators have been defined as "specific information on the state or condition of an object, event, activity or outcome that can be related to [gender] norms and standards … that can be used to assess and monitor the promotion and implementation"[1083] of gender standards. The use of indicators has been

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[1076] Sama Al Mutair, Dora Konomi and Lisa, Page, *Trade and Gender*, Trade Lab: University of Ottawa and Queen's University Clinic, 10 (May 17, 2018).
[1077] *supra* note 1016.
[1078] Amrita Bahn, *Measure the Gender Responsiveness of Free Trade Agreements: Using a Self-Evaluation Framework*, 14(11) Global Trade and Customs Journal, 517 – 527, 518 (Dec. 1, 2019).
[1079] Simonetta Zarilli, *The Gender Chapters in Trade Agreements: A True Revolution?* ICTSD (Nov. 14, 2017).
[1080] *Id.*
[1081] *Id.*
[1082] *supra* note 1051 at 1. There is also a possible argument that the chapters are a response to the UN SDGs 2030 Agenda. A demonstration of the international community's commitment to gender equality and empowerment.
[1083] United Nations Human Rights, A Guide to Measurement and Implementation, United Nations Human Rights, 16 (2012).

praised as making communications and goals more concrete and effective, increasing record keeping efficiency, and improving overall monitoring.[1084] The use of well-defined and articulated indicators can "improve public understanding of the constraints and policy trade-offs, and help in creating broader consensus on social priorities."[1085] McKinsey,[1086] the United Nations Sustainable Development Goals (UN SDGs)[1087] and the Women, Business and the Law Project (WBL) formed under the World Bank Group[1088] have all created indicators which seek to measure the main barriers to gender equality and to demonstrate whether any in gender inequality change has occurred. Matching these barriers with specific gender inequality indicators in a trade agreement, assessing and tracking the indicators with a monitoring and reviewing mechanism, and establishing adequate enforcement mechanisms through dispute resolution mechanisms and sanctions would create a gender chapter capable of effectively balancing the scales of gender.

Figure 3: Key Indicators to Assess Gender Equality

McKinsey Report	**World Bank WBL Project**
1. Equality in Work 2. Essential Services and Enablers of Economic Opportunity 3. Legal Protection and Political Voice 4. Physical Security and Autonomy	1. Mobility 2. Workplace 3. Pay 4. Marriage 5. Parenthood 6. Entrepreneurship 7. Assets 8. Pensions

McKinsey has divided its 15 indicators of gender equality for a study of 95 countries into four large subsections: equality in work, essential services and enablers of economic opportunity, legal protection and political voice and physical security and autonomy.[1089] Equality in work looks at the perceived wage gap for similar work, the lack of women in leadership positions, and the disproportionate number of women working in unpaid work and not in the formal labor market compared to men. Essential services and enablers of economic opportunity looks to access to health care through reproductive and maternal health, education, financial services, and "digital connectivity." Legal protection and political voice look to laws protecting individuals against violence, the right to inherit property, the right to find work and be fairly compensated for such work.[1090] For example, laws prohibiting a woman from obtaining a passport without the consent of her husband, or laws placing the man as the head of the household and requiring the women to live in that household would fall under this

[1084] *Id* at 1.
[1085] *Id.*
[1086] *supra* note 1051 at 1.
[1087] United Nations, 2030 Sustainable Development Goals, Goal 5 (2015).
[1088] Marie Hyland, Simeon Djankov, and Pinelopi Koujianou Goldberg, *Gendered Laws and Women in the Work Force*, Peterson Institute for International Economics, 2 (May 2020).
[1089] *supra* note 1051 at 1.
[1090] *Id.*

indicator.[1091] Physical security and autonomy has also been used as an indicator and refers to selective abortions due to societal preference of baby boys over girls, early marriages and evidence of women being victims of violence by their intimate partner.[1092]

The World Bank Women, Business, and the Law (WBL) Project has created eight indicators for gender parity[1093] as shown in Figure 3. WBL looks at rights and conditions relating to mobility, workplace, pay, marriage, parenthood, entrepreneurship, assets and pensions. Mobility refers the woman's freedom of freedom of movement, and her right to choose where to live. For example, Article 153 of Senegal's Family Code states that the choice of the marital home "belongs to the husband; the woman is required to live there with him, and he is obliged to receive her."[1094,1095] Workplace refers to laws restricting a woman's decision to work and whether adequate legal protection exists relating to workplace discrimination and sexual harassment through associated penalties or civil remedies. Pay indicates whether there is legislation mandating the "equal remuneration for work of equal value."[1096] WBL finds the standard under the International Labor Organization (ILO) of "equal pay for equal work" to be an insufficiently rigorous[1097] and instead refers to Chapter 226 of the Employment Act of Kenya as good practice which establishes that "an employer shall pay his employees equal remuneration for work of equal value."[1098] Marriage analyzes whether there is a legal obligation for woman to obey her husband and whether she can be the legal head of her household. For example, under Article 316 of the Mali Family Code "the wife must obey her husband, and the husband must protect his wife."[1099] Further under Article 58 of the Jordan Civil Status Code, "the husband is the head of the household."[1100] Parenthood refers to right to paid maternity leave, paternity leave and the treatment of pregnant workers.[1101] Entrepreneurship assess legal constraints to women starting and running a business. Such legal constraints include a woman's ability to sign a contract, register a business or to open a bank account.[1102] Assets refers to property ownership and inheritance, the right of authority of assets during a marriage the valuation of their non-monetary contribution.[1103] The final indicator, pensions, refers to the equalization of retirement ages, including the impact of gaps or absence from employment due to childbearing or children care towards pension benefits.[1104] For example, a difference in retirement ages, such as in Brazil where women

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[1091] *supra* note 1071 at 2

[1092] *supra* note 1051 at 9.

[1093] *supra* note 1025 at 258.

[1094] Senegal Family Code, Article 153, January 17, 1989. Original French Text: "Le choix de la résidence du ménage appartient au mari; la femme est tenue d'y habiter avec lui et il est tenu de l'y recevoir."

[1095] It must be noted that also under Article 153 of the Senegalese Family Code, if the husband's residence provides physical or moral dangers to the wife, she may, under certain exceptions be authorized to live with her children in a separate residence to be decided by the Justice of the Peace. Original French Text: "Lorsque la résidence fixée par le mari présente pour la famille des dangers d'ordre physique ou d'ordre moral, la femme peut, par exception, être autorisée à avoir pour elle et ses enfants un autre domicile fixé par le juge de paix."

[1096] *supra* note 1088 at 3.

[1097] *Id.*

[1098] Kenya – Employment Act, Chapter 226, Section 5(3), 2007.

[1099] Mali - Law No. 2011-087, Relating to the Code of Persons and Code, Article 316, December 30, 2011.

[1100] Kingdom of Jordan, Civil Status Code, Article 58, 2001.

[1101] *supra* note 1088 at 4. Assessment of Parenthood: WBL confers positive scores for the parenthood indicator for states providing a minimum of 14 weeks of paid maternity leave where the government provides 100% maternity leave benefits.

[1102] Women, Business and the Law, *A Decade of Reform*, World Bank Group 11 (2019).

[1103] *supra* note 1088 at 5.

[1104] *supra* note 1033 at 8.

retirement age is 60 versus 65 for men, has been shown to be counterproductive towards gender equality.[1105] In fact, studies have shown that increases in retirement ages result in increased female labor supply thus contributing not only to gender equality but also to overall economic growth.[1106]

Finally, Figure 4, reflects the UN Sustainable Development Goals, specifically, Goal 5 and its corresponding targets and indicators. The UN SDGs are made up of 17 Goals defined through a list of 169 SDG Targets.[1107] These targets are agreed to be tracked through 231 individual indicators.[1108] Goal 5 of the UN SDG seeks to "achieve gender equality and empower all women and girls"[1109] and contains a wide array of targets and indicators. While Goal 5 specifically and exclusively deals with gender, gender is encompassed in many other goals as well. Other gender references include, Goal 1, on the elimination of poverty in all its forms everywhere, which under Target 1.b aims to "create… gender-sensitive development strategies."[1110] Goal 4 on education and lifelong earning for all, refers to gender under Target 4.5 calling for the elimination of "gender disparities in education,"[1111] and under Target 4.7 for all learners to acquire the knowledge needed to promote sustainable development, through various means including "gender equality."[1112]

The Targets under Goal 5, as seen in Figure 4, are mostly vague and all-encompassing such as "end all forms of discrimination against women and girls";[1113] however, they are supplemented by specific indicators, such as "legal frameworks in place to promote, enforce and monitor equality and non-discrimination on the basis of sex."[1114]

[1105] Ole Hagen Jorgensen, Romero Rocha and Anna Fruttero, *Growign Old in an Older Brazil: Implications of Population Ageing on Growth, Poverty, Public Finance, and Service Delivery,* The World Bank, 76 (2011).
[1106] *supra* note 1088 at 4.
[1107] United Nations SDG Goals, *SDG Indicators,* A/RES/71/313, https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202020%20review_Eng.pdf.
[1108] *Id.*
[1109] *supra* 1087.
[1110] *Id* at Target 1.b.
[1111] *Id* at Target 4.5.
[1112] *Id* at Target 4.7
[1113] *supra* note 1087.
[1114] *Id.*

Figure 4: United Nations Sustainable Development Goals, Goal 5 on Gender Equality and Empowerment of Women and Girls, Targets, and Indicators[1115]

Targets	Indicators
5.1 End all forms of discrimination against women and girls everywhere	5.1.1 Whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex
5.2 Eliminate all forms of violence against all women and girls	5.2.1 Proportion of ever-partnered women and girls aged 15 years and older subjected to physical, sexual or psychological violence
5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.	5.3.1 Proportion of women aged 20-24 years who were married or in a union before age 15 and before age 18
5.4 Recognize and value unpaid care and domestic work	5.4.1 Proportion of time spent on unpaid domestic and care work, by sex, age and location
5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.	5.5.1 Proportion of seats held by women in national parliaments and local governments and proportion of women in managerial positions
5.6 Ensure universal access to sexual and reproductive health and reproductive rights	5.6.1 Proportion of women aged 15-49 years who make their own informed decisions regarding sexual relations, contraceptive use and reproductive health care
	5.6.2 Number of countries with laws and regulations that guarantee full and equal access to women and men aged 15 years and older to sexual and reproductive health care, information and education

Returning to what should be included in an effective gender chapter, there is a debate surrounding whether to include broad or narrow indicators. Some theorists argue that indicators should be broad so as to encompass all obligations enshrined in gender agreements and human rights treaties concerning treaties.[1116] For example, in terms of human rights, broad commitments such as the obligation to "respect, protect, fulfill" human rights would effectively constitute a broad indicators that could help track both violations of human rights and the steps needed for a state to implement towards the progressive realization of human

[1115] *supra* note 1107 at Goal 5.

[1116] Office of the High Commissioner of Human Rights, Human Rights Impact Assessments for Trade and Investment Agreements, Report of the Expert Seminar, 11 (Jun. 23-24, 2010).

rights.[1117] The logic is that with a broad indicator, can cover all prospective issues[1118] and the state practitioners can subsequently narrow the list depending on the needs and climate of the specific state.[1119]

Other theorists have argued that a broad indicator approach is too burdensome and thus impractical for governments.[1120] In the absence of specific indicators it is unclear which provisions are being violated and harder to hold perpetrators accountable,[1121] particularly, in countries already struggling with upholding human rights standards.[1122] Adopting instead a short list of specific key indicators keeps the task manageable and allows regulators to set specific standards towards achieving those goals.[1123]

Building on both of these theories, perhaps the best solution would be to incorporate both broad and narrow objectives in an effective gender chapter, such as was accomplished through the inclusion of broad targets and specific indicators in the UN SDGs. For an effective gender chapter, this could be done by explicitly referring to the Goal 5 Targets and Indicators or through a broad statement signaling the parties intention and agreement towards the elimination of all discrimination against women and the elimination of all forms of violence towards women (UN SDG). The gender chapter could then highlight a short list of indicators derived from the WBL, SDGs, and McKinsey report that would be necessary to achieve these goals, such as the implementation of laws protecting women against discrimination and sexual harassment in the workplace,[1124] the implementation of laws protecting a woman's right to movement[1125], property and inheritance[1126] and an equal pension.[1127] Combining these three approaches to gender indicators could create a gender chapter that captures evolving areas of gender discrimination while also creating ascertainable goals for policy markets to work towards post the ratification for the FTA. The additional advantage of taking already existing indicators would be that they are already being collected and thus cost neutral additions.

B. Addressing Effect of Trade on Gender by Industry

To supplement the use of broad and narrow indicators for an effective gender chapter in an FTA there is also a need for an assessment to be made by industry of the effects of trade on gender. As previously discussed, international trade affects different industries in different countries in different ways and, importantly, affect gender as a result.

According to the OECD, there is a clear need for trade negotiators to take into account the effect of trade on gender and to specifically include a gender sensitive framework for each industry affected by a trade agreement.[1128] A gender sensitive framework calls for the need to take into account a gender perspective in overall trade policy negotiations, design and

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[1117] *Id* at 12.
[1118] *supra* note 1039 at 508.
[1119] *supra* note 1116.
[1120] *Id.*
[1121] Meredith Kolsky Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means,* 12(1) Loyola University Chicago International Law Review, 1 – 22, 9 (2014).
[1122] *Id.*
[1123] *Id* at 10.
[1124] *supra* note 1088 at 2.
[1125] *Id.*
[1126] *Id* at 5.
[1127] *supra* note 1033 at 2.
[1128] Mariama Williams, *Gender and Trade: Impacts and Implications for Financial Resources for Gender Equality,* OECD 2 (May 2007).

implementation[1129] and calls for the implementation of 'flanking measures' to counter act such an impact.[1130] A gender sensitive framework and assessment of necessary flanking measures needs to be carried out by either the trade negotiators or other agencies within an existing government. For example, in the US framework, the International Trade Commission (ITC), under the Trade Act of 2002 was created as an independent federal agency charged with reporting on the effect of trade agreements on the US economy.[1131] The Agency reports on economic and social impacts of trade but strikingly fails to look at the impact on gender.[1132] In the US context, the inclusion of a gender sensitive framework assessment could practically be added to the purview of the ITC's mandate.[1133]

As previously discussed, agriculture is the second largest woman dominated industry in which women are largely engaged in for purposes of food security and providing for their families rather than profit.[1134] The liberalization of trade in agriculture poses a threat to the ability of women to provide for their families.[1135] During the negotiations of the Dominican Republic–Central American Free Trade Agreement (DR–CAFTA) democratic members sent a packet to congress titled "Women Say No to DR–CAFTA."[1136] The packet addressed the impact of the FTA as contributing to the poor working conditions of women, the privatization of public goods and services and, in reference to agriculture, the impact of DR–CAFTA on food security due to the resulting changes in agriculture production.[1137] Changes to food security and women's ability to work and feed their families need to be addressed when negotiating the agriculture portion of a free trade agreement. Flanking measures need to be taken to counteract these negative effects.[1138] An example of an effective flanking measure could be a tax incentive to promote woman run businesses.[1139] A way to measure the impact of an effective agricultural flanking measure could be through the targets and indicators established for Goal 2 of the UN SDGs on ending hunger and achieving food security.[1140] For instance, Target 2.3 calls for the doubling of "agricultural productivity and income of small-scale food producers, in particular women" the corresponding indicator being the "average income of small-scale food producers by sex."[1141]

In relation to services, with services being the primary area in which women are employed and dominate,[1142] an impact of international trade on services could have a detrimental impact

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[1129] *supra* note 1018 at 4.
[1130] *supra* note 1128 at 2.
[1131] Trade Act of 2002, H.R. 3009 107th Congress (2001-2002), Sec. 2104, June, 8 2002.
[1132] *supra* note 1039 at 518.
[1133] *Id.*
[1134] *Id* at 514.
[1135] UN Women Watch, *Gender Equality & Trade Policy, VI. Trade, Agriculture, Food Security and Gender Equality* https://www.un.org/womenwatch/feature/trade/Trade-Agriculture-Food-Security-and-Gender-Equality.html (The effect on women's ability to provide for families partially stems international trade in increasing demand of production of "cash crops" and instead sourcing food crops from imports, thus competing with locally produced food crops and decreasing their price. The predominant effect on women is due to women generally working as 'small scale food-crop farmers' which cannot compete with the international markets).
[1136] *supra* note 1039 at 517.
[1137] *DR-CAFTA Falls Short on Workers' Rights,* Human Rights Watch (Jul. 26, 2005) https://www.hrw.org/news/2005/07/26/dr-cafta-falls-short-workers-rights.
[1138] *supra note* 1128 at 2.
[1139] *supra* note 1025 at 245.
[1140] *supra* note 1110 at Goal 2.
[1141] *Id* at Target 2.3.
[1142] *supra* note 1023 at 5.

on women and as such gender equality.[1143] For example, increased competition from trade liberalization creates a tiered system of different levels of health care provisions,[1144] which could, in turn, affect the quality of health care services provided for the poor.[1145] Trade liberalization has, as a result, *affected* a woman's access to high quality health care services and as such as negatively affected women and in turn has contributed to gender inequality. An example of a flanking measure that could address this burden could be the creation of government funded programs providing high quality health care to affected low-income women.[1146] Flanking measures could also follow targets set out under Goal 3 of the UN SDGs to "ensure healthy lives and promote well-being for all at all ages."[11471148]

Other than agriculture and services there could be additional impacts on apparel, industrial work, the informal sector[1149] and others. Overall, in order to create a truly effective gender chapter consideration must be afforded to the gender sensitivity of provisions affecting industries and flanking measures must be considered within the chapter or by the respective state in order to address potential impacts on gender equality.

C. Monitoring and Review

To ensure that the state parties are actively working towards implementing the indicators previously discussed there is a need for a committee or independent body to monitor and periodically review state party actions as well as any possible actions of private entities in the states affecting gendering equality.

The reason for the need for monitoring and review is that the gender impact assessment should not be a "one-off policy, but an ongoing and dynamic process."[1150] The committee should continuously review and evaluate whether the indicators effectively drive the parties to include more progressive legislation and secure increased gender equality for its citizens and companies.[1151] The committee should also have the right to suggest amendments to its government in case indicators need to be amended due to unexpected impacts on gender in the states.[1152]

In order to increase transparency and encourage the involvement of public interest groups and interested stakeholders[1153] there should be a process to allow interested parties to submit

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[1143] Dorotea Lopez, Felope Munoz & Javiera Caceres, *Working Paper: Gender Inclusion in Chilean Free Trade Agreements*, udp Facultad de Economia y Empresa, 7 (May 2019).

[1144] *supra* note 1023 at 5.

[1145] *supra* note 1039 at 514; *see also supra* note 1079. Studies have shown that the majority of those living in poverty are women. Specifically, 70% of those living in extreme poverty are women.

[1146] Gretchen Borchlet, *The Impact Poverty Has on Women's Health,* 43(3) Human Rights Magazine (Aug.1 2018). Affordable Care Act (ACA) addresses areas of discrimination faced by women with regard to health care by outlawing insurance providers refusal to sell insurance to women with pre-existing conditions such as prior pregnancy or having a Cesarean delivery. ACA has also outlawed charging women more than men for the same insurance covered.

[1147] *supra* note 1110 at Goal 3.

[1148] Under Target 3.7 ensuring "universal access to sexual and reproductive health-care services' and Target 3.8 to "achieve universal health coverage, including… access to quality essential health care service." Access to health care services under Targets 3.7 and 3.8 are to be measured by its corresponding indicators of women having their need for family planning "satisfied with modern methods" and 'coverage of essential health services.'

[1149] Kaori Miyamoto and Marianne Musumeci, *Strengthening the Gender Dimension of Aid for Trade*, OECD, 6 (2020).

[1150] James Harrison, *Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?* Warwick University, 6 (November 2013).

[1151] *Id.*

[1152] *Id.*

[1153] *supra* note 1016 at 121.

complaints to the committee.[1154] The committee in turn should have the right to submit any credible complaints to a dispute resolution mechanism with the power to impose sanctions.

D. Effective, All-Encompassing Dispute Resolution Mechanism

Building on the need for indicators and sector specific flanking measures and monitoring and review there is a need for a dispute resolution mechanism to resolve implementation issues. Without an effective dispute resolution mechanism there is no way to ensure that the indicators

Many FTAs have a dispute resolution provision that allows the parties to refer a dispute falling under its purview to a dispute resolution mechanism of the choice of the parties. [1155] For example, in the DR–CAFTA FTA, the parties agreed to refer disputes relating to the improper enforcement of provisions of the FTA, including but not limited to, issues of labor, investment expropriation and the environment.[1156] For a gender chapter to be effective there is a need for the dispute resolution mechanism of the FTA to also encompass disputes related to the gender chapter. Further there is a need for parties to have recourse to dispute resolution for all matters relating to gender equality, not only matters of gender relating to trade. This would enable parties to raise claims against corporations and entities in the other party that abuse gender rights.

The need for an all-encompassing dispute resolution mechanism was exhibited in a series of labor issues that arose between 2011 and 2017 in Guatemala.[1157] In 2011 the U.S. required the creation of a panel under the CAFTA–DR dispute resolution clause due to Guatemala's failure to "effectively enforce its labor laws, through a sustained recurring course of action or inaction, in a manner effecting trade between the parties."[1158] After prolonged proceedings the panel eventually decided in favor of Guatemala and found that they had not violated their commitments under the CAFTA–DR.[1159] The Panel came to the positive finding for Guatemala on the basis that despite the fact that Guatemala had repeatedly failed to comply with eight court orders and reinstate employees dismissed for unionization and collective bargaining, which the Panel said could be characterized as "sustained or recurring course of action or inaction"[1160] this failure had not affected the trade between the parties. The result of this Panel decision demonstrated the lack of resources through labor chapters of free trade agreements for labor advocates.[1161] Further, the Panel decision essentially legitimized

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[1154] UN Women, *Communications Procedure*, https://www.unwomen.org/en/csw/communications-procedure. The Commission on the Status of Women considers complaints by any individual, NGO, or group t submit complaints 'containing information relating to alleged violations of human rights that affect the status of women in any country in the world.' The commission considers these submissions for purposes of their research. In the case of a gender chapter committee, a similar structure of complaint procedure could be instituted.

[1155] *supra note 1069*. For example, NAFTA has three main areas of dispute settlement under investment (Chapter 11), review of anti-dumping and countervailing duty administrative actions (chapter 19) and general dispute settlement (chapter 20).

[1156] Central American-Dominican Republic-United States Free Trade Agreement, arts. 10.8.1–3, 43 ILM 514 Aug. 5, 2004. [hereinafter CAFTA-DR].

[1157] Dr. Phillip Paiement, *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, 49 GJIL, 675 – 692, 684 (2018).

[1158] *supra* note 1156 at art 16.2:1(a).

[1159] *Id.*

[1160] In re Guatemala – Issues Relating to the Obligations (U.S. v. Guatemala), Final Report, CAFTA-DR Arb. Panel (June 14, 2017) [hereinafter U.S. v. Guatemala], para 219.

[1161] *supra 1157* note at 692.

Guatemala's anti-union activities and went against the wording of the CAFTA–DR calling for "non-interference in formation of a union."[1162]

Translating the CAFTA–DR example to a gender chapter, if the dispute resolution mechanism only applies to "trade related matters" then a corporate or a state party could effectively continue to discriminate on the basis of gender in a "sustained or recurring course of action or inaction"[1163] but fail to face any legitimate consequences due to its non-application to trade.

E. Imposition of Target Sanctions

Supplementing the dispute resolution mechanism, for there to be an effective implementation of a gender chapter there needs to be an ability for the created panel to impose sanctions on a non-complying party. Referring back to the Guatemalan example discussed above. Under the DR–CAFTA there was another labor-related issue in a Korean owned factory in Guatemala.[1164] The Korean-owned plant refused to allow government labor inspectors to inspect their facilities and determine whether there was adequate compliance with labor standards. Subsequently, due to the Guatemalan government's lack of resources and will to compel such inspections, the factory was never inspected, resulting in lack of enforcement or protection of the workers' labor rights.[1165] If a gender chapter does not contain language calling for enforcement of decisions of a dispute resolution panel or other enforcement actions through the threat or imposition of sanctions, the chapter will lack "teeth"[1166] or any ability to actually facilitate change.

In the human rights arena, there has been discussion over whether sanctions for human rights abusers should be comprehensive or targeted.[1167] Comprehensive sanctions are directed at entire states as a whole and affect the entire population through for example: trade restrictions, travel restrictions and embargoes. In the past, comprehensive sanctions have been criticized for their lack of effectiveness in relation to the detrimental humanitarian effects they create on the entire State as a result. For example, humanitarian aid groups have been unable to transfer vital aid assisting malnourished children and other vulnerable groups due to the imposition of trade restrictions and embargoes.[1168]

For an effective gender chapter, comprehensive sanctions are, therefore, likely not the most effective form of sanctions, as the women who are already facing gender discrimination will likely face more hardship as a result of a comprehensive sanction indiscriminately affecting the entire population of the state.[1169] As previously discussed, trade is not gender neutral, therefore an indiscriminate comprehensive sanction will likely affect women in different ways than men and as a result further threaten their status.

[1162] USTR, CAFTA-DR Labor Capacity Building Fact Sheet (May 2011) https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/may/cafta-dr-labor-capacity-building.
[1163] *supra* note 1159.
[1164] *How Labor Issues Are Complicating the Latest Wave of Free Trade Pacts*, Knowledge @ Wharton, University of Pennsylvania (July 2014) https://knowledge.wharton.upenn.edu/article/labor-issues-complicating-latest-wave-free-trade-pacts/.
[1165] *Id.*
[1166] Katie Simpson, *Updated Canada-Israel trade agreement to give gender rules 'teeth'*, CBC News, (May 2018) https://www.cbc.ca/news/politics/canada-israel-free-trade-agreement-gender-1.4680309.
[1167] *supra* note 1025 at 259.
[1168] *Id* at 261.
[1169] *Id.*

The ideal situation is, therefore, most likely to create targeted sanctions. Targeted sanctions, also known as "smart sanctions" are directed at individuals and companies.[1170] In the past they have been used to target terrorism but have recently been expanded to retaliate against human rights abusers.[1171] A targeted sanction minimizes civilian suffering through freezing the assets or implementing foreign aid reductions and capital restrictions of the individual targets.[1172] A gender could greatly benefit from the extension of targeted sanctions as a tool for the dispute resolution mechanism.[1173] For instance, in the Guatemalan example, the Korean owned company's refusal to comply with the inspection order[1174] could be enforced through the target sanctions of asset freezing or perhaps, less radically, a suspending of their export license. If the company wished to continue operations and have their assets unfrozen, they would be required to comply with the inspection order. This same model could be used in a gender chapter with a dispute resolution mechanism imposing target sanctions on gender abusing companies and entities and limiting its impact on the women and other civilians already impacted by the gender discriminatory action.

VII. The Inclusion of Gender Chapters in Free Trade Agreements

The gender chapters of the Chile–Uruguay, Canada–Chile (CCFTA), Chile–Argentina and Canada–Israel FTA (CIFTA) are revolutionary in that not only are they the first dedicated a gender chapters in FTAs, but also three of them (CCFTA, Chile–Argentina, and CIFTA) were all concluded in 2019. As such, 2019 marked a revolutionary year for gender and free trade agreements. Following Part VI on the elements necessary for an effective gender chapter, this paper now turns to the elements incorporated in the gender chapters.

The FTAs are assessed below in order of their entry into enforcement, starting with the Chile–Uruguay FTA, the first FTA to include a gender chapter, followed by the CCFTA, the Chile Argentina FTA, the CIFTA and finally, an assessment of the provision on gender in the USMCA. While the provision in the USMCA is not a separate chapter it is important to see the development of gender provisions and how the gender chapters have influenced their substance.

A. Chile – Uruguay FTA (2016)

In 2016, Chile and Uruguay made the unprecedent move to include an entire chapter on gender in their FTA. The first six articles of Chapter 14 have been incorporated in almost exact form in the gender chapters of subsequent FTAs. This demonstrates that the Chile–Uruguay FTA has become the foundation for the subsequent gender chapters of 2019 not only in terms of changing the attitude towards including gender in trade negotiations but also in terms of the provisions and wordings in the subsequent FTAs.

[1170] *supra* note 1012.

[1171] Ewelina U. Ochab, *How Targeted Sanctions Can Provide a Response to the Most Egregious Human Rights Violators,* Forbes (Mar. 6, 2020), https://www.forbes.com/sites/ewelinaochab/2020/03/06/how-targeted-sanctions-can-provide-a-response-to-the-most-egregious-human-rights-violations/#266542423c42.

[1172] Human Rights Watch, *The US Global Magnitsky Act,* (Sep. 13, 2017) https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act. For example, the Global Magnitsky Human Rights Accountability Act (2012) provides the executive branch to impose targeted sanctions towards perpetuators of gross human rights violations.

[1173] *supra* note 1012.

[1174] *supra* note 1164.

B. Canada – Chile FTA (CCFTA) (2019)

Canada and Chile are the strongest advocates in terms of incorporating gender chapters into free trade agreements. Canadian officials have stated that Canada's objectives in including a separate gender chapter were fourfold. Through a gender chapter, Canada wanted to reaffirm the "importance of incorporating a gender perspective into economic and trade issues," to reaffirm its commitment to international agreements on women's rights and gender equality, to "provide a framework for parties to the agreement to undertake cooperation activities on issues related to gender and trade," and finally, to establish a trade and gender committee as well as other institutional gender related provisions.[1175] The provisions of the Chapter N *bis* of the CCFTA are very similar to those of the Uruguay–Chile FTA but for the inclusion of the UNSDGs and the CEDAW.

C. Chile – Argentina FTA (2019)[1176]

On June 26, 1996, Chile and MERCOSUR, which is comprised of Argentina, Brazil, Paraguay and Uruguay signed the Economic Complementation Agreement No. 35 (ACE No. 35). In 2017 Chile and Argentina agreed to negotiate a new agreement solely between the two countries to "expand and deepen their economic trade relations."[1177] The text was incorporated as an additional protocol of the ACE No. 35 however; it only applies to Chile and Argentina. The FTA is unique amongst the other FTAs with gender chapters as reference to the party's commitments to incorporate gender into the international trade agenda and to promote equality is included in the preamble of the entire agreement rather than only in the chapter.[1178]

D. Canada – Israel FTA (CIFTA) (2019)

The most revolutionary of the gender chapters is undoubtedly the Canada – Israel FTA, due to its extension of the dispute settlement provision to the gender chapter as well. In every other gender chapter previously discussed there is a universal caveat restricting the application of the dispute settlement mechanism to the gender chapter. As with the other FTAs, this is not the first FTA between the parties. Instead, the new FTA was a renegotiated version of the 1997 FTA between Canada and Israel[1179] and was created to "signal the importance of progressive trade, ensuring that the benefits and opportunities that flow from trade and investment are more widely shared."[1180]

E. USMCA

Finally, when negotiating the USMCA, there was talk of including a gender chapter; however, this goal was ultimately not reached.[1181] While the original NAFTA agreement included a side agreement with 'some language about sex discrimination' it required significant

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[1175] *Id.*

[1176] Free Trade Agreement, Chile – Argentina, May 2, 2019.

[1177] Foreign Trade Information System, *Trade Policy Developments: Argentina - Chile Trade Agreement*, http://www.sice.oas.org/TPD/ARG_CHL/ARG_CHL_e.ASP.

[1178] *supra* note 1176 at Preamble.

[1179] Government of Canada, Canada-Israel Free Trade Agreement, (May 28, 2018) https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/index.aspx?lang=eng.

[1180] *Id.*

[1181] Alicia Frohmann, *An Opportunity for a Gender Equality Focus in Trade Policy*?, ICTSD, (Nov. 16, 2018) https://www.ictsd.org/opinion/an-opportunity-for-a-gender-equality-focus-in-trade-policy.

strengthening.[1182] Instead, Prime Minister Trudeau, furthering Canada's trade policy of including gender in their FTAs, successfully negotiated inclusion of a reference to gender under Article 23.9 of the USMCA.[1183]

Article 23.9 of the USMCA promotes the equality of women in the workplace and calls for parties to implement policies appropriate to protect workers against employment discrimination on the basis of sex, pregnancy, sexual orientation, gender identity and caregiving responsibilities.[1184] However, it must also be noted that under footnote 13 of Article 23.9 the U.S. included the caveat that the U.S.' "existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article."[1185] This provision, whilst not as expansive as the aforementioned gender chapters, is still a significant step, particularly for the U.S., as this is the first FTA in which the U.S. has agreed to include not only a mention of women's rights but also the rights of LGBTQ+ through extending the provision to "sexual orientation."[1186]

VIII. International Response to Gender Chapters

The international response from government officials and interested stakeholders has been mixed at best and critical at worst. On the positive side, commentators have argued that the inclusion of gender chapters "reflect[s] a new interest of the trade community in gender equality and the recognition that trade can be instrumental in achieving it."[1187] The negative overall response however, has been to argue that these gender chapters do little to further gender equality and are "nothing" and "just about being nice to women."[1188] Notwithstanding these contrasting views, this paper seeks to illustrate that the main reasons for the mixed response is the lack of the effectiveness of the current chapters. These effectiveness issues concern the need for specific gender-related protections and indicators, country specific analyses, a clear and identifiable purview of the Gender Committees, and an extension of the dispute resolution mechanism which is strikingly absent in all the aforementioned FTAs other than the CIFTA.

A. Lack of Specific Indicators

None of the FTAs discussed include clear guidance on how to achieve the goals of the gender chapter and, perhaps more importantly, none include specific indicators to track whether the chapter is achieving its goals. For example, critics of the Chile-Uruguay FTA and CCFTA have pointed out that neither FTA includes any specific gender relation protection, not even the provision of equal pay for equal work or any similar standard.[1189] UNCTAD regarded the CCFTA as a "welcome step"[1190] but noted that, due to the lack of specific goals,

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[1182] Jean Galbraith and Beatrix Lu, *Gender-Identity Protection, Trade and the Trump Administration: A Tale of Reluctant Progressivism,* Yale Journal of Law Reform 129, 44-63, 48 (Oct. 7, 2019).
[1183] U.S.-Mex.-Ca Agreement, art 23, Nov. 30, 2018 [hereinafter USMCA].
[1184] *Id.*
[1185] *supra* note 1182 at 50.
[1186] Raj Bhala & Cody N. Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ Rights through Free Trade Agreements*, 47 Ga. J. Int'l & Comp. L. 302 (2019).
[1187] *supra* note 1050.
[1188] Valerie Hughes, *Gender Chapters in Trade Agreements: Nice Rhetoric or Sound Policy?* Mainstreaming Gender in Trade Agreements (October 2019) https://www.cigionline.org/articles/gender-chapters-trade-agreements-nice-rhetoric-or-sound-policy.
[1189] *supra* note 1079.
[1190] UNCTAD, *The New Way of Addressing Gender Equality Issues in Trade Agreements: is it a true revolution?* No. 53 Policy Brief, 4 (October 2017).

the fact that the dispute resolution mechanism did not extend to the gender chapter, and that it did not require the harmonization of gender related legislation, it remained a "light component."[1191]

The Chile–Uruguay FTA and CCFTA, lack specific indicators other than a reference to "importance of eliminating discrimination against women at all levels and in all sectors of the population." While, as previously discussed, there is a need for broad indicators calling for the eliminating of gender inequality, the provision on eliminating discrimination against women is arguably not even an indicator, it does not affirm the parties' commitment to eliminating discrimination against women and only "acknowledges"[1192] its importance.

The lack of specific indicators could easily be remedied through the reference under Article N *bis*-01 of the CCFTA in which the parties "recall Goal 5" of the UN SDGs to "achieve gender equality and empower all women and girls."[1193] A clear reference to the goals of the UN SDGs would allow for the establishment of broad indicators to improve the effectiveness of the gender chapter. Further, rather than limiting the reference of the UN SDGs solely to Goal 5, including provisions on gender in the goals relating to health and agriculture would demonstrate the reality that gender affects all areas of trade and must be sufficiently monitored across industries.[1194]

With regards to the purview of the gender committees, since the ratification of the gender chapters in the FTAs, only the Canada–Chile FTA has met for its annual gender committee meeting.[1195] In the publicized review of the first annual Committee meeting, the parties effectively only celebrated the ratification of the agreement and highlighted a capacity building workshop on women and trade.[1196]

The lack of specific indicators and articulable goals for the gender committee to assess has arguably turned the gender committee into nothing more than a voice to broadcast gender related conferences and workshops held by Canada and Chile annually. There is no assessment of any improvements to gender equality or any monitoring and review of the implementation of gender standards by either party.

B. Country Specific Analyses

As demonstrated above, the FTAs all virtually follow the same structure and incorporate the first six article of the Chile–Uruguay FTA almost indiscriminately. This has effectively created a situation in which each party to the FTAs with gender chapters has been treated the same with regard to gender equality. This ignores the reality that there are massive differences in how[1197] of gender equality is understood and tackled in Chile, Uruguay, Canada, Israel, and Argentina.

In terms of the different standards of gender-equality in the gender chapter FTA countries reproductive health policies alone are vastly different between the parties. For example, out of the South American parties, Uruguay is the only state that has decriminalized abortion in the

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[1191] *Id.*

[1192] *supra* note 1183.

[1193] *supra* note 1184 at Article N-*bis*-01.

[1194] *supra* note 1025 at 258.

[1195] Government of Canada, *First Trade and Gender Committee meeting under the Canada-Chile Free Trade Agreement (CCFTA) Trade and Gender Chapter*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/meeting-26-04-2019-reunion.aspx?lang=eng.

[1196] *Id.*

[1197] *supra* note 1048 at 27.

first trimester without a restriction as to the reason for the abortion.[1198] Argentina despite indications from the government of the possibility of decriminalizing abortion, continues to criminalize the practice, except for in cases of rape or where the pregnancy will endanger the life of a pregnant woman.[1199] Chile in 2017 passed a progressive reform decriminalizing abortion, where the life of the pregnant woman or girl is at risk, where the pregnancy is as a result of rape and where the fetus faces several conditions incapable of surviving outside the womb.[1200] However, in the implementation of these reforms, the Constitutional Tribunal upheld restrictions allowing doctors to refuse to perform abortions on the basis of conscience and even allowed entire hospitals to invoke conscience arguments to refuse to provide abortions.[1201] This barrier to abortion does not require any justification from the refusing doctor or hospital.[1202] While the right of a woman to choose to terminate her pregnancy is a heavily debated topic that intertwines with religion and politics this paper is not seeking to argue that not providing women the right to choose is an indication of gender inequality. Instead, the discrepancies between abortion rights and the provision of prenatal health care shows the vast differences in politics between Chile, Argentina and Uruguay. As such it seems unlikely that a gender chapter with virtually the same wording but for minor adjustments would adequately accommodate such differences.

In addition to evaluating the political differences in a country, an assessment of the enforcement of the rule of law and judiciary in each respective state is also needed. The now defunct Transpacific Partnership (TPP) called for the creation of high labor standards but did not call for their enforcement.[1203] Mexico has very progressive labor standards and, under Article 123 of the Mexican Constitution,[1204] equal pay is mandated for equal work and provisions for maternal rest and leave and overtime restrictions are also in place for "women of any age."[1205] However, these progressive laws are "seldomly enforced"[1206] and, as such, the protections afforded under the Mexican constitution are nothing more than empty promises.[1207]

Therefore, in order for the FTA gender chapters to be effective and enforceable there is a need to reframe them based on the country's specific political situation, the distribution of labor in industries, the legal contexts, and the enforceability of the rule of law in the respective countries.

[1198] Center for Reproductive Rights, *Uruguay becomes the Third Nation in Latin American in Decriminalize Abortion*, (October 2012) https://reproductiverights.org/press-room/uruguay-becomes-the-third-nation-in-latin-america-to-decriminalize-abortion.

[1199] Uki Goni, *Argentina set to become first major Latin American country to legalise abortion*, The Guardian, (March 2020) https://www.theguardian.com/world/2020/mar/01/argentina-set-to-become-first-major-latin-american-country-to-legalise-abortion.

[1200] Jose Miguel Vivanco, *A Backward Step for Reproductive Rights in Chile,* Human Rights Watch (April 2018) https://www.hrw.org/news/2018/04/16/backward-step-reproductive-rights-chile.

[1201] *Id.*

[1202] *Id.*

[1203] Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements*, Institute for International Law and Justice, 2 (Mar. 2018); *see also id.* at 15 (In the revival of the TPP through the CPTTP these high labor standards were not even included).

[1204] Constitucion Politica de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federacion (DOF) 50-02-1917, Title VI, ultimas reformas DOF 10-02-2014 (Mex.) [hereinafter Mexican Constitution].

[1205] *Id.*

[1206] John P. Isa, *Testing the NAALC's Dispute Resolution System: A Case Study,* 7 AM. U.J. Gender Soc. Pol. & L, 179, 187 (1998).

[1207] *supra* note 1025 at 258.

C. Unclear Parameters CIFTA's of Dispute Resolution Mechanism

Finally, the CIFTA[1208] is the only FTA gender chapter which extends the dispute resolution mechanism to the gender chapter. The lack a dispute settlement mechanism in other gender chapters has been criticized as making the chapters "weak" and "merely symbolic."[1209]

The dispute resolution provision in the CIFTA has been celebrated as giving the gender chapter "teeth."[1210] However, as shown below in **Error! Reference source not found.** there are serious concerns about its implementation. A primary issue identified is the lack of clarity over whether the provisions extend merely to matters concerning trade and actions by state parties or whether it also extends to companies and corporations implementing gender-biased policies.[1211] Under Article 19.2 (b) it could be argued that the dispute resolution mechanism extends to abusing companies indirectly. This indirect impact on companies could be seen as the failure of a State to take action against a company imposing a gender biased policy.[1212] However, until the dispute resolution mechanism has been invoked on the basis of gender this will be unclear.

Furthermore, the dispute resolution mechanism under Article 19.11 does not allow for sanctions.[1213] Instead, under Article 19.13 the parties may deny benefits if they cannot agree on a compensation.[1214] The ability to impose targeted sanctions would greatly strengthen the dispute resolution mechanism's power and would confer legitimacy onto the entire chapter. It is unclear what the 'suspension of benefits' refers to however, it likely involves a comprehensive measure which would indiscriminately inflict harm on the entire country, thus worsening the position of already affected women.

D. Successes of Gender Chapters

While there are clear areas in which the gender chapters must be strengthened in order for them to be effective, their mere existence must still be lauded. Before 2016, gender was merely referred to in provisions of a trade agreement or in an annex, if at all, and there was never a serious consideration of gender in the negotiation of an FTA.

The shortcomings of the gender chapters and gender provisions should not disguise the fact that a shift in international trade has taken place.[1215] As per Francois Phillipe Champagne, the Canadian Minister of International Trade, while the chapters may not be fully effective, one should not discount the symbolic effect of the gender chapters and the fact that "gender rights are on the table at all."[1216] Further, as per Justin Trudeau, Canada's implementation of gender chapters in its FTAs is a step forward in the sense that it is the first time a Group of Seven country (G7: Canada, Italy, U.S., France, UK, Japan, and Germany) has agreed to a gender chapter in a trade deal.[1217] As another G7 country, it is notable and also a step forward

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[1208] Free Trade Agreement, Canada-Israel, (May 27, 2019).
[1209] Joana Smith, *U.S. Unlikely to Accept NAFTA Gender Chapter with Teeth: Trade Experts,* CBC News (Sep. 23, 2017) https://www.cbc.ca/news/politics/nafta-gender-chapter-experts-1.4304197.
[1210] *supra* note 1166.
[1211] Katie Simpson, *Updated Canada-Israel trade agreement to give gender rules 'teeth'*, Bilaterals.org (May 2018) https://www.bilaterals.org/?updated-canada-israel-trade.
[1212] *supra* note 1208 at Article 19.2.
[1213] *Id* at Article 19.11.
[1214] *Id* at Article 19.13.
[1215] *supra* note 1050.
[1216] *supra* note 1209.
[1217] *supra* note 1025 at 253.

that the U.S. agreed to include a provision on gender in the USMCA.[1218] While there is not an exclusive gender chapter in the USMCA, as envisaged by Canada, there is a need for the U.S. to address its failures in gender equality, and the gender provision in the USMCA is the first step.[1219]

Although a developed country that has branded itself as a leader in democracy, the United States currently ranked as the 49th poorest nation in terms of the gender gap[1220] and 96th in the world for female political empowerment[1221] out of the World Economic Forum's 2017 Global Gender Gap index of 144 countries.[1222] The U.S., therefore, ranks lower than most, if not all, developed nations for gender,[1223] and even the smallest provision in the USMCA is a step towards improving gender equality in the U.S.

Overall, it is clear that, while there are areas in the gender chapters that need critical reform in order to reach the full potential of promoting and furthering gender equality, it must also be noted that these chapters are an important step indicating hopefully a beginning trend[1224] towards gender equality and recognition of gender sensitivity in international trade.

Conclusion

2019 marked a transformative year for the inclusion of gender in FTAs. With gender chapters in three new FTAs, an additional provision in the USMCA, the importance of gender in FTAs was certainly highlighted. Overall, this paper has demonstrated that while the gender chapters are ground breaking in their existence and signify a move in international trade policymaking towards considering the effects of trade on gender, they lack the basic requirements needed to be truly effective in combating gender inequality. In order to redress the shortcomings and lack of effectiveness of the current chapters, the paper concludes that a number of reforms are required to strengthen the effectiveness of the gender chapters such as the use of specific indicators based on industry and country realities, monitoring and review, effective dispute resolution and the ability to impose real sanctions. Despite these shortcomings, there is hope that the spotlight has shifted to the importance of gender in international trade negotiations and that these chapters are only the beginning of a future rich with expansive, all-encompassing, effective gender chapters in FTAs.

[1218] *supra* note 1184.
[1219] *supra* note 1182 at 49.
[1220] *supra* note 1186 at 305.
[1221] *Id.*
[1222] Judith Warner, Nora Ellman, Diana Boesch, *The Women's Leadership Gap,* Center for American Progress (November 2018) https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/
[1223] *Id.*
[1224] *supra* note 1050.

CHAPTER 14: PRESERVING TRADITIONS: NAVIGATING THE INTERSECTION OF INTERNATIONAL TRADE AND INDIGENOUS PEOPLES

ZHUO LING*

Abstract

This paper delves into the complexities of protecting indigenous peoples and their traditional knowledge within international trade law. It starts by discussing the fundamental controversies in defining key concepts in this domain and scrutinizes the prevailing legal frameworks, encompassing trade-related dimensions of international environmental and intellectual property law. The paper highlights the shortcomings of these frameworks in safeguarding indigenous rights and traditional knowledge and explores measures states can implement within these frameworks to bolster protection. Furthermore, the paper emphasizes the potential of international trade and investment agreements as robust instruments for championing indigenous rights and their traditional knowledge. It stresses the paramount importance of refining the definitions of "indigenous people" and "traditional knowledge." The paper suggests strategies such as integrating preferential terms in international agreements, creating dedicated monitoring entities, and harnessing alternative dispute resolution mechanisms.

In conclusion, the paper advocates for enhanced dialogue and collaboration to protect indigenous culture and underscores the imperative for robust mechanisms to shield indigenous communities and their traditional knowledge in our quest for global advancement.

Introduction

Cultures around the world, especially among the 5,000 indigenous groups totaling 476 million people, preserve unique traditions rooted in global history and geography.[1225] At the eighteenth session of the United Nations Economic and Social Council's Permanent Forum on Indigenous Issues, Chair Anne Nuorgam summarized that "traditional knowledge (TK) is at the core of indigenous identity, culture, languages, heritage and livelihoods, and must be protected."[1226] Ms. Nuorgam highlighted escalating tensions over indigenous lands, resources, and identity. Root causes include climate change impacts and the repercussions of environmental mismanagement and extractive industries.[1227] Biopiracy and theft of TK are also rising concerns,[1228] with a great number of individual researchers conducting studies on

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[1225] United Nations Development Programme, 10 Things to Know about Indigenous Peoples (Jul. 21, 2021), https://stories.undp.org/10-things-we-all-should-know-about-indigenous-people.

[1226] Economic and Social Council, Indigenous People's Traditional Knowledge Must Be Preserved, Valued Globally, Speakers Stress as Permanent Forum Opens Annual Session, HR/5431 (Apr. 22, 2019), https://press.un.org/en/2019/hr5431.doc.htm.

[1227] *Id.*

[1228] *See generally*, Annie O. Wu, *Surpassing the Material: The Human Rights Implications of Informed Consent in Bioprospecting Cells Derived from Indigenous People Groups*, 78 Wash. U. L. Q. 979 (2000).

genetic resources and other local community information without prior consultation,[1229] or without facing any substantial enforcement of such a requirement.[1230] At the sovereign state level, many argue that state practice of prior consultation with local communities, especially in the realm of national legislation, falls short of solidifying into customary international law. This leads many to assume a government license suffices for legitimately appropriating TK and natural resources, damaging trust and communication between researchers and indigenous communities.[1231]

This paper is structured in three parts. Part I explores the complexities of current legal systems for indigenous rights, focusing on ambiguities in defining indigenous communities and TK, and the impact of international trade. It reviews the legal frameworks under International Environmental and Intellectual Property Law. Part II offers solutions for better protecting indigenous rights and TK, using international trade agreements as a basis, suggesting enhancements to negotiation provisions, treaty obligations, and promoting bodies to oversee TK protection. It also advocates for alternative dispute resolutions for TK conflicts. Part III summarizes the paper's findings and future strategies for indigenous and TK protections.

I. The Existing International Legal Framework for Protecting Indigenous People and TK

A. Who and What Should be Protected: Definition of Indigenous People and TK

A key challenge in developing a system for TK protection is the lack of universal definitions for "indigenous people"[1232] and "TK."[1233] In general, for a group to be considered as "indigenous," three criteria must be met: (1) self-identification as indigenous,[1234] (2) pre-

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[1229] *See* World Intellectual Property Organization & United Nations Environment Programme, WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge, at 137, https://www.wipo.int/edocs/pubdocs/en/tk/769/wipo_pub_769.pdf; Malka San Lucas Ceballos, *The Failure to Consult Indigenous Peoples and Obtain Their Free, Prior and Informed Consent in Ecuador, in* THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA (2020), 197-209; For the lack of consent from indigenous group in the context of medical research, see Emily F. M. Fitzpatrick, Alexandra L. C. Martiniuk, Heather D'Antoine, June Oscar, Maureen Carter & Elizabeth J. Elliot, Seeking Consent for Research with Indigenous Communities: A Systematic Review, 17 BMC Med. Ethics 65 (2016), https://doi.org/10.1186/s12910-016-0139-8.

[1230] For an examination of how consultation processes are carried out in a formalistic way while the communicative effect of indigenous groups' speech is denied, *see* Leo Townsend, Dina Lupin Townsend, *Consent, and the Silencing of Indigenous Communities*, 37 J. Applied Phil. 788 (2020), https://doi.org/10.1111/japp.12438.

[1231] Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 Nw. J. Int'l Hum. Rts. 54, 66 (2011).

[1232] African Commission on Human and People's Rights v. Republic of Kenya, Application No. 006/2012, African Court of Human Rights, [Afr. Comm'n H.P.R.], ¶ 105 (May 26, 2017), https://www.escr-net.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf, [hereinafter *Ogiek Decision*]; Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, HR/PUB/13/2 (2013), 6, https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf.

[1233] *See* Regulation No. 511/2014 of the European Parliament and Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, ¶ 20.

[1234] Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 1650 U.N.T.S. 383, art. 1.

colonization ancestral land occupancy, and (3) maintenance of traditional practices.[1235] In addition, some argue that the experience of marginalization or non-dominance should be a defining factor for indigenous people,[1236] while certain state practices argue against the inclusion of this criterion.[1237] Controversies are likely to arise regarding whether a group constituting the majority of a State's population deserves special protection. Notable examples include the Polynesians, who constitute 96% of the Samoan population; and the Greenlandic Inuit, occupying 89% of Greenland's population and self-identifying as Kalaallit.[1238] To address such situations, a flexible, case-specific approach is essential, avoiding rigid definitions of indigenous communities.[1239]

Meanwhile, TK has been defined by the World Intellectual Property Organization (WIPO) as comprising "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[1240] Many states accept this definition, noting its generational transmission, like medicinal insights.[1241] However, it has been proved difficult to fit TK well into the modern legal regime of protecting intellectual property (IP) rights. For instance, in instances of biopiracy, a contentious point arises: to what extent must indigenous peoples understand the scientific theories underpinning their own traditions to be entitled to equitable benefit-sharing from the exploitation of their knowledge?[1242] Recognizing all TK's importance, nations or communities should determine which indigenous groups and TK areas are prioritized during negotiations.

[1235] José R. Martínez Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, E/CN.4/SUB.2/1986/7ADD.4, ¶ 39, (1986), ¶¶ 81, 83-103 [hereinafter *Cobo report*]; James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, E/CN.4/2002/97/Add.1, ¶ 13 (Mar. 6, 2002).

[1236] *Cobo report*, *supra* note 11, ¶ 37; JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 3 (Oxford University Press, New York, 2004); *Ogiek Decision*, *supra* note 8, ¶ 107.

[1237] Farida Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights on her Visit to Botswana*, A/HRC/31/59/Add.1, ¶ 11 (Jan. 12, 2016).

[1238] Swayne Mamo, The Indigenous World 2022, at 493, https://www.iwgia.org/doclink/iwgia-book-the-indigenous-world-2022-eng/eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9.eyJzdWIiOiJpd2dpYS1ib29rLXRoZS1pbmRpZ2Vub3VzLXdvcmxkLTIwMjItZW5nIiwiaWF0IjoxNjUxMTM5NTg1LCJleHAiOjE2NTEyMjU5ODV9.jRnv3PeantfRZtJg4jph8xdshK5Mh25Z3hlcPs9As_U. For other problems associated with identifying indigenous groups, *see* Lere Amusan, *Politics of Biopiracy: An Adventure into Hoodia/Xhoba Patenting in Southern Africa*, 14 Afr. J. Tradit. Complement. Altern. Med. 103, 106 (2016) (discussing the issue in terms of intermarriage between indigenous groups).

[1239] GRAHAM DUTFIELD, INTELLECTUAL PROPERTY, BIOGENETIC RESOURCES AND TRADITIONAL KNOWLEDGE, 91, 94 (London: Earthscan, 2004).

[1240] World Intellectual Property Organization [WIPO], *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, at 25 (Apr. 2001), https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf.

[1241] African Regional Intellectual Property Organization, Swakopmund Protocol on the Protection of TK and Expressions of Folklore, 2010, §2.1; Protection of TK and Cultural Expressions Act, 2016, art. 6 (Kenya); Law No. 1/13 of July 28th, 2009 on Industrial Property, art. 247 (Burundi); WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, TK and Folklore, WIPO/GRTKF/IC/11/15 (2007), ¶¶ 304, 311-12.

[1242] Examples where royalties are given are situations where the traditional knowledge was largely analogous, *see* Roger Chennells, *Traditional Knowledge and Benefit Sharing after the Nagoya Protocol: Three Cases from South Africa*, 9 Law Env't & Dev. J. 163, 169-70 (2013). *But see* D. Selisteanu, *Microbial Production of Enzymes: Nonlinear State and Kinetic Reaction Rates Estimation*, 91 BIOCHEM. ENG. J. 23 (2014) (arguing that protection should be given even when indigenous peoples cannot scientifically explain their practice).

B. Affirmative Obligations

1. Trade-Related Aspects in International Environmental Law

International environmental law, like the 1992 Convention on Biological Diversity (CBD), seeks to protect indigenous peoples and TK, mandating that access to genetic resources is contingent upon the prior informed consent of the Contracting Party providing these resources.[1243] Further, States are obligated to institute appropriate measures to establish mechanisms that ensure the sharing of benefits derived from the utilization of genetic resources, such as those derived from research or commercialization of plant or animal species.[1244] Subsequent State practice has extended this obligation to TK associated with genetic resources, recognizing their close linkage.[1245] However, this obligation does not extend to the use of TK unrelated to genetic resources.[1246] Moreover, although article 8(j) of the CBD requires parties to "respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles,"[1247] it overlooks indigenous communities that have modernized.[1248] Hence, a more nuanced and inclusive understanding of TK and indigenous peoples in modern contexts is needed.

The 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization ("Nagoya Protocol") provides more explicit obligations than the CBD.[1249] Nevertheless, it mirrors the CBD's language by merely instructing States to act "as appropriate," and further stipulates that any benefit-sharing obligations should rest on mutually agreed terms.[1250] This flexibility can disadvantage developing countries against stronger nations. Moreover, Article 11 of the Nagoya Protocol, addressing transboundary situations, includes the phrase "endeavor to cooperate," suggesting a lack of obligatory commitment to benefit-sharing terms and instead requiring merely a show of good faith during negotiations. This further dilutes benefit-sharing commitments.[1251]

In addition, many TK misappropriations predate the Nagoya Protocol, and its retroactive application is ambiguous as there are no explicit provisions addressing this issue.[1252] While

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[1243] Convention on Biological Diversity art. 15(5), Jun. 5, 1992, 1760 U.N.T.S. 79 [hereinafter *CBD*].

[1244] *Id.*, art. 15(7); Convention on Biological Diversity Conference of the Parties [CoP], *Progress Report on the Implementation of the Programmes of Work on the Biological Diversity of Inland Water Ecosystems*, UNEP/CBD/COP/5/INF/7, 2 (2000).

[1245] Vienna Convention on the Law of the Treaties art. 31(3)(b), Jan. 27, 1980, 1155 U.N.T.S. 332 [hereinafter *VCLT*]; CoP, *Report of the Ad-Hoc Open-Ended Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, UNEP/CBD/COP/9/7, 18 (2007) [hereinafter *CBD Report*].

[1246] *CBD Report*, *supra* note 21, at 36; Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization*, at 2, 10, 11 (2002), https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

[1247] CBD, *supra* note 19, art. 8(j).

[1248] Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 Harvard Human Rights Journal 57, 111 (1999).

[1249] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1 [hereinafter *Nagoya Protocol*].

[1250] *Id.*, art. 5.

[1251] *See* PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 627-628 (3rd ed. 2009); Michelle F. Rourke, *Who Are Indigenous and Local Communities and What Is Traditional Knowledge for Virus Access and Benefit-Sharing? A Textual Analysis of the Convention on Biological Diversity and Its Nagoya Protocol*, 25 J. Law Med. 707, 711-12 (2018).

[1252] VCLT, *supra* note 21, art. 28; *Ambatielos Case (Preliminary Objection) (Greece v. United Kingdom)* [1952] ICJ Rep 28, 40; OLIVIER CORTEN AND P KLEIN THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 725 (OXFORD UNIVERSITY PRESS, OXFORD, 2011).

provisions hinting at retroactivity were discarded, suggesting no such intention,[1253] defenders of indigenous rights argue that since Nagoya addresses TK within the CBD's purview,[1254] it should apply retroactively from CBD's onset.[1255] Alternatively, they contend that treaties can cover extended wrongful acts under international law.[1256] Nonetheless, advocating for indigenous rights, especially in disputes, remains a complex task.

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), effective from 2004, also aims to protect indigenous peoples and TK.[1257] Unlike the Nagoya Protocol, its wording provides stronger protection for genetic resources by using binding terms like "shall"[1258] or the phrase "the responsibility for realizing Farmers' Rights…rests with national governments."[1259] Plant genetic resources under this system will be accessible via a standard material transfer agreement (MTA), which imposes certain obligations, including that any recipient who commercializes a product obtained from the multilateral system must contribute a fair share of the profits resulting from the product's commercialization into a specified financial mechanism.[1260] However, when TK alone and the associated Farmers' rights are involved, ITPGRFA merely states that contracting parties "should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights."[1261] In other contexts of international law, the difference between "shall" and "should" has been proven decisive, as the former is interpreted as implicating mandatory obligations, while the latter only gives an aspirational or progressive goal to realize.[1262] In fact, perhaps as a reconciling effort, Article 13.2(b), addressing access to and transfer of technologies, stipulates that this access should respect "applicable property rights and access laws." The intent behind these provisions seems to be to assure developed countries that the IP rights already secured under other international agreements will not be compromised by ITPGRFA.[1263]

Regarding state practice, South Africa stands out for its progressive approach, enacting the Biodiversity Act in 2004[1264] and setting an Access and Benefit-Sharing framework (ABS)

[1253] Evanson Chege Kamau, Becis Fedder & Gerd Winter, *The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and What are the Implications for Provider and User Countries and the Scientific Community?*, 6 L. Env't & Dev. J. 248, 254-55 (2010).

[1254] Nagoya Protocol*, supra* note 25, arts. 3, 4(4).

[1255] H. MEYER, NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION: BACKGROUND AND ANALYSIS 41 (2013).

[1256] International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 53 UN GAOR Supp (No 10) at 43, A/56/83, art. 14 (2001).

[1257] International Treaty on Plant Genetic Resources for Food and Agriculture, June 29, 2004, 2400 U.N.T.S. 303 [hereinafter "*ITPGRFA*"]. Art. 5.1 highlights the conservation, exploration, collection, characterization, evaluation, and documentation of PGRFA. Art. 6 focuses on the sustainable use of PGRFA, encouraging support for farming practices like traditional farming systems that maintain and utilize PGRFA. Art. 9 directly pertains to farmers' rights, many of whom are indigenous peoples. Art. 9.2 further protects TK relevant to PGRFA, allowing farmers to participate in decision-making processes and retain the right to save, use, exchange, and sell farm-saved seeds.

[1258] *Id.*, arts. 5.1, 7.2.

[1259] *Id.*, art. 9.2.

[1260] *See id.*, arts. 12.3(c), 13.2(a).

[1261] *Id.*, art. 9.2

[1262] Germana D'Acquisto & Stefania D'Avanzo, *The Role of SHALL and SHOULD in Two International Treaties*, 3(1) Critical Approaches to Discourse Analysis Across Disciplines, 36 (2009).

[1263] Shawn N. Sullivan, *Plant Genetic Resources and the Law: Past, Present, and Future*, 135 Plant Physiology 10, 14 (2004), available at https://www.lancaster.ac.uk/fass/journals/cadaad/wp-content/uploads/2015/01/Volume-3_DAcquisto-DAvanzo.pdf.

[1264] Republic of South Africa, National Environmental Management: Biodiversity Act No. 10 (May 31, 2004), https://www.sanbi.org/documents/national-environmental-management-biodiversity-act-no-10-of-2004.

post-Nagoya Protocol ratification.[1265] Upon ratifying the Nagoya Protocol, South Africa established a comprehensive ABS framework, under which, users or bioprospectors are mandated, among other things, to obtain benefit-sharing agreements from the custodians of TK associated with the genetic resources of interest.[1266] In cases involving transboundary benefit-sharing, when P57, a compound found in the hoodia plant, was patented, the government of South Africa also proactively entered into benefit-sharing agreements with indigenous San communities in Angola, Botswana, and Namibia who have traditionally used hoodia.[1267] Moving forward, South Africa's effective ABS framework and proactive approach to international benefit-sharing agreements provide a model for other countries seeking to develop similar legislation.

2. Trade-Related Aspects in International Intellectual Property Law

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the WTO, requiring parties to provide strong protection for IP rights: It establishes minimum standards for the regulation by national governments of different forms of IP as applied to nationals of other WTO member nations.[1268]

The protection of TK poses unique challenges within the realm of IP law. While IP rights and laws have evolved to keep up with technological advancements, indigenous communities' knowledge is often left unprotected. TK differs from the traditional characteristics of IP rights: As discussed previously in this paper, TK itself is difficult to define and distinguish from other knowledge. This poses a significant challenge in safeguarding and promoting small-scale innovations made by them that may not meet the threshold for patent protection in terms of novelty and non-obviousness.[1269] Further, the authors or inventors of TK are rarely identified as the knowledge is passed on by multiple generations.[1270] Moreover, TRIPS does not mandate benefit-sharing for public domain knowledge.[1271] Even if one could argue that the knowledge of indigenous people shall be entitled to protection similar to trade secrets,[1272] once the

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[1265] South Africa Department of Environmental Affairs, South Africa's Bioprospecting, Access and Benefit-Sharing Regulatory Framework: Guidelines for Providers, Users and Regulators (2012), https://www.dffe.gov.za/sites/default/files/legislations/bioprospecting_regulatory_framework_guideline.pdf.

[1266] *Id.* at section 3.

[1267] Global Forum on Bioethics in Research, *Case Study 4: The San people and the Hoodia Plant* (2004), https://gfbr.global/wp-content/uploads/2015/09/Fifth_Casestudy4.pdf.

[1268] Agreement on Trade-Related Aspects of Intellectual Property Rights, Jan. 1, 1995, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm; *See generally* Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. Int'l Econ. L. 1023, 1024-25 (2009).

[1269] *See, e.g.*, Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 Vand. L. Rev. 1743, 1746-47 (2000).

[1270] Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 Case W. Res. J. Int'l L. 233, 246, 250 (2001).

[1271] Uruguay Law No. 9.739 on Copyright and Related Rights, as amended up to Law No. 19.857, art. 42 (Dec. 23, 2019), https://www.wipo.int/wipolex/en/legislation/details/21441; Rwanda Law No. 31/2009 on the Protection of Intellectual Property, art. 9 (Oct. 26, 2009), https://www.wipo.int/wipolex/en/legislation/details/5249.

[1272] Typically, trade secret law imposes three basic requirements: (1) a broad subject matter requirement of information that derives actual or potential economic value because it is not generally known; (2) the trade secret holder took reasonable precautions under the circumstances to keep the information secret; and (3) the defendant obtained the secret by violating an express (e.g., contractual) or implied duty, or though other "improper means." For a brief overview of trade secret law in various WTO jurisdictions, see id. § 15.05 (noting the similarity between trade secret laws in Canada, Japan, and China and trade secret laws in the United States), see ROBERT P. MERGERS, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE TECHNOLOGICAL AGE 36-37 (5th ed. 2010).

information has escaped into the mainstream of public knowledge, however, protection ends. It can be argued that when TK is made available to the public through publication or the internet, it does not necessarily enter the public domain, because it is not "freely available."[1273] In this situation, indigenous communities still retain ownership rights,[1274] and obtaining their consent is necessary before using.[1275] Both Peru and Sri Lanka provide models for ensuring that even when TK enters public domain, benefit-sharing agreements with the original indigenous communities are in place.[1276]

By and large, the IP approach struggles to adequately protect TK because of its narrow focus on moral rights and labor-desert principles. Some have suggested that a renegotiation process of TRIPS should be opened, including the implementation of a complete sui generis right system.[1277] It should be recognized that the advantage about the negotiations at WIPO is that they are more holistic and openly embrace TK held and maintained by communities.[1278] However, TRIPS is a compromise that, once reopened, will prompt demands for lower or higher levels of protection in almost all areas of intellectual property.[1279] The political ramifications make TRIPS seemingly untouchable or a "done deal."[1280]

A more pragmatic approach within this system might be to adopt a Declaration on TK and Trade. Being non-binding, a Declaration offers significant flexibility as it serves as a guide for interpreting existing agreements rather than constituting enforceable WTO law.[1281] The Declaration can suggest that some IP rules fit certain TK types as they are and that existing common law should be used to deter TK misuse.[1282] Further, the Council for TRIPS could also be instructed to provide specific technical cooperation in this area, providing necessary tools for the investigation of prior art originating from TK sources during the review of relevant patent applications.[1283] This approach may bridge the gap between TK proponents and users, leading to a comprehensive TK protection system in the future.

[1273]CoP, *Report of the Ad-Hoc Open-Ended Working Group on Access and Benefit-Sharing*, UNEP/CBD/WG-ABS/9/INF/1, 31-33 (2010).

[1274] *See, e.g.*, Indian Biological Diversity (Amendment) Bill, ch. V (2021), https://prsindia.org/files/bills_acts/bills_parliament/2021/Biological%20Diversity%20(Amendment)%20Bill,%202021.pdf; African Regional Intellectual Property Organization, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, § 9.1 (2010), https://www.wipo.int/wipolex/en/text/201022.

[1275] Nagoya Protocol, *supra* note 25, art. 7; Brazil Provisional Act No. 2,186-16, art. 8.1 (Aug. 23, 2001), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/br/br038en.pdf.

[1276] Peru Law No. 27811, Introducing the Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources, art.13 (Aug. 11, 2002), https://www.wipo.int/wipolex/en/text/179597; A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka, ¶ 5 (Jan. 1, 2009), https://www.wipo.int/wipolex/en/text/191823.

[1277] Ajeet Mathur, *Who Owns Traditional Knowledge?*, 38 Econ. & Pol. Wkly. 4471, 4479 (2003).

[1278] For example, The 1997 World Forum on Folklore, convened by WIPO and UNESCO, saw consensus among most attendees regarding the insufficiency of copyright law in safeguarding TK and folklore, leading to a call for WIPO and UNESCO to continue their endeavors to establish an efficient international system for the protection of folklore. The majority of participants proposed the steps such as the establishment of a technical committee comprised of professionals in folklore conservation and protection, the organization of regional consultation forums, etc. UNESCO-WIPO, *World Forum on the Protection of Folklore, Apr. 8-10, 1997*, preface, 26-27, WIPO Publication No. 758(E/F/S) (1998), https://unesdoc.unesco.org/ark:/48223/pf0000125858.

[1279] Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 Mich. St. L. Rev. 137, 161 (2005).

[1280] Mathur, *supra* note 53, at 4480.

[1281] Gervais, *supra* note 55, at 160.

[1282] *Ibid.*

[1283] Gervais, *supra* note 55, at 162.

II. Building Additional Avenues for Protecting Indigenous People and TK in International Agreements

A. Preferential Terms for Countries with Major Indigenous Communities

TK has become a more pivotal part in modern trade talks. The Trade and Environment Database shows that of 684 trade agreements from 1947-2015, 50 addressed genetic resources, highlighting the rising importance of indigenous rights protection.[1284] Parties, especially like-minded States such as Peru, China, Chile, Brazil, New Zealand, should seize the opportunity to align and establish shared norms for the protection of TK.[1285] This includes both clarifying existing agreements and considering new mechanisms.

Developing countries could potentially benefit from leveraging the Special and Differential Treatment provisions (S&DT) outlined in the GATT.[1286] These provisions include measures designed to enhance trading opportunities for developing countries, clauses requiring all WTO members to safeguard the trade interests of developing countries, and support to assist developing countries in managing WTO work.[1287] Under these terms, developing countries could advocate for the preferential inclusion (such as export subsidies) of TK-related products in trade agreements, promoting fair compensation for TK holders. Additionally, these agreements can emphasize technical support for indigenous communities, allowing them to actively shape and benefit from future agreements.[1288]

There are concerns about whether economically developed countries can invoke S&DT provisions.[1289] This issue is particularly relevant for countries like New Zealand, which has a substantial indigenous population and a corresponding need for such provisions. In fact, within most of New Zealand's Free Trade Agreements (FTAs) there are provisions relating to TK, folklore and genetic resources.[1290] Under those agreements, New Zealand has made sure that "subject to each Party's international obligations the Parties…may establish appropriate measures to protect traditional knowledge."[1291] These provisions allow protection of traditional knowledge, but they're bound by broader international frameworks like TRIPS, limiting New Zealand's special treatment due to its indigenous population.

[1284] High-Level Working Group on U.S.-Ecuador Relations, Traditional Knowledge and International Trade, Sept. 2021, at 13, https://theglobalamericans.org/wp-content/uploads/2021/09/Traditional-Knowledge-Global-Americans.pdf.

[1285] Susy R. Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements, in* INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE 142 (Christoph Graber, Karolina Kuprecht & Jessica Lai eds., forthcoming), Victoria University of Wellington Legal Research Paper No. 34/2011, https://ssrn.com/abstract=1952969.

[1286] Preamble to the Marrakesh Agreement establishing the WTO, Apr. 15, 1994, 1867 U.N.T.S. 153, 33 I.L.M. 1144 (1994) (hereinafter *GATT 1994*); *see also* article XXXVI of the GATT 1994.

[1287] *See generally* Peter Van den Bossche and Werner Zdou, THE LAW AND POLICY OF THE WORLD TRADE ORGANISATION: TEXT, CASES AND MATERIALS 123 (Cambridge university Press, 4th ed, 2017); Vineet Hedge and Jan Wouters, *Special and Differential Treatment Under the World Trade Organization: A Legal Typology*, 24 J. Int'l Econ. L. 3 (2021).

[1288] Jean-Frédéric Morin & Mathilde Gauquelin, *Trade Agreements as Vectors for the Nagoya Protocol's Implementation*, CIGI Papers No. 115, 1 (Nov. 2016), https://www.cigionline.org/static/documents/documents/Paper%20no.115.pdf.

[1289] Aniekan Ukpe & Sangeeta Khorana, *Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development*, 20 J. Int'l Trade L. & Pol'y 83, 85-86 (2021).

[1290] *See, e.g.*, NZ-Thailand Closer Economic Partnership (Apr. 19, 2005), ch 12, Article 12.5(1)(d); NZ-Malaysia FTA (Oct. 26, 2009), ch. 11, Articles 11.6, 11.4(2)(e); Trans-Pacific Strategic Economic Partnership NZ (Brunei, Chile, New Zealand and Singapore) (June 3, 2005), ch. 10, Article 10.3.3(d).

[1291] *See, e.g.*, Trans-pacific Strategic Economic Partnership, *supra*, ch. 15, Article 15.8; NZ-Malaysia FTZ, *supra*, ch. 17, Article 17.6.

Furthermore, as discussed in the preceding sections, the current TK protection system under international law is fraught with legal uncertainties, which underscore the importance of well-defined TK-related terms and obligations in trade agreements. They should address three crucial elements: prior informed consent (PIC), benefit-sharing agreements, and measures to safeguard TK against misappropriation.[1292] Specifically, PIC should serve as a non-negotiable prerequisite in all TK-related agreements. Any entity intending to utilize TK must first secure explicit consent from the indigenous community that holds this knowledge. The language of the agreement should stipulate that PIC is to be obtained in a manner that respects the community's traditions and customs, thereby ensuring a fair, transparent, and culturally appropriate process.

In addition, measures like Geographical Indications (GIs) – symbols applied to products with a specific geographical origin and characteristics or reputation resulting from that origin – can also prevent misappropriation by foreign businesses.[1293] For instance, as suggested by Peru in the TRIPS Council, there should be a requirement to disclose the origin of any biological or genetic resources with consequences for non-disclosure that would make the patent invalid.[1294] GIs have indeed been effectively utilized to protect TK globally. In 1999, Darjeeling tea was granted GI status in India, which ensures that only tea from Darjeeling's district can use the name, guarding its TK against imitation.

Last, consideration of indigenous people's rights should also be incorporated into the negotiation process of international investment agreements (IIAs). While multinational enterprises (MNEs) have significantly impacted human rights in indigenous communities,[1295] very few IIAs have contained due diligence requirements with regards to human rights impacts.[1296] In future negotiations, including standards like the UN Guiding Principles on Business and Human Rights in negotiations can bridge the gap between indigenous rights and corporate responsibilities.[1297]

B. Establishment of a Special Monitoring Council

Indigenous communities face financial hurdles in participating in international agreement discussions, such as in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[1298] To address this, the WIPO Voluntary Fund was established in 2005 to support their participation. While initially well-

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[1292] *See, e.g.*, China-Costa Rica FTA (Apr. 8, 2010), ch. 10 ("Intellectual Property"), article 111.1, where the parties agree to discuss disclosure of origin of the source of genetic resources and prior informed consent subject to developments in domestic law.

[1293] As was done for access to medicines, see WIPO, Geographical Indications and Trademarks: the Road from Doha, WIPO/GEO/SFO/03/11, July 4, 2003, ¶ 5.

[1294] *See* WTO, TRIPS Issues: Art 27.3(b), Traditional Knowledge, Biodiversity, https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm.

[1295] John G. Ruggie, *Comments on the "Zero Draft" Treaty on Business & Human Rights* (Aug. 20, 2018), https://www.business-humanrights.org/en/blog/comments-on-the-zero-draft-treaty-on-business-human-rights/.

[1296] Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration, in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82-96 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., Oxford University Press 2009).

[1297] U.N. Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, H.R.C. Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011).

[1298] Veronica Gordon, *Appropriation without Representation? The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, 16 Vand. J. Ent. & Tech. L. 629, 654 (2014).

funded, its resources dwindled over time.[1299] Furthermore, although disputes related to indigenous peoples and TK protection could potentially be resolved after-fact before a dispute settlement body, enforcement remains a significant challenge in the realm of international law; notably, achieving effective enforcement presents a particular difficulty in the context of GATT litigation.[1300]

To better protect TK and indigenous rights, there's a need for effective enforcement platforms in international bodies like WIPO and WTO. Possible solutions include an interstate committee that crafts guidelines, facilitates communication for obtaining PIC for TK use, offers support, and conducts regular human rights assessments.[1301] As discussed in the section above, S&DT provisions can sometimes stifle disputes. To mitigate this, an independent committee, consisting of panelists selected by a variety of countries, could be established. This committee could conduct periodic reviews of the parties' development status in a certain industry, and determine, in specific situations, the most appropriate course of action,[1302] thereby avoiding the current "all-or-nothing" approach[1303] under the GATT, and resolving the problem faced by countries like New Zealand, as mentioned earlier.

Alternatively, an independent national committee can enhance TK protection by focusing on indigenous needs without governmental or indigenous biases. Such a committee can undertake practical tasks, like creating a TK database, which helps in identifying TK holders and streamlining benefit-sharing.[1304] Ecuador's National Service of Intellectual Law is a prime example, developing a confidential TK registry to curb wrongful patents and protect indigenous rights.[1305] Similarly, New Zealand's Waitangi Tribunal examines the impact of FTAs on Maori interests, and specifically, on the effectiveness of the Treaty Exceptions within it.[1306] This Tribunal has voiced the Maori's concerns regarding the government's flawed strategy for involving Maori in FTA policy,[1307] playing a meaningful role in engaging indigenous people in the decision-making process. States can create international or national entities inspired by these past successes to protect indigenous rights. For sustainable TK protection, these bodies should collaborate closely with indigenous communities, prioritize

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[1299] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Participation of Indigenous and Local Communities: Voluntary Fund, WIPO/GRTKF/IC/45/3, 5 (Nov. 23, 2022).

[1300] Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. Pa. J. Int'l Econ. L. 555, 570 (1996).

[1301] For example, in 2011, the then UN Special Rapporteur on the Right to Food developed Guiding Principles on HRIAS of trade and investment agreements, which include the methodology that is now generally applied for such HRIAs. Olivier De Schutter, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5, at 19 (Dec. 19, 2011).

[1302] For three distinct legal approaches that are commonly used in international organizations to determine the status of 'disadvantaged' regime members (the definition, list and auto-election approaches), see Rajamani, Lavanya, *From Berlin to Bali and Beyond: Killing Kyoto Softly?*, 57 Int'l & Comp. L.Q. 909, 926 (2008); Ukpe & Khorana, *supra* note 65, at 88-92.

[1303] Clara Weinhardt & Till Schöfer, *Differential Treatment for Developing Countries in the WTO: The Unmaking of the North–South Distinction in a Multipolar World*, 43 Third World Q. 74, 75-76 (2022).

[1304] This database can also exist between States. *See* United States-Peru Trade Promotion Agreement, Understanding Regarding Biodiversity and Traditional Knowledge (Apr. 12, 2006), https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file719_9535.pdf.

[1305] *See generally*, Guía para la Construcción de Protocolos Comunitarios Paso a Paso, Ecuador, Ministerio del Ambiente y Agua del Ecuador, 2019, https://absch.cbd.int/api/v2013/documents/15AD7FB1-D24C-2E3D-22A8-2AD9618C9E84/attachments/213522/Gu%C3%ADa-Protocolos-Comunitarios.pdf.

[1306] New Zealand, Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement (May 5, 2016), at 2.2.3, available at https://www.waitangitribunal.govt.nz/news/tribunal-releases-report-on-the-cptppa/.

[1307] New Zealand, Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement, at 4.4.5, 5.1.4-5.1.6.

their perspectives, and promote mutual respect. This also entails continuous initiatives to empower these communities.

C. Use of Alternative Dispute Resolution Mechanisms

Dispute-resolution mechanisms play a vital role in protecting indigenous peoples and TK. National courts have already manifested a trend towards increasingly citing and applying international law in attempts to vindicate indigenous property rights.[1308] Globally, multiple groups might claim the same TK, especially if they span several countries. A two-tiered conflict resolution approach may be necessary: one for nation-nation disputes using international courts, referencing the CBD and Nagoya Protocol; and one for private entities vs. states, usually via arbitration tribunals.[1309]

Before the International Court of Justice (ICJ), States may struggle to defend indigenous peoples' rights over TK based on current norms. Parties might argue actions outside treaty scope are influenced by non-legal factors.[1310] With regard to international arbitrations, as highlighted in studies, the Investor-State Dispute Settlement (ISDS) system has been the subject of much controversy for various reasons.[1311] Concerns include potential arbitrator biases[1312] and misuse of proceedings to maximize chances of success.[1313] Indigenous peoples, as noted by the UN Special Rapporteur in 2015,[1314] have expressed concerns about the ISDS due to its limited respect for their rights and minimal participation.[1315]

Given those concerns, specialized dispute resolution bodies in trade agreements can increase transparency and ensure impartial arbitration, and tailored tribunals or mechanisms can address specific situations. Between China and New Zealand, for example, according to the FTA between these two countries, when it comes to special concerns rising under the Treaty of Waitangi,[1316] such cases shall not be subject to the dispute settlement provisions of their FTA; instead, an arbitral tribunal may be specially requested and established.[1317] Identical language can also be found in the Comprehensive and Progressive Agreement for Trans-

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[1308] *See, e.g.*, Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 256 (Can.), recognizing that aboriginal peoples possess ownership rights similar to those associated with fee simple; Cal v. Attorney General of Belize, Consolidated Claims Nos. 171 & 172, (Sup. Ct. Belize Oct. 18, 2007); Mabo v. Queensland (No. 2) (1992) 175 C.L.R. 1 (Austl.); Alexkor Ltd v. Richtersveld Community 2004 (5) SA 460 (CC) at 1 (S. Afr.).

[1309] *See* Symposium, Panel II, *The Law and Policy of Protecting Folklore, TK, and Genetic Resources*, 12 Fordham Intell. Prop. Media & Ent. L. J. 753, 768 (2002). A third level would be conflicts between private parties, including Aboriginal communities.

[1310] *See, e.g.*, The African Union Model Law for the Protection of the Rights of Local Communities Farmers and Breeders and the Regulation of Access to Biological Resources, Preamble; Brazil: Law No. 13.123 of May 20, 2015.

[1311] Greenpeace European Unit, *From ISDS to ICS: A Leopard Can't Change Its Spots Position Paper on the Commission Proposal for an Investment Court System in TTIP* (Feb. 11, 2016), https://www.greenpeace.org/static/planet4-eu-unit-stateless/2018/08/e1ac3b1c-e1ac3b1c-2016_02_11_greenpeace-position-paper-ics_final.pdf.

[1312] Emmanuel Gaillard, *Abuse of Process in International Arbitration*, ICSID Rev. 1, 10 (2017), https://www.shearman.com/~/media/files/newsinsights/publications/2017/01/icsidreviewsiw036full.pdf.

[1313] *Id.* at 6.

[1314] *See* Victoria Tauli Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/33/42, 8-13 (Aug. 11, 2016).

[1315] *Id.* at 13-15.

[1316] A treaty that was entered into between Maori, New Zealand's indigenous people, and the British Crown when New Zealand was colonized. *See* NEW ZEALAND HISTORY, TREATY OF WAITING, https://nzhistory.govt.nz/politics/treaty-of-waitangi (last visited May 13, 2023).

[1317] NZ-China FTA, ch. 12, Article 205 (Apr. 7, 2008).

Pacific Partnership (CPTPP),[1318] acting as a general exception. It lets New Zealand defend any breach claims if they need to favor the Maori more than stipulated in the agreement.

In addition, international courts often decline amicus briefs from indigenous groups,[1319] yet they remain a potential avenue for voicing concerns.[1320] In the WTO, while non-members cannot directly submit,[1321] Panels have the discretion to consider external input.[1322] A notable example of indigenous interests influencing a Panel's decision can be seen in the proceedings between the U.S. and Canada concerning the Softwood Lumber dispute, a case involving the "first Indigenous amicus brief" before WTO panels.[1323] It was submitted to the WTO Panel by the Interior Alliance, representing five Indigenous nations in the South Central Interior of British Columbia, whose interest in the WTO dispute lay in the fact that the vast majority of softwood lumber extraction is conducted in British Columbia. The amicus brief argued that Canadian softwood lumber producers had an unfair advantage due to Canada's failure to adequately recognize Aboriginal land rights.[1324] Although the United States Department of Commerce still concluded that the Canadian legal and political system should address the issue of land rights, the Interior Alliance's argument had impacted the investigation and helped bring attention to the issue of indigenous land rights concerning the softwood lumber industry.

In conclusion, these modes of engagement can create a pathway for a more equitable treatment of Indigenous peoples and their TK in the global arena. It is incumbent upon us to ensure that these issues remain at the forefront of international legal and political discourse.

III. Conclusion

TK is foundational for indigenous groups, society, and environmental health. Its significance is widely recognized, but effective legal protections are still needed. While current legal frameworks, like TRIPS, have their own limitations, international trade and investment agreements offer potential avenues for safeguarding indigenous rights and TK. There is significant potential in using international trade and investment agreements to provide additional avenues for protecting indigenous peoples and TK. These agreements could incorporate preferential terms for countries with substantial indigenous communities, contributing to the promotion of their rights and the safeguarding of their TK. The establishment of a special monitoring committee, either in an international or a domestic form, could oversee and ensure the compliance of parties with TK-related obligations. Last, the use of alternative dispute resolution mechanisms could provide a more accessible and equitable platform for resolving conflicts related to TK.

[1318] Comprehensive and Progressive Trans-Pacific Partnership, Austl.-Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru-Sing.-Viet., Article 29.6: Treaty of Waitangi (Mar. 8, 2018).

[1319] *See* Corpuz, *supra* note 90, at ¶ 64.

[1320] *See generally* Megan Davis, *New Developments in International Advocacy: Amicus Curiae and the World Trade Organisation*, 3 Indigenous L. Bull. 5 (2003).

[1321] Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 41, WT/DS138/AB/R (May 10, 2000).

[1322] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 105-106, WT/DS58/AB/R, (adopted 6 November 1998) (holding that the "standards established in the chapeau are … necessarily broad in scope and reach", and that, "[w]hen applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies.")

[1323] *See* Megan Davis, *International Trade Law and Indigenous Peoples: A New Direction in Human Rights Advocacy?*, 9 Austl. Indigenous L. Rep. 16, 17 (2005).

[1324] *Ibid.*

In summary, while existing laws offer a base, they require strengthening. The goal is to both shield and empower these communities, ensuring TK's survival. Achieving this is challenging but attainable with dedication to justice and sustainability.

CHAPTER 15: TRADE BARRIERS AND TECHNOLOGICAL SOLUTIONS FOR NIGERIAN MSMES

IYÙNADÉ OJUTALAYO*

Abstract

This paper presents a comprehensive examination of the Micro, Small, and Medium-sized Enterprises (MSME) sector, shedding light on the formidable barriers they encounter, specifically concerning access to finance and access to markets. These impediments restrict their readiness for trade and their capacity to fully leverage the opportunities presented by the African Continental Free Trade Area. This paper advocates for technology as a pivotal tool in facilitating market access for MSMEs.

This approach has the potential to unlock the untapped economic power residing within the informal sector, thereby making a significant and positive contribution to Africa's economic development, trade, and overall prosperity.

Introduction

Micro, Small, and Medium-Sized Enterprises (MSMEs) are the uncelebrated backbone of Nigeria's economy. Cultivating a thriving MSME sector is crucial for a country's economic diversification and resilience. By creating jobs and increasing real take-home wages, MSMEs play a significant role in alleviating poverty and promoting economic equity and inclusion.[1325] Moreover, investing in MSMEs and creating an enabling business environment contributes to national growth through diversifying trade and generating tax revenue that can be reinvested in public services and infrastructure.

Despite the fact that MSMEs contribute approximately 50% to the national GDP and employ 80% of the workforce, due to challenges such as lack of access to finance and markets, 80% of small businesses in Nigeria are shut down before reaching the five-year mark.[1326] With these obstacles, many MSMEs are not trade ready. As a considerable number of African countries grapple with trade deficits – where their imports exceed their exports – addressing non-tariff barriers that keep MSMEs from engaging in intra-African trade becomes even more urgent and imperative. Trade deficits can strain national economies and hinder overall development.[1327] Thus, overcoming the non-tariff barriers that prevent small business from growing, scaling and trading, and creating an enabling environment, is crucial to unlocking economic growth and strategically redressing trade imbalances that have long hampered many African economies.

The African Continental Free Trade Area, established to promote intra-African trade and economic integration, aspires to achieve goals such as expanding markets, increasing investment, and fostering industrialization.[1328] The AfCFTA's Services Protocol recognizes

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[1325] FATE Foundation, Bridging the Access to Finance Gap for Nigerian Entrepreneurs (FATE Foundation, 2022).

[1326] O.M Atoyebi S.A.N The Impact of Taxation on Small and Medium Sized Enterprises (October 17, 2022).

[1327] African Export - Import Bank, African Trade Report 2022 Leveraging the Power of Culture and Creative Industries for Accelerated Structural Transformation in the AfCFTA Era (2022)

[1328] Ibid.

the importance of access to markets for service suppliers, including MSMEs. According to the World Bank's report titled "The African Continental Free Trade Area: Economic and Distributional Effects," the AfCFTA has the potential to generate substantial income gains, estimated at a remarkable USD 292 billion, through trade liberalization and facilitation in goods and services.[1329] However, for member states to fully benefit from this agreement, they must ensure that their nations are well-prepared for intra-African trade. This readiness hinges on the cultivation of a business-friendly environment that actively encourages the formalization of informal sectors and facilitates the growth and scalability of small enterprises.

Technology is the new frontier of growth and development, becoming an essential part of any functional and successful business. Technology has proven to enable MSMEs to adapt to the rapidly changing business environment by improving operations, financial management, market access, business marketing and business competitiveness for even the smallest of businesses. This paper advocates for technology as a tool for overcoming non-tariff barriers to accessing markets for MSMEs, unlocking their economic power, and driving development.

Access to Finance

Access to finance remains a significant and ongoing challenge for numerous MSMEs within Nigeria, hindering their ability to thrive and participate in the trade opportunities presented by initiatives like the African Continental Free Trade Area (AfCFTA).[1330] According to the PwC 2020 MSME survey, the finance gap is estimated to be about N617.3 billion annually.[1331] The Credit Bureau Association of Nigeria (CBAN) also notes that despite the efforts of the Central Bank of Nigeria, credit bureaus, and financial institutions to make loans accessible to MSMEs, only 4% out of nearly 40 million MSMEs in the country have access to credit.[1332] This wide financing gap serves as a clear indicator of an unfriendly business environment that stifles the growth of MSMEs in Nigeria.

Access to finance is the lifeline of any business, especially small businesses that are seeking to scale and grow. By using various technological tools to enable access to credit financing, many MSMEs can expand beyond the limitations of bootstrap funding. By using technology to empower businesses to invest in infrastructure, skilled labour, and marketing, MSMEs can reach wider markets, increase production capacities, and compete more effectively within their industry. However, the absence of a unique identifier in Nigeria's banking sector, coupled with limited technological adoption among MSMEs, greatly prevents this from happening.

This issue poses a significant obstacle for MSMEs in Nigeria, particularly as they seek to participate in the trade opportunities presented by the AfCFTA. The absence of a single unique identifier makes it difficult to track the creditworthiness of business owners, thus limiting their access to finance. To address this complex issue and enable MSMEs to fully participate in trade, there is an urgent need for policy reforms and initiatives that foster a more conducive environment for businesses to thrive. Solving this problem has to be tackled with a two-pronged approach, focusing on both financial institutions and MSMEs.

Financial institutions need to harness technology and data-driven solutions as a tool to bridge the access to finance gap. Comprehensive credit reporting, which hinges on the

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[1329] The World Bank Group, The African Continental Free Trade Area Economic and Distributional Effects (2020)
[1330] FATE Foundation, Bridging the Access to Finance Gap for Nigerian Entrepreneurs (FATE Foundation, 2022).
[1331] PwC, Nigeria Micro, Small, and Medium Enterprises (MSMEs) Survey 2020 (PwC Nigeria, accessed [September, 22nd]), available at https://www.pwc.com/ng/en/assets/pdf/pwc-msme-survey-2020-final.pdf.
[1332] Smith, J. Only 4% of MSMEs Have Access to Credit in Nigeria. The Guardian. (2021, September 15). https://guardian.ng/business-services/only-4-of-msmes-have-access-to-credit-in-nigeria/.

collection of data to map the financial history and behavior of businesses and individuals through a unique identifier, is the cornerstone for addressing this issue. These records can then be utilized by financial institutions to assess the creditworthiness of MSMEs, allowing them to make informed decisions about lending and thereby improving access to finance for these enterprises. However, in order to provide this data to financial institutions, MSMEs need to move beyond offline informal business structures.

Lack of proper documentation, poor corporate governance structures, and bookkeeping practices make it difficult for financial service providers to assess the creditworthiness of small businesses and their owners. The low level of education and high informality among most MSMEs limit their ability to seek and understand the available funding opportunities in the economy. Even with numerous government funding programs, their inability to access the technology that will allow them to capture the information, coupled with poor access to the internet, are key factors that limit access to finance for these businesses.

In Nigeria, many MSMEs, especially those operating on the micro-scale, remain unbanked, and a large number of transactions are still made through cash. With cash-based transactions being transitioned into the banking system, lenders will have better visibility into the data generated, ensuring that the information needed for decision-making becomes readily available.

Capacity-building programs for entrepreneurs that emphasize the use of technology to aid and track bookkeeping is a crucial first step in helping MSMEs become investor-ready. Providing accessible digital financial literacy programs aimed at MSMEs to develop the skills necessary to produce financial records and manage their businesses effectively is essential, especially as they look to engage in cross-border trade opportunities under the AfCFTA.

Access to Markets

Access to market is a crucial determinant of an MSMEs success, as it directly impacts their ability to compete, grow, and thrive in an increasingly competitive global economy. Furthermore, it plays a significant role in creating opportunities for economic development by fostering the diversification of exports. Under the AfCFTA, which aims to promote intra-African trade, access to markets takes on even greater significance.

For businesses operating in countries that provide an enabling business environment and reliable infrastructure, the AfCFTA offers the potential to export their products and services across international borders, expanding their horizons and contributing to the economic development of their home country. However, accessing new markets comes with many hurdles. The FATE Institute's 2022 State of Entrepreneurship report shows that among Nigerian MSMEs that did not grow, the majority cited poor access to markets as a factor that mitigated growth.[1333] In this report, poor access to market was ranked as one of the top five challenges facing small businesses in Nigeria.

Several factors hinder access to market for Nigerian MSMEs, including inadequate infrastructure, high cost of technology, certification and standardization issues, foreign exchange constraints, and competition with foreign goods. These factors create barriers that impede the ability of small businesses to reach a wider customer base and expand their market presence; consequently, this does not offer any real incentive for informal businesses to formalize.

The transformative potential of technology for MSME's was evident during the COVID-19 pandemic. Data from the State of Entrepreneurship Report shows that 40% of businesses

[1333] FATE Foundation, State of Entrepreneurship in Nigeria Report (FATE Foundation, 2022).

that adopted technology reported an increase in employees since the lockdown, highlighting the pivotal role of technology adoption in driving business growth.[1334] The capacity to swiftly pivot through technology was instrumental in revenue generation and customer attraction for those who embraced it, underscoring its significance in the entrepreneurial landscape.

However, for many businesses, technology adoption still proves to be a significant barrier to accessing markets. The lack of technological infrastructure, such as affordable and fast internet access, is a key challenge for MSMEs. Most businesses require fast and affordable internet access to carry out their operations, and the initial cost of implementing the technology remains high, as does the infrastructure required for overall setup. For example, a small business in a rural area may not be able to reap the full benefits of an internet connection due to a lack of rural electrification and may be unable to access technology gadgets due to factors such as cost constraints and product availability. Governments need to prioritize infrastructure developments, particularly in establishing robust electricity and communication networks. These initiatives should encompass providing free and accessible data and Wi-Fi services, particularly for MSMEs operating in rural areas. These measures are crucial for fostering growth, innovation, and expansion.

The low level of soft and technical skills among MSMEs, especially those operating in rural areas, is a substantial barrier to technology adoption. By improving literacy in technology, business owners will be able to tap into new markets through digital marketing. However, more than digital literacy is needed, branding, selling, and promoting their business are essential to operating online. Furthermore, MSMEs, particularly those operating at the nanoscale, may find it challenging to do business without physically seeing the cash exchange in hand. To bridge the knowledge gap, MSMEs require proper education on how to leverage technology to access markets for the growth of their businesses.

In the context of the AfCFTA, addressing the barriers to market access for Nigerian MSMEs, both formal and informal, becomes imperative. The AfCFTA provides a framework within which efforts can be made to reduce these barriers, thereby creating an environment that fosters the growth and formalization of businesses. This, in turn, aligns with the broader goals of the AfCFTA to promote trade, economic development, and prosperity on the African continent. It emphasizes the importance of policy frameworks that are not only trade-friendly but also supportive of MSMEs' growth and access to markets, ultimately contributing to the achievement of sustainable and inclusive development in the region.

Recommendations

In order to benefit from the AfCFTA this paper proposes that governments first create an enabling business environment that enables small businesses to scale and grow to a level where they are trade-ready. With barriers such as Access to finance, lack of internet access and technology adoption, this limits MSMEs from intra continental trading.

Access to Finance is a critical success factor for businesses; the current approach of subjecting small enterprises to complex and burdensome collateral requirements, similar to that of a large enterprise, stifles the growth of formal MSMEs and deters informal actors from formalizing.

Improving access to market should be eased through providing essential infrastructure provisions such as bolstered manufacturing facilities through investments and providing dependable electricity supply. These elements are pivotal for enabling businesses to align with

[1334] FATE Foundation, State of Entrepreneurship in Nigeria Report (FATE Foundation, 2021).

the demands of the African Continental Free Trade Agreement (AfCFTA), fostering seamless market interactions, and optimizing the potential benefits of this continental trade initiative.

In conclusion, unlocking the developmental potential of the MSME sector holds substantial economic benefits. Implementing inclusive and enabling policies can significantly transform the economy of any developing nation. The MSME should be viewed not merely as a survival mechanism but as potential for economic prosperity.

CHAPTER 16: THE GLOBAL WINE TRADE AND SMALL WINE PRODUCERS: EXPLORING CHALLENGES TO SME ECONOMIC SUSTAINABILITY

NICOLE MARTINEZ*

Abstract

In recent years, the wine industry has been the target of de-globalization and populist rhetoric and weaponized within larger trade disputes. While executive actions regarding tariff increases dominate headlines and generate controversy, these actions, in fact, fall within an extensive and complex global trade regime. This regime touches every stage of the wine production process, from grape growing and oenological practices, to packaging and label requirements, to export procedures and inspections, among other steps.

This paper analyzes global wine trade market trends and the current legal regime to identify potential challenges to the economic sustainability of small wine producers. While there exists a significant body of academic work on the global wine trade, relatively few studies have focused exclusively on how the current trade regime impacts smaller firms. This paper identifies areas where targeted studies and field work could better inform policies to integrate small wine producers into the global market, namely: (1) the relative economics of small wine production and corresponding government interventions; (2) the disproportionate impacts of tariff measures on the basis of firm size; (3) the disparate effects of non-tariff measures; and, (4) differentiated positioning and opportunities in regards to climate change. The paper further suggests areas for initial reforms in regards to the role of international groups in collecting data, facilitating participation of small producers, providing insights on the disproportionate nature of tariff measures, and adjusting their agendas, both substantively and through prioritization decisions regarding non-tariff measures, to benefit small wine producers.

Although the controversial nature of the wine industry may have inspired this study specific to its reach, this paper as whole argues for the importance of adopting a sectoral-approach to sustainable development initiatives. Despite the scarcity of data in regards to a firm-level ability to engage global markets, it is clear that general assumptions on the developed versus developing country divide do not neatly apply. Sector-specific considerations such as market maturity and the cultural and historical significance of the product, among other factors, informs the areas proposed for future research and, in turn, the policies to maximize the welfare benefits provided by small wine production.

Introduction

Policy seeking to integrate small-to-medium sized enterprises (SMEs) into global markets stems, in part, from the recognition that SMEs significantly contribute to domestic economic activity and are a valuable source of employment.[1335] Moreover, a failure to tap into international markets presents a gap between actualized and unrealized economic potential.[1336] Additionally, the development of SMEs – through international market participation or

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[1335] See *Fostering Greater Participation in Globally Integrated Economy*, Discussion Paper, OECD 2018 SME Ministerial Conference, 6 (Feb 22, 2018) link ("In most OECD economies, for example, SMEs account for upwards of 95% of all firms, around two-thirds of total employment and over half of business sector value-added, but their contribution to overall exports is significantly lower – between 20% to 40% for most OECD economies."

[1336] See Id at 6 (linking SME access to global markets to reduced wage gaps between small and large firms).

otherwise – yields domestic returns[1337] and widespread benefits to consumer welfare by creating competitive, dynamic, and innovative markets that would be lost in environments marked by large firm dominance.[1338] In other words, the desire for rapid expansion through market consolidation can bring short term gains at the expense of longer term, sustainable, growth.[1339]

Although there exists a significant body of academic work on the global wine trade, a much smaller subset has focused on the role small wine producers play in the market and how they are affected by the legal international trade regime. Macro-level data indicates that small wine producers constitute a large market segment within "old world" producers and a smaller, developing segment within "new world" producers. The global wine trade regime likely impacts these segments differently and presents them with unique obstacles and growth opportunities.

Mindful of these trends, this paper identifies areas where further research is needed to better understand how small wine producers are impacted by the global wine trade regime and advocate for the sustainable economic development[1340] of small wine producers. First, this paper provides background on both the global wine trade market and its overarching legal regime. Next, the paper identifies salient areas that may be adversely impacting small wine producer sustainability namely: challenges to creating an enabling environment for small wine producers due to firm-level economics and related government interventions; potential disproportionate impacts of trade barriers in the form of tariff and non-tariff measures; and lastly, challenges to adapting to climate change. Based on these areas of concern, the paper suggests topics for targeted research and initial reforms. Moreover, throughout this exploration, this paper hopes to advocate, by way of example, for a sectoral approach to sustainable international trade.

I. Factual Background and Legal Regime of the Global Wine Trade

A. The Global Wine Trade

The international wine trade has experienced two great globalization waves in its history.[1341] The most recent began in the 1980's when global demand for foreign-produced wine jumped forward and surpassed the declining consumption in traditional wine producing countries.[1342] Simultaneously, wine export was facilitated by technological innovations and supply chain efficiencies that lowered relative transaction costs.[1343] The combination of demand and supply side factors resulted in that 40% of all wine consumed has crossed an

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[1337] See generally, Emma Murphy M.A. CSR, *Sustainable Development in SMEs*, Encyclopedia of Corporate Social Responsibility (2013) link (describing benefits of SMEs generally such as reducing poverty disparities, increasing job security, reducing workforce migration, among others).

[1338] See generally, Agostino Menna, Philip R. Walsh, *Assessing environments of commercialization of innovation for SMEs in the global wine industry: A market dynamics approach,* 2 Wine Economics and Policy 8, 191-202 (Dec 2019) link (describing the important role SMEs play in the diffusion of wine innovation).

[1339] Id.

[1340] See generally Murphy supra note 3 (defining economic sustainability for SME on their ability to continue operating for an indefinite time).

[1341] See e.g. Herve Remaud, *Wine Business Practices: A New Versus Old Wine World Perspective*, 3 Agribusiness 22, 405-16, 405 (Jul 26, 2006) link; Noa Ohana-Levi, Yishai Netzer, *Long-Term Trends of Global Wine Market*, 1 Agriculture 13, 224 (Jan 16, 2023) link.

[1342] Id.

[1343] See Susan Cholette, Richard Castaldi, *The globalization of the wine industry: Implications for old and new world producers*, 1 (Apr 2005) link.

international border post-production.[1344] Despite some slow downs in growth, in terms of overall production and traded volume, the global wine trade reached record highs in 2021.[1345] Specifically, the wine trade amounted to 112 million hectoliters in volume and 41 billion USD in value.[1346] Moreover, these numbers were achieved even as the industry faced challenges in recent years related to the inflated cost of inputs, pandemic-related logistical difficulties, and the effect of the war in Ukraine that destabilized European production markets and energy supply, in particular.[1347]

In addition to overall growth trends, the global wine trade is marked by regional concentrations and shifts in regional trade flows in the last several decades. European producers make up 75% of global exports.[1348] Spain, Italy and France, collectively comprise most of that regional share, contributing 54% of the total global supply by volume and 61% by value.[1349] Oceania, North America, and South America, constitute the bulk of the remaining market supply at 9%, 7% and 4% of global exports, respectively.[1350] While "old world" producers have maintained their relative market dominance, trade patterns have significantly changed. Trade between old world producers has reduced as a percentage of total flows and been replaced with flows into "new world" markets.[1351] Additionally, there has been an increase of commercial exchange between new world producers as they have developed their own wine production capacity to meet increased domestic demand linked to modernization and development, urbanization, and higher household incomes.[1352] In sum, the wine market growth can be explained broadly as both a corollary of general economic growth and the increasing competitive pressures driven by new world markets.[1353]

B. Overarching Legal Trade Regime

Potential frictions in the international wine trade include both tariff and non-tariff measures (NTMs). At the highest level, the World Trade Organization (WTO) has created a framework that touches on both. The WTO monitors compliance with limits on tariffs, most favored nation (MFN) principles, and non-discrimination in domestic regulation through the General Agreement on Tariffs and Trade (GATT).[1354] Additionally, the WTO regulates NTMs through agreements such as the Technical Barriers to Trade (TBT) Agreement, Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), among others. The WTO also

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[1344] See Andrea Dal Bianco et al., *Tariffs and non-tariff frictions in the world wine trade*, European Review of Agricultural Economics 43.1 (2016), 31-57, 31; *State of the World Vine and Wine Sector 2021*, International Organisation of Vine and Wine, 12 (Apr 2022) link.

[1345] See Dal Bianco supra note 10 at 12; *Wine Profile*, Observatory of Economic Complexity, link (last visited May 15, 2023).

[1346] Observatory of Economic Complexity supra note 11.

[1347] See e.g. Rachel Arthur, *Global Wine Trade Hit by Rising Costs and Inflation*, Beverage Daily (May 2, 2023) link; *Global Wine Trade Hits Record High Value but Volumes Fall*, Reuters, (Apr 20, 2023) link; Inmaculada Carrasco, Juan Sebastián Castillo-Valero, Marcos Carchano, Carmen Córcoles, *Recent evolution of wine exports in a turbulence period: a multiregional input–output analysis*, 1 Agric Food Econ. 11, 6 link (analyzing the effects of geopolitical changes and market shocks such as the Covid pandemic on the Spanish wine market).

[1348] Observatory of Economic Complexity supra note 11.

[1349] See *State of the World Vine and Wine Sector 2021*, International Organisation of Vine and Wine at 14.

[1350] Id.

[1351] See Noa Ohana-Levi and Yishai Netzer, *Long-term trends of global wine market,* Agriculture 13.1 (2023), 224.

[1352] See Id.

[1353] See Id.

[1354] Vicki C. Waye, *Regulatory Coherence and Pathways Towards Global Wine Regulation*, 3 Journal of World Trade 50, 497 - 531, 500 (Jun 2016) link.

endorses international standard setting bodies such as the Codex Alimentarius Commission.[1355]

WTO efforts contributed to an overall global reduction in the MFN tariff rates placed on wine since the 1990's, specifically driven by reductions in applied tariffs by Canada and China.[1356] Moreover, studies support that the tariff reductions within Preferential Trade Agreements account for the majority of the trade-expanding effects of these agreements.[1357] However, there have been a number of high profile disputes in the last few years regarding violations of WTO norms and retaliatory increases in wine tariffs.[1358] In 2018, China imposed tariffs of 25% on American wine exports on top of its existing 14% MFN tariff rate.[1359] In 2019, as part of its WTO-authorized retaliation over EU subsidies to Airbus, the United States imposed new duties of 25% on wine containing 14% alcohol or less from France, Germany, Spain, and the United Kingdom, on top of MFN rates of 2.41%.[1360] And, in 2020, China imposed ad valorem tariffs of up to 212% on Australian wine.[1361] The U.S. imposed tariffs on the EU, and the Chinese tariffs on Australia, are estimated to have reduced the total global wine trade by nearly 340 million USD.[1362] It is also worth noting that imposed tariffs in the wine sector tend to apply different rates depending on the wine segment, for example, bottled versus bulk wine, therefore, impacting wine producers of these segments differently.[1363]

The general reduction of tariffs in the sector has coincided with an increased use of NTMs in trade agreements.[1364] The WTO instruments such as TBT and SPS do not contain wine-sector specific provisions and are highly deferential to domestic laws and regulations.[1365] Therefore, states have sought to clarify trade standards in two ways: (1) through the incorporation of NTM terms in multilateral, regional, and bilateral agreements, and (2) through international bodies that have created wine-specific NTM instruments.

Salient NTMs in the wine trade include TBTs, SPSs, pre-shipment inspections, export-related measures and intellectual property.[1366] An empirical analysis of country-specific NTMs related to wine shows that 75% of all those adopted between 1996 to 2016 are considered TBTs.[1367] These measures encompass technical regulations related to product characteristics,

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[1355] Id.

[1356] See Dal Bianco supra note 10 at 38.

[1357] William Ridley, Jeff Luckstead, Stephen Devadoss, *Wine: The punching bag in trade retaliation*, Food Policy 109, 3 (2022) link ("The tariff-reducing impacts of trade agreement membership […] account for the majority of the trade-expanding effects of PTAs. For bulk wine, however, PTA membership is found to cause large and statistically significant trade-expanding effects, conceivably due to regulatory policy harmonization (e.g., cooperation on and standardization of TBT measures) or other country-specific treatments of NTMs.").

[1358] See Ridley supra note 23 at 29 ("While the WTO's dispute settlement mechanism offers complainants in trade disputes the right to enact cross-sector retaliation [...] our results clearly demonstrate that this practice gives rise to harmful collateral impacts on non-offending industries.").

[1359] Ridley supra note 23 at 3 (2022).

[1360] Id at 4 link.

[1361] Id at 4 link.

[1362] Id at 31 link.

[1363] Ridley supra note 23 at 12.

[1364] See Figure 3 below.

[1365] See Waye supra note 20 at 500.

[1366] Some scholarship includes geographic indications as within the scope of TBTs and not intellectual property - including the studies referenced directly below - but likely this measure overlaps between these two non-tariff barrier categories. See e.g. Dal Bianco supra note 10 at 31.

[1367] See Fabio Gaetano Santeramo, et al., *The benefits of country-specific non-tariff measures in world wine trade*, Wine Economics and Policy 8.1 (2019) 28-37, 32 ("Country-specific NTMs on wine are heterogeneous: the most and the least adopted are Technical Barriers to Trade (TBTs, 75%) and Sanitary and Phytosanitary Standards (SPSs, 1%), respectively; others are pre-shipment inspections and export-related measures (24% in total).").

production methods, terminology, symbols, packaging, marking or labeling requirements, as well as the procedures for assessing conformity with the technical regulations and standards.[1368] Additional research also finds that labeling requirements, including those protecting designations or specific names, regulating the wording regarding the country or Designation of Origin, and mandating the presence of obligatory information like brand, alcohol content, vintage, etc., are among the most legislated NTM within the TBT category.[1369]

Although labeling related to geographical indications may be the most overt NTM, it is unclear that it presents the greatest friction to trade. SPS requirements regarding, for example, minimum residue limits (MRLs) for a range of processing aids that can be used for grape cultivation, remain extremely heterogeneous between states even if avoided in trade agreements. Moreover attempts to reach consensus on the appropriate MRLs to protect human health have been so unsuccessful in the past as to be completely halted.[1370]

International organizations, namely the Organization of Vine and Wine (OIV), and the World Wine Trade Group (WWTG), have sought to create regulatory coherence through data collection, standard setting, and international agreements, among other initiatives.[1371] Notably the WWTG has created the Mutual Acceptance Agreement (MAA) of Oenological Practices, Labeling Agreement, Labeling Protocol, Memorandum of Understanding on Certification Requirements, and Arrangement on Information Exchange, Technical Cooperation & Counterfeiting, in attempt to simplify the legal regime and facilitate trade.[1372] The MAA of Oenological Practices, for example, requires importing parties to accept the oenological practices of the exporting party, even if the wine-making practices of the exporting country differ from those required domestically. These agreements are most limited by the WWTG's membership of only 9 states within the new world,[1373] lack of specificity, and gaps in NTM coverage.

II. Potential SME Challenges Engaging in the Global Wine Trade

While the wine industry is composed of a variety of businesses specializing in the cultivation of grapes, wine brokerage, importers, and exporters, among others, this paper focuses on areas for research to facilitate the economic sustainability of small wine producers. Moreover, the challenges discussed below appear to be the most relevant to this particular industry segment, but they are not exhaustive. Other challenges to sustainability generally could include, for example, gender inclusion,[1374] incorporation of specific environmentally-conscious practices, and socially-responsible approaches to labor, among others.

[1368] *International Classifications of Non-Trade Measures*, United Nations Conference on Trade and Development, United National Publication (2012), 15 link.

[1369] See Dal Bianco supra note 10.

[1370] *Additives in wine: the Codex Alimentarius reopens discussions*, International Organisation of Vine and Wine, (Sep 15, 2021) link ("These discussions [between Codex Alimentarius and OIV on additives in wine] had been suspended in 2017 due to lack of consensus on the reference to the OIV in a footnote about the application of Good Manufacturing Practices (GMP)").

[1371] See Waye supra note 20 at 499.

[1372] *Agreements*, World Wine Trade Group, https://www.wwtg.gov/agreements/ (last visited May 15, 2023).

[1373] Membership of the WWTG is limited to representatives from the new world, namely Argentina, Australia, Canada, Chile, New Zealand, Republic of Georgia, South Africa, United States of America, and Uruguay. *Participation*, World Wine Trade Group, https://www.wwtg.gov/participation/ (last visited May 15, 2023).
Notably, China is not a member of this group but is a member of the Wine Regulatory Forum, an off-shoot organization focused on the Asia Pacific Region. See Waye supra note 20 at 507.

[1374] See e.g Alicia León-Pozo, Lino Meraz-Ruiz, Diana E. Woolfolk-Ruiz, *Wine Industry in Baja California, Mexico: A Gender Perspective*, Cultural and Creative Industries (2019) link.

A. Firm-Level Economics and Government Intervention

First and foremost, an intentional approach toward the economic sustainability of small wine producers must be grounded in market realities. As it stands, the regional bifurcation between old and new world producers is correlated with low and high firm-level market concentrations, respectively. For example, in France, Italy, Spain and Germany, most of the country's production is concentrated in small wineries.[1375] Meanwhile, in the United States, 75% of national production is concentrated in the top 5 firms, and in Australia, 80% of production is concentrated in the top 4 firms.[1376] Market concentration has also varied over time as there was a dramatic increase of micro and small producers in the 1980's who began controlling the whole production process, from the vineyard to the bottle until the final market.[1377]

Despite their inability to reap the benefits of economies of scale, the fruition of this fringe of smaller producers supports the idea that the "smallness" of wineries can be an element of strength.[1378] However, anecdotal reports of the marketability of small wine production should be taken with a grain of salt. Large wine producers can imitate this element of "smallness" in the eyes of the consumer through the use of a multitude of brands and omitting the name of the actual producer on the wine label.[1379] Additionally, the benefits of "smallness" may vary for small wine producers depending on their location in the old versus the new world.

There is little data on the links between hurdles facing small wine producers and firm-level market concentration. However, one study assessed different indicators of economic performance of wineries by firm size, based on data pertaining to wineries in two wine regions of Portugal.[1380] The study found that export performance increased with size and reasoned that this was due to larger firms having greater marketing resources at their disposal and the ability to make substantial investment in the search for new international markets.[1381] Interestingly, the study was not able to draw clear conclusions on the relationship between firm size and other areas of economic performance such as profitability, productivity, or efficiency.[1382] Further research could support that "smallness" of firms allow them to capitalize on product "premiumization" and conduct themselves more nimbly to compete with larger firms to sustain, for example comparable rates of return, production output per hectare, and labor-to-production ratios. If this proves true, integration of small producers into the international wine market would be best facilitated through resources concentrated in, for example, providing groups that govern appellations[1383] the resources to connect small wine

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[1375] See Cholette supra note 9 at 4, 6-7 (Jan 2005) link.

[1376] See Cholette supra note 9 at 8, 11 (Jan 2005) link.

[1377] Eugenio Pomarici, *Recent Trends in the International Wine Market and Arising Research Questions*, 1 Wine Economics and Policy 5, 1-3, 2 (Jun 2016) link.

[1378] See Id; João Rebelo, Sofia Gouveia, Lina Lourenço-Gomes and Ana Alexandra Marta-Costa, *Wine Firm's Size and Economic Performance: Evidence from Traditional Portuguese Wine Regions*, Grapes and Wines - Advances in Production, Processing, Analysis and Valorization, (Dec 20, 2017) link ("[S]mall firms prefer to satisfy the needs of narrow markets, emphasizing the importance of differentiation based on the terroir, appellation, and geographic identity in order to enhance perceived wine quality, which endorses the monopolistic competition model.").

[1379] See e.g. David Williams, *For wine producers, small is beautiful – but big is useful*, The Guardian (Mar 20, 2016) link ("On the one hand, you have multi-million-selling brands attempting to camouflage the scale of their production with suggestive back-label trigger words such as 'artisan', 'terroir' and 'craft.'").

[1380] See Rebelo supra note 44.

[1381] Id.

[1382] Id.

[1383] These governing bodies that ensure compliance with appellation norms go by different names depending on the region, for example: Denominación de Origen (DO) or Denominación de Origen Protegida (DOP) in Spain;

producers with export and import partners who can specialize in marketing and research efforts. However, the study did not address other potential frictions such as minimum costs associated with export operations. Broker's fees, minimum container limits, discounted bulk pricing schedules, or inability to maintain wholesale distributor relationships[1384] were not mentioned and, yet, could also disproportionately impact smaller producers and result in lesser export performance.

Burgeoning wine producers in the new world face vastly different challenges. Integration into the world market may require longer-term investment directed to firm operations, managerial systems, and increasing "vino-sophistication," before "smallness" benefits can be realized on the global scale. As aforementioned, some of the largest new world producers also experience high degrees of concentration. Countries like South Africa have experienced aggressive market consolidation in an effort to undercut old world producers.[1385] One study concluded that the South African market development has been facilitated by simultaneous product "downgrading" and process "upgrading," while admitting that product downgrading would likely not be a sustainable long term strategy.[1386] In other words, although the path to economic sustainable growth generally requires an upward trajectory in the global value chain, meaning the production of higher value-added products and/or taking on more sophisticated functions along a value chain, some downgrading measures, including initial specialization lower in the chain,[1387] can be strategically facilitated in the short term to secure a stable and profitable supplier position in "buyer-driven" contexts.[1388]

Another study signals that product downgrading is not a sustainable long term strategy given its conclusions that the markets with the strongest commercialization environments for the wine sector were those with both high demand and "vino-sophistication." Countries within this cluster had made investments in varietal conversion, vineyard relocation, and

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Denominazione di Origine Controllata (DOC) and Denominazione di Origine Controllata e Garantita (DOCG) in Italy; and, American Viticulture Area (AVA) in the United States. See *Looking for Good Wine? Start With The Appellation*, Wine Folly, link (last visited May 15, 2023).

[1384] See Cholette supra note 9 ("Wholesaler consolidation has made it increasingly difficult for smaller producers to get their product to market. Wholesalers prefer to distribute only the top selling brands, in lieu of small or new labels, since their profits come from markups on products they are able to replenish quickly, and wine turnover is notoriously slow (2.4 turns/year), compared to the churn generated by liquor (50 turns/year) and beer (70 turns/year). Distributors wish to avoid products that may sit on the customers' shelves too long and prefer products that are proven bestsellers, relying on the pull from the consumers. Of course only brands that engage in push advertising or have shelf presence have sufficient consumer recognition.").

[1385] See Cholette supra note 9 ("The South African wine industry is experiencing consolidation as seen by the proposed merger of the nation's Distillers Corporation with Stellenbosch Farmers Winery Ltd which would form the largest alcoholic beverage corporation in South Africa. Larger corporations and strong collaborations within the national industry have enabled aggressive and effective marketing efforts abroad. KWV International is the leading brand builder of South African wines in global markets and has a strong focus in Nordic markets with the result that South Africa is expected to replace France as the largest supplier of Sweden's wine.").

[1386] See Stefano Ponte, Joachim Ewert, *Which Way is "Up" in Upgrading? Trajectories of Change in the Value Chain for South African Wine*, 10 World Development 37, 1637-50, 1647-48 (Oct 2009) link.

[1387] See *Fostering Greater Participation in Globally Integrated Economy*, Discussion Paper, OECD 2018 SME Ministerial Conference, 8 (Feb 22, 2018) link ("GVCs allow SMEs to specialise in specific segments of production, rather than having to master all processes required to produce finished goods and thus integrate into segments of global production chains. In turn this can be a pathway towards economic development through productivity growth, exporting more sophisticated products, and a less concentrated export basket.").

[1388] See Ponte supra note 52 at 647-48 ("Product downgrading, it is sometimes important as a means of securing a stable and profitable supplier position in "buyer-driven" contexts, especially at times of strengthened competition among suppliers and if coupled with improved economies of scale. Bulk sales have actually allowed the survival of key segments of the wine industry in South Africa at times of crisis, making it possible to survive in the short run by reducing costs. At the same time, product downgrading may not be a profitable strategy in the long run.").

improvement of vineyard management techniques in order to successfully boost competitiveness.[1389] Furthermore, successful vino-sophistication programs included business-side education on introducing new grape varieties and on reducing the variability of output in order to produce wines of regular taste and quality despite the variability in climate conditions, and soil characteristics.[1390] Taken together, these studies point towards the need to arm small, new producers with technical capacity specific to their geography to push them up the global value chain in ways that may not be simply transplanted from the old world through traditional knowledge exchanges and agreements to provide technical assistance.

It is worth noting that the transfer of "lessons-learned" from old to new world is also impeded by the legacy of government intervention in the former. European viticulture has been consistently supported and subsidized in one form or another over time, with studies suggesting as much as 1,000 euros per hectare in the most prominent regions.[1391] Presently, the European government budgetary focus is on generic promotion.[1392] On the other hand, the most striking government interventions by new world producers are those related to the initiatives by the WWTG to address non-tariff barriers and facilitate trade, at least among its membership. Studies point towards the impracticability of matching old world subsidization levels, particularly for small-to-mid sized wine producers.[1393] In sum, more research is needed to understand state-level measures to strategically increase product and process upgrading versus facilitating unhealthy levels of downgrading and consolidation.

B. Disproportionate Impact of Tariff Measures

In addition to affirmative efforts to enable the development and expansion of small wine producers into the global wine market, a global trade regime focused on the sustainability of small wine producers must account for the potential disproportionate effects of trade frictions. While tariffs can appear facially uniform, there is some evidence that tariffs disproportionately impact small wine producers. In the case of Chinese anti-dumping duties on Australian bottled wine imports, Australian wine industry representatives claimed a disproportionate impact on small producers not because of costs felt on a per unit basis, but rather, because of the inability for small firms to adjust export operations to target new markets.[1394] One of Australia's larger firms, Treasury Wine Estates, underwent a restructuring given tariff-induced losses but

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[1389] See Agostino Menna, Philip R. Walsh, *Assessing environments of commercialization of innovation for SMEs in the global wine industry: A market dynamics approach,* 2 Wine Economics and Policy 8, 191-202 (Dec 2019) link (describing the market developments in Australia and Greece).

[1390] Id.

[1391] Id ("According to our new estimates, government support for European wine producers continued unabated between 2007 and 2012, albeit in changing forms. The support per hectare of vineyard in 2011 and 2012 exceeded 700 euros in the EU in aggregate and more than 1,000 euros in Austria, Cyprus, France, and Germany.").

[1392] See Kym Anderson and Hans G. Jensen, *How Much Government Assistance Do European Wine Producers Receive?*, 2 Journal of Wine Economics, 11, 289-305, 297 (Aug 30, 2016) link ("Generic promotion accounted for a growing share of total EU support, amounting in 2012 to 0.009 euros per liter of wine produced. By contrast, Australia's expenditure per liter on generic promotion that year was half that amount.').

[1393] See Renée Johnson, *The U.S. Wine Industry and Selected Trade Issues with the European Union*, Congressional Research Service, 8 ("Domestic barriers to U.S. wine exports include a lack of resources dedicated to relatively small-scale production and a lack of focused support [SME] wine producers in the U.S. market.").

[1394] See Saheli Roy Choudhury, *China's wine tariffs will have a 'devastating impact' on small Australian producers, trade group says*, CNBC (Nov 30 2020) link ("[La]rger Australian wine exporters who have diversified portfolios would likely be able to cope with China's decision even though they, too, would feel the pain. 'It's grape growers, it's regional communities and it's small exporters that have very little ability to adjust. They're the ones that are going to suffer,' [Tony Battaglene, chief executive of Australian Grape and Wine], said.").

expressed confidence in its ability to reroute to new markets[1395] suggesting that trade destruction may disproportionately fall on smaller firms. Moreover, tariff-induced liquidity crises at the smaller firm level may be more likely to result in insolvency than at a larger firm and result in closure of businesses altogether.

Larger firms may also be able to continue exporting to former markets unencumbered by tariffs as their position affords them "work-around" opportunities. For example, as the U.S. tariffs were imposed only on bottled wine under 14% alcohol, some firms began shipping bulk wine to the U.S. to be bottled on shore.[1396] While there exists a lack of data on the size of the firms that exploited this loophole, the number of bottles produced suggest that these firms were at least mid-size.[1397] Should the use of work-arounds be quantified and held significant, this could mean that larger firms are not just experiencing "lesser" negative impacts than smaller producers, but rather, absolute gains during a period of higher tariffs as their relative competitive advantage over smaller firms has increased.

On the other hand, smaller firms may have benefited from the parameters of the tariffs given factors such as: the role cooperatives can play in bringing together small wine producers to furnish bulk wine; a higher risk-tolerance of small firms for declaring wine as being over 14% when at the margin;[1398] and, a lesser likelihood of being targeted for compliance and enforcement checks. Additionally, larger firms may experience a relative loss of productivity after a tariff announcement as focus, human capital, and financial resources may have shifted to lobbying campaigns as smaller firms are more likely to free-ride from those lobbying efforts than to participate in them.[1399]

Tariffs may also disproportionately impact smaller firms due to the inelastic nature of consumer purchasing behavior in this market. Some studies indicate that wine is relatively price inelastic,[1400] meaning consumers purchasing decisions are not as sensitive to price increases as other products. These findings are corroborated by other studies that show that, although overall trade value has gone up, consumer welfare in the past few years has gone down as consumers have unduly carried the burden of tariff measures.[1401] More research is needed to determine if this inelasticity is uniform throughout the sector or if consumers are

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[1395] See Arpit Nayak and Paulina Duran, *Australia's Treasury Wine to overhaul business, sell assets as Chinese tariffs bite*, Reuters (Feb 16, 2021) link ("[Chief Executive Officer] Ford said, however, the company had become more confident about its plans to reroute its Penfolds Bins and Icon luxury ranges from China to other markets.").

[1396] See e.g. Scott Horsley, *Where There's A Wine, There's A Way*, NPR (Oct 25, 2019) link; Emmanuel Saint-Martin, *How French Wine Is Using Legal Loopholes to Avoid the 25% Import Tariffs*, Frenchly (Nov 15, 2019) link.

[1397] See Emmanuel Saint-Martin, *How French Wine Is Using Legal Loopholes to Avoid the 25% Import Tariffs*, Frenchly (Nov 15, 2019) link ("The wine is primarily sold in the eastern United States and the midwest, and targets the mass market: some 600,000 bottles will be available for sale at around $9.90 at retail.").

[1398] See Id ("[T]he reality of production is that many wines are in fact very close to this limit. "Testing the alcohol level is not an exact science," says an industry expert. "As a result, the authorities traditionally tolerate a margin of error." Thus a table wine tested at 13.8% can quite legally be labelled as 14.2% and avoid the 25% tariff.").

[1399] See Ridley supra note 23 at 29 ("These trade actions likely cause further distortions in that the winemakers (and other industries caught in the crossfire) needlessly have to engage in directly unproductive lobbying efforts to remove the unwarranted trade retaliations on their commodities, an additional negative outcome given the general economic inefficiency of such efforts.").

[1400] See generally Kenneth W. Clements, Marc Jim M. Mariano, George Verikios, Berwyn Wong, *How elastic is alcohol consumption?* Economic Analysis and Policy 76, 568-581(2022) link.

[1401] See Ridley supra note 23 ("Our policy counterfactual simulations also show that complete trade liberalization would generate substantial benefits, equivalent to a roughly 4% trade-weighted average increase in the welfare of wine consumers. These welfare increases are significantly larger for consumers in many large developing countries which currently maintain inordinately high tariff rates, such as India, Brazil, and Thailand.").

more willing to absorb price jumps for established brands at the expense of overall consumption or a change in product.

C. Navigating Non-Tariff Measures

1. Data Collection by and Participation in International Bodies

The sustainable development of wine producers requires that they be able to navigate non-tariff measures so that awareness of and compliance with standards facilitate trade rather than incur burdensome costs. Intuitively, organizations that influence NTMs through informational resources for policy makers and advocacy must, therefore, account for the needs and interests of small wine producers. At the international level, the OIV collects and publishes statistics regarding, for example, wine production, consumption, exports and imports.[1402] However, public reports do not provide transparent data in regards to firm sizes, market concentration, or other forms of segmented analysis.[1403] Moreover, while the OIV has put out a general framework for sustainable viticulture, reference to small to medium sized producers is made only once.[1404]

In terms of participation, the OIV consists of state members and industry groups as observers.[1405] No observers appear to exclusively represent the interest of small wine producers, while some clearly represent large, multinational company interests.[1406] The representatives interested within the WWTG are opaque as the organization does not provide a list of industry representatives included within its membership.[1407] While fixed representation may not be required, there is no evidence that these groups are conducting public consultations or outreach to small wine producers to collect input.

2. The Harmonization and Mutual Acceptance Efforts of International Bodies

In some respects, the setting of any uniform standards, or the practice of mutual acceptance of divergent standards, helps to provide clarity that can be diffused for all market benefits. For example, reducing the costs that result from regulatory disparities between nations related to definitions of wine and wine beverages, and required nutritional information of labels, will provide benefits to firms of all sizes. On the other hand, the policy agenda that motivates standardization of some NTMs over others will have significant implications on the sustainable growth of small wine producers.

The standardization, or not, of national practices regarding geographical indications provides an example. At first glance, the controversy over geographical indications appears to be driven by old versus new world producers with old world producers attempting to maintain market dominance through the protection of regional terms (or "semi-generic" depending on one's position). However, a more nuanced approach shows that there are some segments within new world producers that are not represented in organizations such as the WWTG that do see the value in developing their own product identity in a way that has proven beneficial to small producers. Napa Valley Vintners, for example, is a group that does not oppose

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[1402] See *Country Report*, International Organisation of Vine and Wine, link (last visited May 15, 2023).
[1403] Id.
[1404] See *Oiv guide for the implementation of principles of sustainable viti-viniculture*, International Organisation of Vine and Wine, link (last visited May 15, 2023).
[1405] See *Member States and Observers,* International Organisation of Vine and Wine, https://www.oiv.int/index.php/who-we-are/member-states-and-observers (last visited May 15, 2023).
[1406] Id (including observers such as World Federation of Major International Wine and Spirits Competitions).
[1407] See *Participation,* World Wine Trade Group, https://www.wwtg.gov/participation/ (last visited May 15, 2023).

European efforts to phase out the use of semi-generic terms in the U.S. industry and would in fact like to see greater protection for their regional names (e.g., Napa Valley, Sonoma County, etc.).[1408] Moreover, industry representatives from across the new and old world expressed before Congress that a disregard for GI presents another trade barrier, not a form of trade liberalization, because it distorts the market by confusing consumers and compromising wine industry integrity.[1409]

Groups like Napa Valley Vintners have advocated for a multilateral register for wines and spirits, such as that being proposed by the International Trademark Association (INTA), that would allow GIs from different countries to be efficiently and mutually recognized without the need to investigate the complexities of country-specific GIs.[1410] The OIV also provides a database of geographic indications and appellation origins, and the WWTG includes a list of more limited geographic indications in its labeling protocol.[1411] In sum, the lack of clarity on which formal registry should take precedence, and the substantive position of the WWTG, may be particularly adverse to SMEs that would benefit from both clarity and protection of geographic indications that would facilitate "upgrading" within the global value chain. Furthermore, the undue interests of large-firm interests in the WWTG may be impeding other opportunities for structural efficiencies like the creation of a formal registry or the development of wine associations to help domestic geographic indications gain broader recognition through collective marketing efforts.

In addition to substantive positions taken by international organizations, the initiatives these organizations choose to prioritize may disadvantage smaller wine producers. For example, the OIV has worked on and off with the Codex to harmonize differences between residue limits for pesticides without reaching a definitive set of standards.[1412] While no data was found on the ability for smaller producers to comply with divergent marginal residue limits, these limits may be some of the most difficult for smaller producers to navigate as it would require changes throughout the wine production process and significant planning in advance to align production decisions with end-market requirements.[1413]

D. Challenges and Opportunities of Climate Change

Although there are a host of ecological practices that could facilitate the environmental sustainability of wine production, economic sustainability implies the ability for small wine producers to adapt to the environmental changes that have already begun to change the wine production landscape. Vineyard surface areas of countries like Argentina and South Africa

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[1408] See Johnson supra note 59 at 14.

[1409] *Leading Wine Regions Advocate in Washington and Brussels for Elimination of Tariffs and Non-Tariff Barriers on Wine, Wine Industry Advisor*, Press Release, link.

[1410] See Johnson supra note 59 at 14.

[1411] See https://www.oiv.int/what-we-do/giao-database-report?oiv=.

[1412] See *Additives in wine: the Codex Alimentarius reopens discussions*, International Organisation of Vine and Wine, (Sep 15, 2021) link; Waye supra note 20 at 515.

[1413] Although no evidence was found on MRLs, at the SME Ministerial Conference the burden on SMEs of complying with disparate requirements was discussed. See *Fostering Greater Participation in Globally Integrated Economy*, Discussion Paper, OECD 2018 SME Ministerial Conference, 17 (Feb 22, 2018) link ("[S]tandards are far from harmonized across countries and complying with each final destination market's regulations and standards can require firms to make costly investments in adapting production processes, specific packaging and labeling or undertake multiple certification processes for the same product (OECD, 2013). Mutual recognition and convergence of regulatory standards would reduce the burden of compliance for small-scale exporters in particular (OECD-WB, 2015).").

have declined due to climatic factors.[1414] However, studies indicate that the effects of climate change will leave virtually no wine region of the world unaffected.[1415] Scholars have generally concluded that climate change is having a deep impact on the wine sector in terms of production technology, costs, and quality, yet, there is an opportunity for firms to survive these new conditions by engaging with technological change and repositioning themselves in the market while investing in rebuilding/restyling their reputation.[1416] Furthermore, there is some evidence that new world producers, and young businesses, are better positioned to capture these opportunities over their old world counterparts.[1417] While other areas explored in this paper more readily lend themselves to field work, this challenge to economic sustainability will require more speculation as to what resources would best help small wine producers adapt and leverage a natural competitive advantage as potentially more nimble firms.

III. Suggested Topics for Targeted Research and Reform

It is difficult to quantify the harm to small wine producers given gaps in data. International organizations, such as OIV, that have the capacity and industry access to collect more information on market concentrations and firm-specific metrics should do so and provide that information as a policy tool. Such data could form the basis of more specific recommendations on how best to support small producers in the old versus new world.

The empirical analyses and case studies reviewed in this paper support assumptions based simply on the basis of developed and developing countries will not necessarily hold at the sectoral level. Here, both developed and developing countries alike, within the "new world" category, lack a history of long-standing, governmental interventions that have sustained small production in the old world. Within the new world segment, a state's ability to redress the effects of these distortions may differ, but even developed nations find matching old world levels of fiscal support to be untenable. Aggressive market consolidation to undercut traditional old world competitors appears to be sacrificing sustainable growth for small producers., although More research is needed on the proper "upgrading" and "downgrading" policy mix to facilitate the long-term solvency of small producers. Additionally, research on small producer adaptation and attrition due to tariff measures is needed to create reasonable carve-outs in trade agreements.

Some measures adopted by old world producers could potentially be mirrored for the sustainable growth of small producers, alongside more innovative business models. For example, while on the surface the battle over GIs appears to favor European producers, groups of wine producers within the new world see the benefits that come from GIs to cultivate their own brand identity and reap the benefits of "smallness." Bodies like the WWTG

[1414] See *State of the World Vine and Wine Sector 2021*, International Organisation of Vine and Wine at 4 (describing Argentina's decline in vineyard surface area since 2015 due to factors such as water scarcity, rising temperatures, and drought-like conditions and South Africa's decline in vineyard surface area over the last seven years due to higher average temperatures, severe drought, and heatwaves).

[1415] See Jeremy Galbreath, David Charles & Eddie Oczkowski, *The Drivers of Climate Change Innovations: Evidence from the Australian Wine Industry*, Journal of Business Ethics 135, 217–231, 217 (2016) link.

[1416] See Anna Carbone, *From flasks to fine glasses: recent trends in wine economics*, Italian Economic Journal 7.2, 187-198 (2021) link.

[1417] See *Hard-hit by climate change, winemakers turn to sustainability to ride the storms*, Reuters (Sep 14, 2022) ("New Zealand has been pioneering, partly because their smaller scale and relatively newcomer status has supported it," says Tooley [a California-based Master of Wine working at Boisset's Collection, which makes wine in Burgundy, the Rhone, Champagne, the South of France and California]. "The 'older' territories, like France and Italy for example, have had to adapt and modify systems and farming practices that have been in place for centuries.'").

should consider its stance on the issue on a one-producer, one-vote basis and advocate for wine associations of small producers to bolster awareness of these new appellation identities. Additionally, the impact of market fragmentation in terms of MRL requirements on small producers should be evaluated as the trade-offs between small wine producer compliance and health outcomes are unknown.

Lastly, from the perspective of economic sustainability, climate change affords both challenges and opportunities for smaller producers. Although research in this area is also nascent, the international trade regime can be optimized by embedding flexibility for firms to adapt through incorporation of new technology, grape varietals, and wine production processes.

As it stands, the global wine trade regime lacks a clear focus on the economic sustainability of small wine producers, despite their prevalence in important wine-producing countries in the world, as evidenced by the composition of international actors and large data gaps. An inclusive trade regime requires addressing these gaps and leveraging findings on the enabling environments for SMEs, disproportionate effects of trade frictions, and opportunities to develop in light of climate change. Although this paper, by way of example, advocates for a sectoral approach to facilitate the economic sustainability of SMEs that stand to gain from global trade, this analysis of the wine sector also provides some broader insights. The lack of concrete data on SME engagement in global trade is generally concerning. In the wine sector, there are historical and cultural aspects that draw the consumer to smaller wine producers. However, even in industries where the artisanal nature of the product is not as historically pronounced or has faded over time, the ability for SMEs to enter global markets is beneficial in terms of both consumer welfare and domestic returns. The recommendations proposed by this paper regarding the incorporation of SME-specific research and outreach into the agendas of industry-specific international bodies in order to advocate for targeted national policy and technical assistance, equitable tariff regimes, inclusive non-tariff measures, and the development of climate-responsive tools, can similarly inform efforts to facilitate SME economic sustainability of other sectors.

PART II

SOCIAL INCLUSION

Labor

CHAPTER 17: INTERNATIONAL TRADE AND LABOR IN THE U.S.-MEXICO CONTEXT: IS THERE ROOM FOR MORE DEVELOPMENT?

LAUREN IOSUE*

Abstract

As the world population grows and requires more resources, states around the world are engineering a myriad of ways to mitigate global poverty, health crises, and climate change. The rise of regional trade agreements has given states a unique tool: They use regional trade partnerships to tackle pressing development issues, filling gaps where stalling international organizations or national governments have not taken adequate substantive action.

One of these areas is in the development of labor law. A prime example a regional trade agreement that addresses labor is the United-States-Mexico-Canada Agreement (USMCA). The USMCA's Article 23's labor chapter and the Rapid Response Labor Mechanism (RRLM) aim to protect labor rights. But these tools are not sufficiently inclusive or sustainable. Article 23 and the RRLM should be expanded to cover a broader range of labor issues and potential claims brought against the United States and Canada.

To further improve labor rights, the United States, Mexico, and Canada should apply a bottom-up, rights centered approach to address labor law development in the region. By doing this, the parties would better include underrepresented voices in negotiating processes, ensure better implementation of domestic law, and focus on domestic-directed capacity building. This would help address historical power dynamics, deepening cooperation within and between the states, and lead to sustainability and inclusion through greater involvement of many different stakeholders. Overall, the parties to the USMCA can continue to build off the strong trade partnership to develop human rights in the labor sector in an inclusive and sustainable way.

I. Introduction: The Connection Between Trade and Labor

Every person in the world engages in global business in some way, whether as a consumer, business-owner, or laborer in the international supply chain. Global trade's wide reach spurs positive and negative development in economic, social, and environmental spheres in every community it touches.[1418] While global business expands every day, global development moves non-uniformly and ripples unevenly: According to the World Bank's Poverty and Inequality Platform, 659 million people lived on less than $2.15USD per day in 2019.[1419] Inequality is unevenly concentrated; the vast majority of people living below $3.65USD are located in Sub-

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[1418] According to the International Monetary Fund, the global share of goods in trade has decreased from 51.0% in 2008 to 46.5% in 2021 of global GDP in the past three decades, while the growth of trade in services has skyrocketed from "$1.6 trillion in 1990 to $11.5 trillion in 2021, an average annual growth rate of 6.9 percent." Michelle Ruta and others, 'Review of the Role of Trade in the Work of The Fund' (2023) International Monetary Fund, Policy Paper No. 2023/013, 11 < https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/04/03/Review-of-the-Role-of-Trade-in-the-Work-of-the-Fund-531177> accessed 29 September 2023.

[1419] 'Poverty and Inequality Platform' (The World Bank) <https://pip.worldbank.org/home> accessed 9 August 2023.

Saharan Africa and South Asia,[1420] while the wealthiest states are located in Europe and North America.[1421] Recent events and current trends, such as the COVID-19 pandemic and climate change, put added pressure on developing states. The world's labor market is also facing unprecedented pressure across all sectors and industries.[1422] States are changing and negotiating their position in a globalizing community – some are using development as a means to get ahead.

Although some aspects of development may be more difficult to channel through a trade lens, labor laws are more suited for the task. Labor regulations in specific sectors may be addressed in a regional or multilateral trade agreements. The International Labor Organization's (ILO) standards, such as the "core" labor conventions outlining fundamental labor rights,[1423] are also often referenced in regional trade agreements between ILO members to bring domestic labor laws in line with international standards.[1424] Coming out of the pandemic, lawmakers around the globe are at an inflection point: they may use this moment to reform their labor laws and push the economy forward in a sustainable way, which ensures ethical and equitable labor practices. Domestic law also spurred negotiations in different arenas, leading to the creation of new trade rules and developing trends. Utilizing every avenue of forging new international trade law would likely be an effective way to meet development standards in labor contexts.

Development standards can take many forms; however, it is important to emphasize the importance of sustainable and inclusive development. Sustainable development in general extends beyond mere income level: the term "sustainable development" was first defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" during the 1987 Brundtland Commission.[1425] States have gathered around this definition and centered on economic, social, and environmental avenues to support sustainable development in a variety of ways. The United Nations sets sustainable development goals to meet a common sustainable development standard, which spans across health, education, environment, infrastructure, labor, and more. Inclusive trade does not have a common definition, but it can be understood to mean whether "'all people can contribute to and benefit from international trade and investment,' with equality of opportunities as a precondition."[1426] Putting these two definitions into practice may be difficult. However, states can engage in sustainable, inclusive trade which addresses labor development goals through creating innovative regional trade agreements and utilizing the multilateral and domestic trade structures already in place.

[1420] Samuel Kofi Tetteh Bahh and others, 'March 2023 global poverty update from the World Bank: the challenge of estimating poverty in the pandemic' (*World Bank Blogs*, 29 Mar. 2023), <https://blogs.worldbank.org/opendata/march-2023-global-poverty-update-world-bank-challenge-estimating-poverty-pandemic> accessed 29 September 2023.

[1421] Nada Hamadeh and others, 'New World Bank country classifications by income level: 2022-2023' (*World Bank Blogs*, 01 July 2022) <https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2022-2023> accessed 29 September 2023.

[1422] Katrin Kuhlmann, *Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements* (hereinafter "UN Handbook"), (United Nations Economic and Social Commission for Asia and the Pacific, 2023) 117.

[1423] ILO Conv. No. 87 (1948); ILO Conv. No. 98 (1949); ILO Conv. No. 29 (1930); ILO Conv. No. 105 (1957); ILO Conv. No. 138 (1973); ILO Conv. No. 182 (1999); ILO Conv. No. 100 (1951); ILO Conv. No. 111 (1958).

[1424] Kuhlmann, UN Handbook, (*n* 5) 138.

[1425] 'Our Common Future: Report of the World Commission on Environment and Development' (1987) 51.

[1426] Kuhlmann, *UN Handbook*, (*n* 5) 2, citing UN ESCAP, 'Asia-Pacific Trade and Investment Report 2013 – Turning the Tide: Towards Inclusive Trade and Development,' (*United Nations*, 2013) xxii, <https://www.unescap.org/sites/default/files/publications/APTIR%202013%20Full%20Report.pdf>.

A. International Trade Frameworks

The World Trade Organization (WTO) has been the traditional center of the international trade framework. However, criticism of the WTO by some scholars has grown in recent decades for its apparent favoritism to "Western" and "more developed" states.[1427] This is one way states with traditionally less bargaining power are asserting their rights under the international trade system today. Additionally, WTO currently lacks important appellate body judges due to the United States' refusal to appoint them.[1428] In regard to labor, WTO law generally does not cover labor issues other than a very limited mention of prison labor in the GATT Article XX General Exceptions.[1429] Instead, the WTO generally defers to the standards of the ILO.[1430] There is much more activity at the regional level today, with at least 360 regional trade agreements (RTAs) in force registered with the WTO,[1431] numerous regional trading blocs, and an ever-changing number of negotiations in place for different trade programs. RTAs have many benefits; however, they can also create a "spaghetti bowl" effect of overlapping rules and regulations which unnecessarily bind states and private companies, restricting trade flows and leading to punishment.[1432] States also have the opportunity, though they may not always take full advantage of it, to make trade more inclusive through RTAs. They may invite additional voices into regional trade agreement negotiations with greater ease than at the multilateral level: minority, indigenous, and female stakeholders have greater access to representatives in these negotiations. If invited to these negotiations and given an opportunity to actively participate, it may be more likely for their interests to be better represented in the actual agreements, though this is not always guaranteed.

B. Trade Rights as Human Rights

[1427] Céline Carrère, Marcelo Olarreaga, and Damian Raess, 'Labor clauses in trade agreements: Hidden protectionism?' (2022), Rev. Int. Org. <https://doi.org/10.1007/s11558-021-09423-3> accessed 29 September 2023; Aurelie Walker, 'The WTO has failed developing nations' (*The Guardian* 14 Nov. 2011), <https://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries> accessed 29 September 2023; 'WTO policies harming small-scale farmers in poor countries – UN expert' (*UN News* 16 Dec 2011) <https://news.un.org/en/story/2011/12/398532> accessed 29 September 2023 ("The current international trade regime backed by the World Trade Organization (WTO) is harming small-scale farmers in the least developing countries (LDCs), significantly increasing their risk of food insecurity and reliance on large-scale producers, an independent United Nations human rights expert warned today.").

[1428] Mark Pollack, 'International court curbing in Geneva: Lessons from the paralysis of the WTO Appellate Body' (2023) 36.1 Governance 23 https://doi-org.proxygt-law.wrlc.org/10.1111/gove.12686.

[1429] "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .

(e) relating to the products of prison labour; . . ." General Agreement on Tariffs and Trade Art. XX(e), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[1430] While WTO members denounced the "use of labor standards for protectionist purposes," they also reaffirmed the ILO as a competent body on labor regulations. Singapore Ministerial Declaration, Art. 4, WTO Doc. WT/MIN(96)/DEC (World Trade Organization 18 Dec. 1996), <https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>; Katrin Kuhlmann, Lecture for Course Titled "International Trade, Development, and the Common Good" at Georgetown University Law Center (15 Feb. 2023).

[1431] Regional Trade Agreement Database (*World Trade Organization*) <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> accessed 29 September 2023.

[1432] Katrin Kuhlmann, Lecture for Course Titled "International Trade, Development, and the Common Good" at Georgetown University Law Center (01 Feb. 2023).

When most scholars examine international trade law, they may not think of human rights law as well. However, connecting labor rights and human rights as they exist or should exist in the trade law field is a creative way to increase their visibility and enforceability in international community. Not everyone agrees, however, with linking international trade to basic labor rights: some developing countries have historically opposed it, claiming it is "protectionist" and constitutes "discriminatory treatment."[1433] However, when individual stakeholders are able to voice their concerns and experiences, policymakers can ensure that every person's human rights are being protected. When policy comes only from the "top down," stakeholders may assert these policies are driven from legacies of colonization, capitalism, and cycles of unsustainable growth and recession. If states take a rights-centered, bottom-up approach, they may be able to counter feelings of protectionism, intentionally create a more sustainable development plan, and involve as many stakeholders as possible to create a continued interest and dedicated involvement in the upholding of labor rights as capacity-building efforts continue.

II. The United States-Mexico-Canada Agreement

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 01, 2020,[1434] replacing the North American Free Trade Agreement. The USCMA built off the successes of NAFTA, while also innovating in many other ways. Specifically with labor law, it took new approaches to addressing labor development which can be further developed when it is re-evaluated by the United States, Mexico, and Canada in 2036.

A. NAFTA: A Brief History

NAFTA was signed in 1992 by Mexico, the United States, and Canada. NAFTA's was the first regional trade agreement to include labor considerations,[1435] though the main agreement did not contain the main labor provisions; instead they were contained in a side agreement called the "North American Agreement on Labor Cooperation (NAALC)."[1436] Each signatory aimed to improve "working conditions and living standards" through cooperation:[1437] The NAALC covered a variety of topics, such as freedom of association, the rights to collective bargaining and to strike, prohibition of forced labor and employment discrimination, protections for migrant workers, and implementation of standards for minimum pay and compensation schemes for occupational injuries.[1438] Although the NAALC covered these topics, it did not contain a full dispute resolution mechanism.[1439] In fact, some say NAALC did not induce very meaningful change in labor standards: One ILO working paper claims "[a]lthough 22 complaints of [labor] law violations in Mexico had been presented by 2015, out

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[1433]Aaditya Mattoo and others, *Handbook of Deep Trade Agreements* (World Bank, 2020) 58 <https://openknowledge.worldbank.org/handle/10986/34055>.

[1434] United States-Mexico-Canada Agreement, Nov. 30, 2018, Pub. L. No. 116–113, WTO Doc. WT/REG407, [hereinafter "USMCA"].

[1435] 'North American Agreement on Labor Cooperation: A Guide' (*United States Department of Labor*, Oct. 2005) <https://www.dol.gov/agencies/ilab/trade/agreements/naalcgd#Coverage> accessed 29 September 2023 (". . . it represents the first instance in which the United States has negotiated an agreement dealing with labor standards to supplement an international trade agreement.").

[1436] M. Angeles Villarreal and Cathleen Cimino-Isaacs, 'USMCA: Labor Provisions' (2023) Congressional Research Service Paper IF11308, 1.

[1437] USMCA (*n* 18).

[1438] Villarreal and Cimino-Isaacs, *USMCA: Labor Provisions* (*n* 19) 1.

[1439] The NAALC had a limited dispute resolution system covering "persistent pattern[s] of failure" in the areas of minimum wage, child labor, and occupational safety and health. Ibid.

of a total of 40 complaints received under the framework of NAALC, almost none had a notable impact on collective rights and freedom of association in Mexico."[1440]

While the NAALC highlighted what could be done with labor laws in regional trade agreements, there was room to expand the NAALC in the next iteration of NAFTA to fix these issues. Policymakers took note of this in the United States-Mexico-Canada Agreement (USMCA).

B. Annex 31-A: The United States-Mexico-Canada Agreement

The USMCA maintained the spirit of the NAALC, but also expanded it in significant ways. The United States, Mexico, and Canada emphasized "the importance of cooperation as a mechanism for effective implementation of this [labor] Chapter, to enhance opportunities to improve labor standards, and to further advance common commitments regarding labor matters, including the principles and rights stated in the ILO Declaration on Rights at Work."[1441] Now, labor provisions are included in the core text of the agreement rather than an accompanying agreement.[1442] Additionally, there are more general statements strengthening labor rights in addition to the Rapid Response enforcement mechanism, which was not present with NAALC.[1443] This model has since expanded to other regional trade agreements in the EU, Chile, New Zealand, Peru, and Japan.[1444]

Under the USMCA, parties can bring claims under Chapter 23's dispute settlement mechanism for failures "affecting trade or investment between the Parties"[1445] if they violate rights surrounding freedom of association, collective bargaining, forced or compulsory labor, child labor, and/or workplace or employment discrimination.[1446] Additionally, Chapter 23 also has a non-derogation provision, whereby parties agree to not weaken their labor laws in order to encourage international trade. Article 23 also encourages all parties to share resources to build out labor development capacity.[1447] The parties are further encouraged to involve "worker and employer representatives" in these cooperative discussions, "where appropriate."[1448]

Annex 31-A of the USMCA contains a narrower mandate than Chapter 23, governing the Facility-Specific Rapid Response Labor Mechanism (RRLM) for the United States and Mexico. It only applies to these two states, as Annex 31-B governs the Rapid Response Mechanism between Mexico and Canada. There is no rapid response mechanism between the United States and Canada. The stated purpose of the U.S.-Mexico RRLM is to "ensure remediation of a Denial of Rights, as defined in Article 31-A.2, for workers at a Covered Facility, not to restrict trade."[1449] The RRLM is limited in scope to only claims centering on free association and collective bargaining.

Under the RRLM, one of the parties must first submit a request to the other party to review via The Interagency Labor Committee for Monitoring and Enforcement asking

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[1440] Graciela Bensusán, 'The Transformation of the Mexican Labour Regulation Model and its link to North American Economic Integration' (2020) ILO Working Paper, Paper No. 15, 16 <https://www.ilo.org/static/english/intserv/working-papers/wp015/index.html> accessed 29 September 2023.
[1441] USMCA (*n* 17), art. 23.5.12.(1).
[1442] Ibid art. 23 *and* annex 31-A; Kuhlmann, *UN Handbook* (*n* 5) 120.
[1443] Kuhlmann, UN Handbook (*n* 5) 120.
[1444] Ibid.
[1445] USMCA (*n* 17) art. 23.3.1 fn. 5.
[1446] Ibid art. 31.3.1(a)–(d).
[1447] Ibid arts. 23.5.12.2(a)–(d).
[1448] Ibid art. 23.5.12.4.
[1449] USMCA (*n* 17) art. 31-A.1.2.

whether there is a denial of labor rights under the agreement.[1450] The parties must then attempt to remediate any issues it finds.[1451] If the U.S. and Mexico were not able to resolve the issue, then the claim-bringing party may request that the Rapid Response Labor Panel determine if there was a denial of labor rights. The remedies for denials of rights are specific to the Covered Facility and proportional to level of harm. If the facility is a repeat offender, the remedy is heightened.

C. Claims brought under Annex 31-A of the USMCA

There have been requests for review in eleven instances, each time brought by the United States, under the RRLM: On May 12, 2021, the United States Trade Representative asked Mexico to review whether the General Motor's facility in Silao, Mexico denied workers the right of free association and collective bargaining.[1452] This was the first ever request made using the RRLM in the USMCA by any of the three parties.[1453] Through their press announcement, the United States reiterated their focus on a "worker-centered trade policy" through "stopping a race to the bottom" and "support[ing] Mexico's efforts to implement its recent labor law reforms."[1454] By July 8, 2021, the United States and Mexico announced a course of remediation,[1455] and the United States resumed liquidation from the facility just over three months after they were initially directed to be suspended.[1456]

The second case brought under Annex 31-A regarded freedom of association violations at a Mexican automotive parts factor in Matamotoros, Mexico, which was resolved August 10, 2021.[1457] The United States's brought a third claim around one year later, which was resolved on May 18, 2022.[1458] Less than a month later, on June 6, 2022, the United States requested a fourth review of a facility.[1459] By August 16, 2022, the matter had been resolved.[1460]

[1450] Ibid Annex 31-A.

[1451] *Id.*

[1452] 'Press Release: United States Seeks Mexico's Review of Alleged Worker's Rights Denial at Auto Manufacturing Facility' (*Office of the United States Trade Representative*, 12 May 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0> 29 September 2023.

[1453] Ibid.

[1454] Ibid.

[1455] 'Press Release: United States and Mexico Announce Course of Remediation for Workers' Rights Denial at Auto Manufacturing Facility in Silao' (*United States Trade Representative* 08 July 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/july/united-states-and-mexico-announce-course-remediation-workers-rights-denial-auto-manufacturing> accessed 29 September 2023.

[1456] Letter from Katherine Tai, Ambassador, United States, to Janet Yellen, Sec'y, U.S. Treasury, (12 Sept. 2021), https://ustr.gov/sites/default/files/files/Press/Releases/Letter%20to%20Secretary%20Yellen%20-%2009.21.21.pdf.

[1457] 'Press Release: United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights, (*United States Trade Representative*, 10 Aug. 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights> accessed 29 September 2023.

[1458] 'United States, USMCA Request for Review: Panasonic' ((*United States Trade Representative*, 18 May 2022), https://ustr.gov/sites/default/files/enforcement/USMCA/Panasonic%20Request%20for%20Review%20for%20Posting.pdf.

[1459] 'Press Release: United States Seeks Mexico's Review of Labor Rights Issues at Teksid Hierro Facility' (*United States Trade Representative*, 06 June 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/june/united-states-seeks-mexicos-review-labor-rights-issues-teksid-hierro-facility> accessed 29 September 2023.

[1460] 'Press Release: United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Auto Parts Facility in Frontera, Mexico' (*United States Trade Representative*, 16 Aug. 2022) <https://ustr.gov/about-

The United States requested review for the Manufacturas VU facility in Piedras Negras, State of Coahuila, Mexico twice since the RRLM has been operational. On July 21, 2022, the United States requested review and suspended liquidation for the first time,[1461] and the matter was fully resolved by September 14, 2022.[1462] As a part of the resolution, the Mexican government announced they would "conduct further inspections at the facility to monitor the situation."[1463] However, by January 30, 2022, the United States requested the facility be reviewed again because "some of the failures [they] identified previously appear[ed] to be recurring."[1464] Because the RRLM allows the parties to address concerns more than once, the United States suspended liquidations a second time[1465] and both parties announced a thorough plan of remediation on March 30, 2023.[1466] However, the suspension of liquidations is still in place and the matter has not yet been fully resolved.

Upon the resolution of another dispute on October 27, 2022, the United States Trade Representative stated "[t]hrough the USMCA, we are strengthening labor standards across North America, which creates a race to the top in trade and can help us deliver economically meaningful benefits to workers – including those that live beyond our border."[1467] The request for review was filed a month before by the AFL-CIO, United Steelworkers, and a Mexican union.[1468]

The last resolved case under Annex 31-A was a claim brought by the United States on behalf of a Mexican union.[1469] The parties resolved the matter on April 24, 2023 after a request

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us/policy-offices/press-office/press-releases/2022/august/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-auto-parts> accessed 29 September 2023.

[1461] 'United States, USMCA Request for Review: Manufacturas VU' (*United States Trade Representative*, 21 July 2022) <https://ustr.gov/sites/default/files/Manufacturas%20VU%20USMCA%20RRM%20Request%20for%20Review.pdf> accessed 29 September 2023; 'United States, USMCA Request to Suspend Liquidation: Manufacturas VU' (*United States Trade Representative*, 21 July 2022), <https://ustr.gov/sites/default/files/Manufacturas%20VU%20USMCA%20RRM%20Suspension%20of%20Liquidation%20Letter.pdf> accessed 29 September 2023.

[1462] 'Press Release: United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Manufacturas VU Automotive Components Facility in Mexico (*United States Trade Representative*, 14 Sept. 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-manufacturas-vu> accessed 29 September 2023.

[1463] Ibid.

[1464] 'Press Release: United States Invokes Rapid Response Labor Mechanism for a Second Time at Manufacturas VU (*United States Trade Representative*, 30 Jan. 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/united-states-invokes-rapid-response-labor-mechanism-second-time-manufacturas-vu> accessed 29 September 2023.

[1465] 'United States, USMCA Request to Suspend Liquidation: Manufacturas VU' (*United States Trade Representative* 30 Jan. 2023), <https://ustr.gov/sites/default/files/2023-01/VU%20II%20%20Suspension%20of%20Liquidation%20-%20for%20posting.pdf> accessed 29 September 2023.

[1466] 'United States, USMCA Course of Remediation: Manufacturas VU' (*United States Trade Representative*, 03 March 2023) <https://ustr.gov/sites/default/files/202303/Manufacturas%20VU%20Course%20of%20Remediation.pdf> accessed 29 September 2023.

[1467] 'Press Release: United States Announces Successful Resolution of a Rapid Response Mechanism Petition Regarding a Saint Gobain Facility in Mexico' (*United States Trade Representative* 27 Oct. 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/october/united-states-announces-successful-resolution-rapid-response-mechanism-petition-regarding-saint> accessed 29 September 2023.

[1468] Ibid.

[1469] 'Press Release: United States Seeks Mexico's Review of Alleged Denial of Workers' Rights at Unique Fabricating' (*Office of the United States Trade Representative*, 06 March 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-seeks-mexicos-review-alleged-denial-workers-rights-unique-fabricating> accessed 29 September 2023.

for review was submitted on March 6 of the same year.[1470] Because of the actions taken by the facility and the Government of Mexico during the review process, the United States agreed that there was no longer an "ongoing denial of rights."[1471] The last four review requests were brought in May or June of 2023 by the United States and have yet to be resolved.[1472]

D. Claims brought against the United States

There have been various complaints in the United States alleging violations of domestic collective bargaining laws, but only one case brought under the USMCA. On March 23, 2021, several trade unions and civil society organizations filed a complaint under Chapter 23 of the USMCA. The complaint alleged "gender discrimination against migrant worker women on temporary labor migration programs."[1473] This complaint was the first, and only, of its kind to be filed under the USMCA against the United States and the first labor dispute filed under the USMCA Chapter 23.[1474] The case is still ongoing, despite the quick resolution of the matters brought under Annex 31-A. On May 12, 2021, Mexican Ambassador Esteban Moctezuma sent a letter to United States Labor Secretary Martin Walsh proposing "space for cooperation under the terms established in USMCA Article 23.12 to find ways to address the non-compliance of labor laws."[1475] On June 30, 2023, Canada, the United States, and Mexico met in Mexico City pursuant to Art. 23.14 of the USMCA to discuss "effective implementation of the innovative and ambitious USMCA labor obligations and reiterated their desire to promote and ensure the protection of internationally recognized labor rights through laws and

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[1470] 'Press Release, Office of the United States Trade Representative, United States Announces Successful Resolution of a Rapid Response Mechanism Petition Regarding a Unique Fabricating Facility in Mexico' (24 April 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/april/united-states-announces-successful-resolution-rapid-response-mechanism-petition-regarding-unique> accessed 29 September 2023.

[1471] Ibid.

[1472] 'Press Release: United States Seeks Mexico's Review of Alleged Denial of Workers' Rights at Goodyear SLP' (*United States Trade Representative*, 22 May 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/may/united-states-seeks-mexicos-review-alleged-denial-workers-rights-goodyear-slp> accessed 29 September 2023; 'Press Release: United States Seeks Mexico's Review of Alleged Denial of Workers' Rights at Draxton Facility (*United States Trade Representative*, 31 May 2023) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/may/united-states-seeks-mexicos-review-alleged-denial-workers-rights-draxton-facility> accessed 29 September 2023; 'Press Release, United States Seeks Mexico's Review of Alleged Denial of Workers' Rights at Mexican Garment Facility (*United States Trade Representative*, 12 June 2023) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/united-states-seeks-mexicos-review-alleged-denial-workers-rights-mexican-garment-facility> accessed 29 September 2023; 'Press Release: United States Seeks Mexico's Review of Labor Rights Concerns at a Grupo Mexico Mine' (*United States Trade Representative*, 16 June 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/june/united-states-seeks-mexicos-review-labor-rights-concerns-grupo-mexico-mine> accessed 29 September 2023.

[1473]'Migrant worker women submit first-ever petition against U.S. under USMCA' (*Centro de los Derechos del Migrante, Inc.*) <https://cdmigrante.org/migrant-worker-women-usmca/> accessed 12 August 2023; Centro De Los Derechos Del Migrante, Inc., "Amended Petition on Labor Law Matters Arising in the United States Regarding the Failure of the US Government to Effectively Enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 USMCA" (March 23, 2021), <https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23 2021_reduced.pdf>.

[1474] Centro de los Derechos del Migrante, Inc., *Migrant worker women* (*n* 56).

[1475] 'Press Release 226: Mexico proposes cooperation on application of labor laws in certain sectors in the US under the USMCA' (*Government of Mexico*, 12 May 2021), <https://www.gob.mx/sre/prensa/mexico-proposes-opening-a-space-for-cooperation-for-the-application-of-labor-laws-in-certain-sectors-in-the-us-under-the-usmca> accessed 29 September 2023.

policies."[1476] The United States has not taken any concrete steps, however, in resolving the current dispute brought under Chapter 23.

Recently, private companies in the United States have also faced scrutiny for violating collective bargaining laws. In March 2023, the National Labor Relations Board (NLRB) ordered Starbucks to reinstate workers and provide restitution to others after it engaged in "egregious and widespread misconduct" by threatening employees, spying on them, enforcing dress codes more strictly than required, refusing to grant time off, and more.[1477] Also in March, the NLRB alleged that Activision Blizzard Inc. violated collective bargaining rights by surveilling employees during a walkout and threatening to close internal chat channels used by a union to organize its workers.[1478] The news from the United States suggests what should already be known to be true: developed countries still do not have a perfect track record when it comes to following labor laws. Even though they may historically have taken charge, and have significant capacity-building capabilities, they could take a more collaborative approach rather than a directive one to combining labor and trade.

III. Critiques of USMCA and Recommendations for Improvement

Creating a RRLM is a unique tool in addressing labor development goals, however it has only targeted Mexican labor disputes and is too narrow in scope. Furthermore, incorporating labor provisions in the main text of the USMCA is a significant step forward for labor rights in the North American RTA. Chapter 23 can be improved, however, by creating a mechanism to strengthen cooperation between all three parties so disputes brought under the Chapter can be resolved at a reasonable pace. Finally, the "review clause" incorporated into the USMCA gives the United States, Mexico, and Canada an opportunity to improve the Agreement in 2036. It is then that they can manifest the work they should start doing now to incorporate underrepresented voices, such as minority communities, women, and small- and medium-sized businesses.

A. Reformatting the Rapid Response Labor Mechanism

Labor development in Mexico can grow in many ways, and the United States and Canada can help with capacity building and partnership.[1479] Workers, unions, businesses, and the Mexican government are likely able to identify areas of growth for Mexican labor laws. After identifying these possible growth areas, the Mexican government could utilize their strong partnership with the other parties to the Agreement to further build out its legal infrastructure, engage in education outreach, and further extend their capacity to drive their own development while honoring workers' rights. Developing international labor law from the bottom up, adjusting domestic law frameworks, and utilizing regional trade agreements to influence international organizations are also useful ways to motivate mechanisms such as the

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[1476] 'Press Release: Joint Statement of the Labor Council' (*U.S. Mission to Mexico, U.S. Embassy & Consulates in Mexico*, 30 June 2023), <https://mx.usembassy.gov/joint-statement-of-the-labor-council-united-states-mexico-canada-agreement-usmca/> accessed 29 September 2023.

[1477] Dee-Ann Durbin, 'Labor judge: Starbucks violated worker rights in union fight' *AP News* (1 Mar. 2023), <https://apnews.com/article/starbucks-union-labor-law-violations-schultz-d83a3277080b491e623 b7e279f9b33ac> accessed 29 September 2023.

[1478] Daniel Wiessner, 'Activision threatened, spied on workers amid union drive, U.S. agency alleges' *Reuters* (10 April 2023), <https://www.reuters.com/technology/activision-threatened-spied-workers-amid-union-drive-us-agency-says-2023-03-31/> accessed 29 September 2023.

[1479] Kuhlmann, UN Handbook (*n* 5) 128. The UN Handbook promotes capacity building through "encourage[ing] cooperation and technical assistance to share best practices on complying with the provisions on [labor] standards and build technical capacity for work and other priorities[.]"

WTO and the ILO to take capacity-building actions as well. Expanding existing cooperation efforts could assist Mexico direct its own development, leading to its inclusivity and sustainability.

While the USMCA covers many aspects of labor law, the slow processing time of Chapter 23 makes it difficult for parties to fulfill the aspirational cooperation provisions within the agreement. Furthermore, Mexico is unable to bring claims against the United States under Chapter 23 unless the denial of rights occurred at a covered facility was also "under an enforced order of the National Labor Relations Board [NLRB]."[1480] This provision limits Mexico from bringing claims against the United States due to its narrow scope.

Generally, Annex 31-A limits the ability of the Rapid Response Labor Mechanism to only resolve violations of rights around collective bargaining and free association. While these two labor rights are essential to ensuring the dignity of the worker and strengthening human rights, the Rapid Response Labor Mechanism could be expanded. Expanding the Mechanism to cover more labor rights violations would increase workers' access to resolutions to violations of their human rights on a regional and multilateral scale.[1481] For example, if Annex 31-A was expanded to cover employment discrimination and the NLRB limitation was eliminated, the claim brought against the United States in March 2021 may be resolved. The process would have to be reformed, however, for the existing mechanism does not support this: experts on the panel would have to be re-selected or specifically trained, investigation into employment discrimination could take a different path than for other claims, and stakeholders may have different preferences regarding how to proceed. This expansion could possible if driven by both Mexico and the United States, with Canada's support.

B. Addressing historical North-South power dynamics

It is important to acknowledge the one-way flow of claims made through the Rapid Response Labor Mechanism: all the claims are made through the United States to Mexico. Annex 31-A is essentially another enforcement tool, reinforcing the historical power dynamic between North-South countries. Pausing liquidation of assets is a deterrence method for unwanted conduct. In conjunction with Annex 31-A, capacity building mechanisms or a more cooperative approach, such as the approach commonly taken by the European Union,[1482] could even the power dynamic between the two parties. Most European Union RTAs follow a non-binding, recommendation-based approach which refers disputes to a panel of experts.[1483] The experts would examine the dispute and then recommend a resolution, which the parties would take into consideration and could follow if they choose. This "engagement and consultation" process is different from the typical approach the United States takes, which utilizes binding dispute resolution systems and sanctions to enforce RTA terms.[1484] Creating a mechanism that expedites the resolution of a variety of labor claims across borders in a cooperative manner is one way to build more trust in these regional development schemes, which historically give more voice to developing countries.

All parties could also ask underrepresented individuals, groups, workers, unions, companies, and their legislative and governmental bodies to re-evaluate the development and implementation of their labor laws so they can be not only more sustainable but more

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[1480] USMCA (*n* 17) art. 31-A.2 fn. 2.
[1481] Kuhlmann, UN Handbook (*n* 17) 157.
[1482] Ibid. 122.
[1483] Ibid.
[1484] Ibid. 122–23.

inclusive. For example, creating spaces to include women, who have been historically underrepresented in business and trade,[1485] may help to reduce widespread discrimination against women and other minority communities in more areas of life. Including indigenous voices addresses some aspects of exclusion, colonization, and disparate power dynamics.[1486] While inviting these groups to the table is an important step, it is also important to note that states should be careful to consider their input and incorporate it in their decision-making processes. Building rules from the bottom-up means filtering many voices into one unified approach, however special care should be taken to consider groups that have been historically underrepresented in the legislative process, who may have less political power.

Importantly, micro-, small- and medium-sized-enterprises (MSMEs) that could benefit from international trade across the United States and Mexico should also be part of the regional discussions regarding labor development. These businesses may be adversely affected by significant changes in labor laws or may benefit from education on prospective changes before and after they take place. Additionally, MSMEs may also benefit from staged implementation measures to give them time to make internal changes consistent with new laws.

C. Engaging in a bottom-up approach

The USMCA already has existing framework that makes implementing a bottom-up approach achievable: Article 23.5 of the Agreement encourages "provisions committing Parties to enforce their domestic [labor] laws and (ii) provisions prohibiting parties from rolling back their existing [labor] protections (non-derogation) provisions."[1487] Mexico has already committed to this approach, changed its labor laws, and actively pursues change-making in its labor schemes. Through the RRLM, it is evident that Mexico is implementing changes to strengthen labor law protections which fall in line with ILO standards and the USMCA terms. Additionally, Mexico can utilize 23.5 to also call upon the United States to

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[1485] The ILO recognizes widespread discrimination against women in the workplace in provisions throughout their many Conventions, such as ILO Conv. 100 Equal Remuneration, ILO Conv. 111 Discrimination (Employment and Occupation), ILO Conv. 156 Workers with Family Responsibilities, ILO Conv. 183 Maternity Protection. Kuhlmann Lecture (*n* 15). Furthermore, The United Nations targets eliminating discrimination against women through the UN Sustainable Development Goals. UN Sustainable "Goal 5.a [states:] Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.") Kuhlmann Lecture (*n* 15); 'Goal 5: Gender Equality' (*Sustainable Development Goals*) <https://www.un.org/sustainabledevelopment/gender-equality> accessed 14 August 2023.

[1486] More can be done to include indigenous voices in local, regional, and multilateral discussions. Currently, the UNSDG refers to indigenous people directly six times – four regarding education and two regarding reducing hunger. 'Indigenous Peoples and the 2030 Agenda' (*United Nations Department of Economic and Social Affairs: Indigenous Peoples*) <https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda/the-sustainable-development-goals-sdgs-and-indigenous.html> accessed 14 August 2023. International law does not have a common definition of "indigenous peoples." ILO Convention No. 169 "Indigenous and Tribal Peoples Convention" sets out a guiding principle of self-identification, but it is not adopted by the United Nations. ILO Conv. No. 169, art. 1(a). The Convention also outlines a wide range of indigenous cultural and economic rights, though this Convention has only been ratified by 24 countries and is not ratified by the United States. Including indigenous voices at the regional decision-making level through RTAs is a significant step forward to creating more space for their voices, respecting the importance of indigenous rights, and addressing the history of colonization that indigenous communities survive.

[1487] Kuhlmann, UN Handbook (*n* 5) at 133 ("Many RTAs (77 out of 113 with LPs) contain an obligation for the parties to effectively enforce their domestic labour laws and promote private compliance with [labor] laws through government action. Such action can include conducting [labor] inspections, collecting fines, and requiring large businesses to file compliance plans, among other actions.")(internal citations omitted).

uphold their own labor provisions, providing that the violation of the domestic laws affects trade or investment between the parties.

In the labor sector generally, some national governments and regional blocs engage in tripartism to ensure active participation of employers, employees, and governments. Also called social dialogue or social partnership model, the purpose of this model is to involve both "economic and social stakeholders" in the making of labor legislation.[1488] The European Union codified the process in Articles 151-156 of the Treaty on the Functioning of the European Union, which "enables the social partners (representatives of management and [labor]) to contribute actively, including through agreements, to designing European social and employment policy."[1489] The European Parliament must consult social partners before taking any social policy action, who then have nine months to negotiate the policy and take one of three actions (conclude the agreement and ask for a proposed implementation; conclude and implement the agreement themselves; fail to reach a conclusion and the Commission will continue working).[1490] A version of this model was recently adopted by the United States' California fast food industry, which will now host a council of fast food industry representatives and employee representatives to decide fast food wages and industry standards in California.[1491] The bill, AB257, will set minimum wage for fast food workers employed at covered businesses at $22 per hour and give employees more of a voice through the state council.[1492] The USMCA can look to both of these models for inspiration on how to intentionally include more underrepresented voices in its next iteration of the USMCA and Annex 31-A.

IV. Conclusion

The USMCA built off the unprecedented action of NAFTA, facilitating the strong regional ties between the three North American states: the parties integrated labor rights into the main body of the agreement and added the RRLM to quickly resolve claims regarding violations of collective bargaining and freedom of association rights in covered facilities. The agreement further called for enforcement of domestic laws and cooperation between the parties to develop stronger labor laws. Though these are all positive steps forward, more can be done to encourage inclusive, sustainable development in the labor sector through regional trade agreements.

First, the USMCA could be expanded in scope when the Agreement is open for review in 2036. Although RTAs are not usually open for revision after a certain period, the parties included in the Agreement that the USMCA "shall terminate 16 years after the date of its entry into force, unless each Party confirms it wishes to continue this Agreement for a new 16-year term."[1493] This "review clause" offers the parties a unique opportunity to evaluate the effectiveness of the USMCA and incorporate changes, such as expanding the scope of the labor provisions and including more cooperative measures. Chapter 23 covers a wider range of labor rights than Annex 31-A; however, it moves much slower, so much slower that the

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[1488] Monika Makay, 'Social Dialogue' (*The European Parliament*, March 2023), <https://www.europarl.europa.eu/factsheets/en/sheet/58/social-dialogue> accessed 29 September 2023.
[1489] Ibid.
[1490] Ibid.
[1491] Errol Schweizer, 'Why AB257 Could Be Life Changing for California's Fast Food Workers' *Forbes*, (05 Sept. 2022) <https://www.forbes.com/sites/errolschweizer/2022/09/05/why-ab257-could-be-life-changing-for-californias-fast-food-workers/?sh=7462877b3fde> accessed 29 September 2023.
[1492] Ibid.
[1493] USMCA (*n* 17) art. 34.7.1.

one claim brought under it is yet to be resolved, while eleven claims brought under the RRLM have been addressed. The RRLM could be expanded in scope to functionally cover the United States and Canada and not just Mexico and cover a wider range of issues. When individuals can practically bring labor claims under these regional mechanisms, their labor rights are better recognized as human rights and honored in a multilateral sphere. If this trend continues, labor laws may strengthen internationally.

Second, the United States, Canada, and Mexico could also expand beyond the USMCA's existing framework to develop labor laws. The states could deepen their commitment to inclusivity by intentionally inviting and incorporating underrepresented voices into their decision-making processes. They could also engage in capacity-building measures, led by the expressed needs of the recipient state, and supported by the other parties. Working with domestic laws and on-the-ground partnerships and building upwards through regional mechanisms will hopefully lead to sustainable labor development and strengthened partnerships between the USMCA parties.

Finally, the overall trend of turning to regional trade agreements as a tool to develop international law is growing, so it is a strategic decision for states to take advantage of this trend to develop areas of the law such as labor law in sustainable and inclusive ways. The USMCA parties should continue to work together to sustainably recognize labor rights as human rights and push forward bottom-up approaches to regional dealmaking, especially to build an effective framework for USMCA's re-evaluation in 2036.

CHAPTER 18: ADDRESSING FORCED LABOR IN INTERNATIONAL TRADE WITH A COOPERATIVE AND COMPREHENSIVE APPROACH

YANTING CHEN*

Abstract

In recent years, the United States has imposed unilateral economic sanctions against China to address the forced labor issues in Xinjiang. This paper criticizes this unilateral approach's effectiveness and impact on other aspects of trade and development, such as environmental protection and small- and medium-sized enterprises (SMEs). Instead, it proposes a cooperative and comprehensive approach that accommodates the interests of vulnerable communities and different aspects of development. Specifically, it includes bilateral or multilateral treaties between sovereign governments based on reciprocity, targeted enforcement, and constant review, as well as domestic policies that create incentives for the private sector through supply chain due diligence legislation and certification programs. In addition, it recommends that vulnerable communities' voices be represented in the negotiation and legislation process.

I. Introduction

Forced labor, defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,"[1494] was one of the areas in which modern international human rights law made its earliest progress under the background of the abolishment of slavery, labor movement, and the establishment of the International Labour Organization (ILO) in the nineteenth and the early twentieth century.[1495] As early as 1930, the ILO adopted the Forced Labour Convention, which laid the foundation for the prohibition against forced labor on the international law level.[1496]

In recent years, however, forced labor has again become the center of attention in international society. Since 2017, international civil rights groups have been alleging that the Uyghurs, an ethnic minority group in China, are arbitrarily detained by the Chinese government in "re-education camps" in Xinjiang Uyghur Autonomous Region (XUAR or Xinjiang) and subject to torture and forced labor.[1497] These allegations are further confirmed by an assessment by the UN Human Rights Office.[1498]

What makes the forced labor issue in Xinjiang relevant to international trade law is Xinjiang's critical role in the global supply chain. Xinjiang produces many critical agricultural products and raw materials for the global supply chain. For example, Xinjiang produces more

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1494 Forced Labour Convention art. 2, *adopted* June 28, 1930, 39 U.N.T.S. 55.

1495 *See* Frans Viljoen, *International Human Rights Law: A Short History*, *UN Chronicle*, UNITED NATIONS, https://www.un.org/en/chronicle/article/international-human-rights-law-short-history (last visited Mar. 5, 2023); Lee Swepston, Forced and Compulsory Labour in International Human Rights Law 6 (Feb. 5, 2015) (working paper), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_342966.pdf.

1496 *See supra* note 1, pmbl.

1497 *See* UN Hum. Rts. Off., OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, ¶ 1 (Aug. 31, 2022), https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf.

1498 *See id.* ¶ 146.

than 20% of the world's cotton as well as 25% of tomatoes.[1499] In addition, Xinjiang produces 45% of the world's polysilicon, the primary raw material of solar panels.[1500] As a result, the products of many industries, even if they are not directly manufactured in Xinjiang camps, may still be tainted by forced labor from upstream suppliers.

There is some hope that the ILO may take action against China, although it does not have strong enforcement capability.[1501] Another possible route is through international trade law and trade policies.[1502] The U.S. government, for instance, has imposed economic sanctions against China for forced labor in recent years. In 2021, the U.S. Customs and Border Protection (CBP) issued withhold release orders on cotton, tomatoes, and silica-based products from Xinjiang under Section 307 of the Tariff Act of 1930, which prohibits the importation of products made with forced labor.[1503] Subsequently, the U.S. Congress further strengthened the sanctions by passing the Uyghur Forced Labor Prevention Act (UFLPA), which established a rebuttable presumption that products "mined, produced, or manufactured wholly or in part" from Xinjiang are made with forced labor and shifted the burden of proof to the importers.[1504]

On the one hand, these trade measures seem to be harsh and efficient. They effectively prevent products manufactured in Xinjiang from entering the U.S. market without stringent examination of their compliance with labor standards. Furthermore, their implementation and enforcement do not require negotiation and consultation with other countries, which is one of the reasons why many other international legal frameworks lack teeth.

On the other hand, however, these measures are less effective than they appear. Despite the tremendous costs these measures bring to multinational corporations doing business in China, which are facing the burden of supply chain due diligence as well as the boycott by infuriated Chinese consumers,[1505] there is no sign that China has fundamentally changed its policies in Xinjiang.[1506] Two years after the imposition of these sanctions under the UFPLA, the UN and many western countries are still trying to urge China to take action.[1507] This casts doubt on whether the harshness of trade policies guarantees their effectiveness. Consequently, many other jurisdictions, such as the EU, hesitate to follow suit to address human rights concerns in international trade by imposing unilateral economic sanctions.[1508]

This paper aims to use the U.S. economic sanctions for forced labor in XUAR as an example to analyze whether there are more effective solutions to tackle human rights issues in

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[1499] Siqi Ji, *Why Has the US Ban on Xinjiang's Tomato Exports Had Such Limited Effect?*, S. CHINA MORNING POST (Oct. 9, 2022, 8:00 AM), https://www.scmp.com/economy/article/3195195/why-has-us-ban-xinjiangs-tomato-exports-had-such-limited-effect.

[1500] *China Uses Uyghur Forced Labour to Make Solar Panels, Says Report*, BBC (May 14, 2021), https://www.bbc.com/news/world-asia-china-57124636.

[1501] *See* Andrew Samet, *Will the ILO Defend China's Uyghurs?*, DIPLOMAT. (Aug. 18, 2020), https://thediplomat.com/2020/08/will-the-ilo-defend-chinas-uyghurs/.

[1502] *See* Dennis Shea, *The WTO Can Help Shine a Spotlight on Forced-Labor Practices in Xinjiang's Cotton Industry*, CSIS (Apr. 27, 2021), https://www.csis.org/analysis/wto-can-help-shine-spotlight-forced-labor-practices-xinjiangs-cotton-industry.

[1503] *See United States Pressures China Over Human Rights Abuses*, 116(2) AM. J. INT'L L. 433, 435.

[1504] *Id.*

[1505] *See H&M: Fashion Giant Sees China Sales Slump After Xinjiang Boycott*, BBC (July 2, 2021), https://www.bbc.com/news/business-57691415.

[1506] *See United States Pressures China Over Human Rights Abuses*, *supra* note 10, at 438.

[1507] See *UN Wants Action from China on Human Rights Concerns*, RFI (Mar. 7, 2023), https://www.rfi.fr/en/international-news/20230307-un-wants-action-from-china-on-human-rights-concerns.

[1508] *See* Sarah Anne Aarup, *Ban on Uyghur Imports Becomes EU's Hot Potato*, POLITICO (Oct. 15, 2021, 2:38 PM), https://www.politico.eu/article/uyghur-china-europe-ban-imports-europe-trade-hot-potato-forced-labor/.

international trade, which may not necessarily be limited to labor matters. The first part of the paper will explore the link between international trade and development, analyzing whether unilateral economic sanctions fit within the rationale of trade and development. The second part of the paper introduces a comprehensive and cooperative approach and explores the specific mechanisms that could put such an approach into practice.

II. Use Trade as a Weapon but in a Comprehensive and Cooperative Way

A. Development in international trade

Before diving deeper into how to address forced labor through international trade law, it may be helpful to ask, "Why?" The current international trade law system, established with the goal of combating protectionism and liberalizing global trade, is quite limited in scope when it comes to development and essentially leaves the handling of trade-related social issues to domestic policymakers.[1509] However, in recent years, the international trade law's emphasis on liberalization has been questioned, as many benefits that are expected from international trade, such as "raising standards of living" and "full employment,"[1510] have not been equally enjoyed by all economies and stakeholders. Domestic laws have not always been sufficient to address all of the externalities brought by international trade, such as rising economic inequalities.[1511] Also, while areas like environmental protection, labor, and human rights are governed by other bodies of international law, such as ILO Conventions, they may lack teeth compared to international trade law, which has stronger enforcement mechanisms.[1512] Therefore, more and more regional trade agreements (RTAs) are incorporating development-related languages.[1513] At the international level, there are also some breakthroughs under the Sustainable Development Goals (SDGs). For instance, the WTO Agreement on Fisheries Subsidies was adopted in 2022 to meet Goal 14 (Conserve and sustainably use the oceans, seas and marine resources for sustainable development) of the SDGs. [1514]

Therefore, the prohibition on forced labor is encompassed by many trade treaties because of its importance for the welfare of the workers. On the one hand, deprivation of one's freedom of choice of work contradicts the idea that international trade should improve the living conditions of all participants, including those who provide the essential labor elements for producing goods. On the other hand, forced labor usually comes with below-market labor costs and may viciously drive down workers' salaries in other countries.

At the same time, those developmental concerns implicate that policies regarding forced labor should be made under the framework of trade and development. The rationale behind incorporating development into trade comes from the tension between the interests of winners and losers under the free trading system and between economic development and social welfare. Therefore, it requires a framework in which all stakeholders can deliver their concerns, and conflicting values can be balanced. In other words, the approach to trade and development should be cooperative and comprehensive. And that is precisely why the

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[1509] *See* Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1, 3.

[1510] General Agreement on Tariffs and Trade pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[1511] *See, e.g.*, Shaffer *supra* note 16, at 2-4.

[1512] *See* Andrew Samet, *Will the ILO Defend China's Uyghurs?*, DIPLOMAT. (Aug. 18, 2020), https://thediplomat.com/2020/08/will-the-ilo-defend-chinas-uyghurs/.

[1513] *See e.g.*, United States-Mexico-Canada Agreement pmbl., Nov. 30, 2018, T.I.A.S. No. 19-1015 [hereinafter USMCA].

[1514] *See Surge of Formal Acceptances of Agreement on Fisheries Subsidies — Entry into Force Closer*, WORLD TRADE ORG. (Oct. 23, 2023), https://www.wto.org/english/news_e/news23_e/fish_23oct23_e.htm.

unilateral approach taken by the U.S. may be incompatible with the nature of trade and development.

B. Unilateral v. Comprehensive and Cooperative

1. "Anti-social dumping" should not be the ultimate goal

A problem with the unilateral approach is its rationale of "anti-social dumping." As mentioned above, forced labor may indirectly harm workers in importing countries. Thus, some view this human rights-related issue not very differently from dumping, which also hurts domestic industries because of the importation of products produced at below costs.[1515] Under this rationale, the solution to forced labor problems in trade should be based on measures that reduce the importation of those products, such as tariffs or economic sanctions.

UFLPA and Section 307 essentially embody this protectionist "anti-social dumping" rationale. Passed at the peak of protectionism after the Great Depression, Section 307 was not initially designed to improve labor conditions abroad.[1516] Rather, it primarily aimed to "protect domestic workers and producers from unfair competition," and the concern of human rights violations abroad was subordinate to the interests of domestic industries.[1517]

Therefore, the economic sanctions imposed by the U.S. are incapable of addressing the human rights conditions in Xinjiang for several reasons.

First, they were not designed with the purpose of fundamentally improving work conditions in other countries. For instance, economic sanctions under UFLPA do not require any commitment from the Chinese government, responsible for the situation in Xinjiang, to make any improvement through domestic law as it does not contain any measure to engage with the Chinese government directly.

Second, the economic sanctions may induce Chinese policymakers to make changes if they incur a significant economic loss. However, they may not have a significant impact unless similar sanctions are imposed by other countries. Even if the U.S. can reach a consensus with other countries, China may still be able to absorb the impact of the sanctions, given the size of its population and economy. And it is unclear how much economic loss the Chinese government is willing to take in exchange for "social stability" and "long-term peace."[1518] The sanctions' lack of direct impact may account for the sluggish improvement of the situation in Xinjiang.

Third, unilateral economic sanctions may backfire by increasing political tensions and making lasting change more difficult. In the face of economic sanctions, both the Chinese government and the Chinese people, who could have played an important role in alleviating the crisis, reacted in the opposite ways. For example, the Chinese government adopted a defensive attitude and imposed retaliatory sanctions against the United States.[1519] Meanwhile, driven by nationalistic sentiment, Chinese consumers started an initiative to support the

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[1515] 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 215, 219 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

[1516] *See* Desiree LeClercq, *The Disparate Treatment of Rights in Trade*, 90 FORDHAM L. REV. 1, 17 (2021).

[1517] Sandra L. Bell, *The US Prohibition on Imports Made with Forced Labour: The New Law Is a 'Force' to Be Reckoned With*, 11 GLOB. TRADE & CUSTOMS J. 580, 581 (2016).

[1518] Jude Blanchette, *Xi Jinping's Vision for Xinjiang*, CSIS (Sept. 30, 2020), https://www.csis.org/analysis/xi-jinpings-vision-xinjiang.

[1519] *See* China imposes retaliatory sanctions against US over Xinjiang, ALJAZEERA (Dec. 21, 2021), https://www.aljazeera.com/economy/2021/12/21/china-sanctions-four-us-officials-over-xinjiang.

products made of Xinjiang cotton and boycott multinational corporations that promised not to source from Xinjiang.[1520]

Fourth, and even worse than the above-mentioned reasons, it is unclear whether economic sanctions can effectively prevent products made by forced labor from entering the U.S. market. For instance, some suppliers may "launder" cotton through a third country.[1521] Other manufacturers, though not engaging in laundering, may avoid the publicity of their supply chains.[1522] Therefore, it is unclear how the CBP can regulate the sanctioned products given their lack of traceability and the complexity of the supply chain.[1523]

2. One's meat is another's poison

Another problem with the U.S. unilateral approach is its adverse effects on other developmental goals. Apart from human rights and labor, environmental protection, gender equality, SMEs, and food security are also critical developmental concerns in today's international trade.[1524] Unilateral economic sanctions, on the contrary, are usually designed for a particular reason and may negatively impact other aspects of trade and development. The disruption of the solar panel industry as well as the burden on SMEs caused by Xinjiang-related economic sanctions, are good examples of the negative impacts of this unbalanced approach. The sanctions have caused a disruption to the solar panel industry that might stifle the transition to use of renewable energy, which fits within Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) of the SDGs.[1525] As mentioned, approximately half of the world's polysilicon comes from Xinjiang. In addition, China makes almost all of the world's silicon wafers, a component of solar panels.[1526] According to some analysts, it is possible that "every single [solar] module that enters the U.S. market is potentially affected."[1527] Even if manufacturers may ultimately prove that their products are not associated with forced labor, the due diligence process can be pretty challenging and burdensome.[1528]

Another group of stakeholders whom the sanctions may negatively impact is the SMEs. It has been recognized that SMEs are essential for innovation and economic equality. However, they often do not have access to information and financial resources as bigger corporations do. The complexity of supply chain leads many corporations to use high-end

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[1520] *See Nike, H&M face China fury over Xinjiang cotton 'concerns'*, BBC (Mar. 25, 2021), https://www.bbc.com/news/world-asia-china-56519411.

[1521] *See* LAURA T. MURPHY, LAUNDERING COTTON: HOW XINJIANG COTTON IS OBSCURED IN INTERNATIONAL SUPPLY CHAINS (2021), https://www.shu.ac.uk/-/media/home/research/helena-kennedy-centre/projects/laundering-cotton-annexes/laundering-cotton.pdf.

[1522] *See* Michael Copley, *Solar Market Braces for New US Trade Restriction on China*, S&P GLOB. MKT. INTEL. (June 16, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/solar-market-braces-for-new-us-trade-restriction-on-china-70786972.

[1523] *See* Maliha Shoaib, *Wilful Ignorance or Lack of Enforcement? Chinese Suppliers Unaware of US Xinjiang Cotton Ban*, VOGUE BUS. (July 7, 2022), https://www.voguebusiness.com/fashion/wilful-ignorance-or-lack-of-enforcement-chinese-suppliers-unaware-of-us-xinjiang-cotton-ban.

[1524] *See* KATRIN KUHLMANN, HANDBOOK ON PROVISIONS AND OPTIONS FOR INCLUSIVE AND SUSTAINABLE DEVELOPMENT IN TRADE AGREEMENTS (2023).

[1525] *See Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All*, UNITED NATIONS, https://sdgs.un.org/goals/goal7 (last visited May 10, 2023).

[1526] Michael Copley, *Solar-panel Supplier's Links to Alleged Abuses in China Imperil US Climate Goal*, S&P GLOB. MKT. INTEL. (July 26, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/solar-panel-supplier-s-links-to-alleged-abuses-in-china-imperil-us-climate-goal-65519164.

[1527] *Id.*

[1528] *Id.*

technology, such as DNA testing, to determine the origin of raw materials.[1529] Also, the relationship with upstream suppliers is crucial for the smoothness of supply due diligence.[1530] SMEs, however, may not have the technological ability to examine the source of their materials. Nor do they have the same leverage as multinational corporations to require assistance from their suppliers in due diligence.[1531] And unlike FTAs or RTAs, economic sanctions usually do not contain special treatment or capacity-building programs for SMEs. Smaller manufacturers are largely unaware of the existence of such sanctions.[1532] Consequently, both Chinese and U.S. SMEs may be disadvantaged by the high threshold of sanctions compliance.

III. Specific Mechanisms

The problems concerning the U.S. unilateral approach center around one issue: participation. First, there is no participation by the country targeted by the sanctions. And the target country's lack of commitment largely limits the sanctions' effects on its policies. Second, there is no participation by the stakeholders whose interests may be indirectly affected by the sanctions. And the lack of holistic consideration of different interests may sacrifice one developmental goal for another. In contrast, in recent years, many countries have adopted a more cooperative and comprehensive approach to facilitate the conversation between governments and the participation of stakeholders in their international treaties or domestic legislation.[1533] This cooperative and comprehensive approach may be helpful to address the forced labor issues.

A. Intergovernmental regional and bilateral mechanisms

Unlike unilateral mechanisms, regional or bilateral mechanisms require agreement by all parties involved. Though the negotiation process may result in compromise, it makes the parties committed to obligations in the treaties while preserving their policy space, making many developing countries more willing to enforce their duties.[1534] At the same time, as discussed above, it is common for regional and bilateral mechanisms to cover multiple policy goals, allowing them to take a more balanced approach between potentially conflicting developmental values. It should be noted that regional or bilateral mechanisms are not necessarily "soft." For example, many treaties initiated by the United States contain provisions on emphasize dispute resolution and enforcement.[1535] The idea of regional or bilateral mechanisms is that the parties should agree beforehand on the enforcement mechanisms and penalties if they fail to meet certain obligations.

1. WTO exceptions and dispute resolution mechanism

[1529] *See* Shoaib, *supra* note 30.
[1530] *See id.*
[1531] *See* ORG. FOR ECON. COOP. & DEV., INTRODUCTORY PAPER ON SMES AND RESPONSIBLE BUSINESS CONDUCT IN THE GARMENT AND FOOTWEAR SECTOR: SURVEY RESULTS AND KEY CONSIDERATIONS 6 (2021), http://mneguidelines.oecd.org/Introductory-paper-on-smes-and-responsible-business-conduct-in-the-garment-and-footwear-sector.pdf; *see also* Lise Smit et al., *Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard*, 25 INT'L J. HUM. RTS. 945, 955 (2021).
[1532] *See* Shoaib, *supra* note 30.
[1533] *See* KUHLMANN, *supra note* 31.
[1534] *See* Katrin Kuhlmann & Amrita Bahri, *Gender Mainstreaming in Trade Agreements: "A Potemkin Facade"?*, *in* WTO WORLD TRADE CONGRESS ON GENDER COMPILATION (forthcoming) (manuscript at 17-18) (on file with authors).
[1535] *See* KUHLMANN, *supra note* 31, at 26.

The WTO framework may provide some starting points for developmental obligations under international trade law, but it also comes with significant shortcomings. As discussed above, the WTO regime centers around the elimination of trade barriers and largely leaves other social issues to domestic policymakers.[1536] The General Agreement on Tariffs and Trade (GATT) does not contain much language within the context of development-related issues other than the general exceptions in Article XX. The "prison labour" exception in Article XX is too narrow to cover all kinds of human rights abuses related to labor, and while the "public morals" exception of Article XX may provide more possibilities, its scope is also questionable. It would also likely be much more difficult for WTO members to reach a consensus to add human rights or forced labor clauses than it would be to incorporate these issues into FTAs or RTAs. In addition, even if WTO members agreed to add a forced labor exception, it could only be used as a defense for violating other provisions instead of creating an affirmative obligation for the members.[1537] Although adding such an exception would require agreement among the members and the dispute resolution system of the WTO provides a platform for dispute resolution between members, it still does not fundamentally address its weak impact on the target countries' policies and the detriment to other stakeholders. Therefore, the WTO regime may not provide the optimum solution for forced labor issues in international trade.

2. FTAs and RTAs

When compared to multilateral possibilities, FTAs and RTAs may be more promising options. These agreements do not require a consensus among 164 countries in order to make innovative reforms to their trade policies. As a result, in recent years, more and more countries have been resorting to FTAs or RTAs to experiment with their endeavors in trade and development.[1538] Drawing on the success and failure of existing agreements, there are several specific mechanisms that should be incorporated into FTAs or RTAs that aim to address forced labor issues, including reciprocity, targeted enforcement, and assessment and review.

a) Reciprocity

Reciprocity means the parties should undertake duties to the same extent if not exempted for lack of capacity. Although reciprocity is a well-established principle under international trade law, it is not uncommon for trade treaties to hold the parties to different standards. Sometimes this stems from special and differential treatment for countries with limited resources,[1539] but this is not always the case. For example, under the United States-Mexico-Canada Agreement (USMCA), while Mexico is subject to a special enforcement mechanism for issues of collective bargaining and freedom of association, the Rapid Response Mechanism, its application to the U.S. is limited.[1540] Specifically, while a claim can be brought against a Mexican facility when it is necessary to fulfill Mexico's obligations under the USMCA, a claim

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[1536] *See, e.g.*, Shaffer *supra* note 16, at 3.
[1537] *See* GATT, *supra* note 17, Art. XX.
[1538] *See* KUHLMANN, *supra note* 31.
[1539] See Vineet Hegde & Jan Wouters, *Special and Differential Treatment under the World Trade Organization: A Legal Typology* (LEUVEN CTR. FOR GLOB. GOVERNANCE STUD., Working Paper No. 227, 2020), https://www.sielnet.org/wp-content/uploads/2021/04/WP227-Special-and-Differential-Treatment-WTO-Legal-Typology-Hegde-Wouters.pdf.
[1540] *See* USMCA annex 31-A. note 2, Nov. 30, 2018, T.I.A.S. No. 19-1015.

can be brought against a U.S. facility only when the facility is "covered by a National Labor Relations Board enforced order."[1541]

The lack of reciprocity may cause some problems. First, it may create doubt as to whether an agreement actually serves a protectionist purpose, which is why many developing countries are skeptical of incorporating human rights and environmental issues in trade agreements.[1542] Though developed countries presumably have higher labor standards, they are not flawless, as manifested by the migrant workers' case brought against the U.S. under the USMCA.[1543] A stringent and consistently applied standard would be beneficial for workers on both sides if the purpose of the agreement is to improve labor conditions. Second, unequal treatment also discourages the privileged party from fully considering whether obligations are overly burdensome for the other parties since it is not similarly affected by the commitments. In light of these problems, reciprocity is an important consideration in the context of labor standards and should be reflected consistently throughout an agreement.

b) Targeted enforcement

A problem with the UFLPA is that it expands its sanctions rather than making them more targeted. Before the UFLPA, there were several sanctions targeted at specific entities and products in XUAR.[1544] The UFLPA, in contrast, applies to all entities and all products from Xinjiang.[1545] Although the escalation may cover the entities involved in forced labor that escaped previous sanctions, it will affect many innocent players. It could even be counterproductive if SMEs owned by communities suffering from the forced labor system face the same risk of losing business due to the hefty due diligence burden as the entities exploiting those communities.

But how should a targeted enforcement system be established? Of course, it would be ideal if the governments could precisely identify entities or government officials associated with forced labor programs and impose sanctions accordingly. However, considering the complexity of the supply chain, it is doubtful whether governments could meet this expectation. A possible solution is a worker-initiated dispute resolution system resembling the Rapid Response Mechanism under the USMCA.[1546] It would allow workers to report forced labor issues in the system, and the other parties could take action against the relevant facilities in a relatively short time. It might complement the efforts by the government to develop a list of sanctioned entities.

However, forced labor can be highly politically sensitive. Workers under a forced labor system are not likely to be allowed to communicate with the outside freely. Even if they can, they may not have the resources to access legal services or may stay silent in fear of retaliation.[1547] Again, cooperation with the parties, as well as the local community, is vital. First, it is important to apply any dispute resolution system reciprocally. The targeted country may

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[1541] *USMCA's Rapid-Response Labor Mechanism*, HOGAN LOVELLS (Feb. 7, 2020), https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_02_07_usmca_rapid_response_labor_mechanism.pdf.

[1542] *See* Kuhlmann & Bahri, *supra* note 41 (manuscript at 17-18).

[1543] *See Migrant Worker Women Submit First-ever Petition Against the U.S. Under the USMCA*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., https://cdmigrante.org/migrant-worker-women-usmca/ (last visited May 9, 2023).

[1544] *See FACT SHEET: New U.S. Government Actions on Forced Labor in Xinjiang*, WHITE HOUSE (June 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/.

[1545] *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-67, § 3(1), 135 Stat. 1598 (2021).

[1546] *See* USMCA, *supra* note 47, annex 31-A.

[1547] *See, e.g.*, Cassandra Waters, *Egregious Worker Rights Violations Cause Thailand to Lose Trade Benefits*, AFL-CIO (Oct. 28, 2019), https://aflcio.org/2019/10/28/egregious-worker-rights-violations-cause-thailand-lose-trade-benefits.

be less defensive if it also has the right to oversee the labor conditions of other parties. Second, if resources permit, the parties may establish an investigatory committee consisting of government officials and nonprofits from all parties rather than letting workers directly report to the government of another country to neutralize the political effects. Third, the parties should set up hotlines in local languages to give workers easy and confidential access to the system. For example, the USMCA has a web-based hotline to receive confidential information on labor issues, available in English, Spanish, and French.[1548] The UN Guiding Principles on Business and Human Rights (UNGPs) further recommends establishing a grievance mechanism on the operational level.[1549] In addition, programs should be set up to educate unimpacted workers about their rights and available legal resources. Still, such a deep level of engagement with local legal services and the education system is premised on mutual trust or at least willingness to cooperate between the parties.

c) Constant assessment, dialogue, and review

Although a robust enforcement system is necessary, it is also valuable to have a channel to exchange information and concerns and to incentivize dialogue. The lack of transparency is a problem with the forced labor issue in Xinjiang.[1550] Therefore, an institutionalized platform of dialogue is desirable.

Specifically, a dynamic system of assessment, review, and probably revision should be established. For example, the parties will periodically report to a neutral institution consisting of representatives from all parties. It will determine whether existing obligations are appropriate to tackle the labor issues and whether any amendment is necessary. Such a dynamic system would allow the agreement to reflect the latest situations, and the flexibility may incentivize countries to change their behavior correspondingly. If the parties can be subject to lower obligations when the labor conditions improve, and vice versa, they may be more willing to make efforts in the positive direction and publish relevant information.

In addition, the representatives at the newly established institution should not only include government representatives but, ideally, also representatives from nonprofit organizations and local communities. Though sovereign governments presumably represent the interests of their people, the interests of government officials and local communities may diverge, as the former may care more about policy space and economic growth while the latter will be more directly impacted by human rights problems and destructive policies.[1551] And giving the institution the power of review and revision may also enhance the power of nonprofits and local communities, which are underrepresented in trade negotiations and diplomacy. Apart from workers, the local community representatives may also include SMEs, women, and other vulnerable groups. It may help counterbalance the side effects of anti-forced-labor policies, such as the burden of due diligence, lost employment opportunities, and price increases in essentials.

[1548] *See U.S. Web-Based Hotline for Labor Issues in USMCA Countries*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca/hotline (last visited May 9, 2023).

[1549] *See* Lise Smit et al., *Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard*, 25 INT'L J. HUM. RTS. 945, 956 (2021).

[1550] *See* Alexandra Stevenson & Sapna Maheshwari, *Escalation of Secrecy: Global Brands Seek Clarity on Xinjiang*, N.Y. TIMES, https://www.nytimes.com/2022/05/27/business/cotton-xinjiang-forced-labor-retailers.html (May 27, 2022).

[1551] *See* Katrin Kuhlmann, *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, 2 AFR. J. INT'L ECON. L. (2021).

B. Incentives for the private sector

In addition to intergovernmental cooperation, it is important to create incentives for the private sector to bring more stakeholders to the table. Although it is formally possible to add community representatives to the treaty negotiation process or the institutionalized assessment committee discussed above, it may not reflect the wide range of stakeholders impacted by forced labor and relevant trade policies. At the same time, consumers and corporations may weigh different factors when making business or personal decisions, which may have a balancing effect on trade policies even if they do not directly participate in trade negotiations.

This section lays out a market-based mechanism, which is based on two premises: adequacy of information and flexibility. On the one hand, consumers and corporations may not be able to make informed decisions without knowing the risk of a particular product or supplier. On the other hand, consumers and companies should have some autonomy to decide what actions to take when facing conflicting choices so that a subtle balance between different interests can be achieved.

Two mechanisms can be useful for the market-based mechanism. The first mechanism is adopting supply chain due diligence regulations to establish minimum requirements for businesses with respect to the transparency of the sustainability of their supply chains, as explained below. The second mechanism is certification programs, which can create incentives for companies to comply with a higher standard if resources permit.

1. Supply chain due diligence requirements

In recent years, supply chain due diligence has become a hot topic with the ESG movement.[1552] A number of jurisdictions have promulgated supply chain due diligence acts, including Australia, France, the U.K., Germany, and Norway.[1553] On the one hand, supply chain due diligence requirements may shape the behaviors of market players. The due diligence process itself provides valuable information for the government, consumers, and other businesses, and the cost of due diligence may affect some businesses' decisions in operating in a high-risk region or cooperating with high-risk suppliers. On the other hand, an overly high standard of due diligence may create a significant burden for businesses, especially SMEs. Therefore, special attention should be paid to balancing the burden on SMEs.

To begin with, legislators should expect companies to adopt a risk-based approach rather than an exhaustive approach. It would be idealistic if companies could detect and eliminate forced labor in their supply chains. However, as mandatory requirements, supply chain due diligence requirements are applied to all businesses and should only set the minimum standards to mitigate the risks. A more pragmatic approach should require companies to map the risks of their supply chains and prioritize the due diligence of the suppliers that are more likely to be exposed to forced labor. This echoes the best practice of the Organisation for Economic Co-operation and Development (OECD) and recent laws of many jurisdictions.[1554]

[1552] *See* Stuart L. Gillan et al., *Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance*, 66 J. CORP. FIN. 101889, 101889 (2021).

[1553] *See* Fiona McGaughey et al., *Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom*, 7 BUS. & HUM. RTS. J. 249 (2022); Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, Or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550 (2021).

[1554] *See* ORG. FOR ECON. COOP. & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3d ed. 2013), https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf; Oscar Beghin & Edwin Vermulst, *New EU Rules on Supply Chain Due Diligence: A Net Cast Too Wide?*, REGULATING FOR GLOBALIZATION (Apr. 15, 2021), https://regulatingforglobalization.com/2021/04/15/new-eu-rules-on-supply-

Considering the cost of supply chain due diligence, holding SMEs to the same standards as multinational corporations may not be reasonable. In their supply chain due diligence acts, some countries create exceptions for small businesses under a certain threshold, such as the number of employees or revenue.[1555] Although it is better than a one-size-fits-all approach, a rigid definition of SMEs may lead to arbitrary results in borderline cases. A scaled standard may be preferable. For example, rather than dividing businesses into either SMEs or non-SMEs, legislators may consider creating categories such as micro-businesses, small businesses, medium-sized businesses, and large businesses with different levels of obligations.

Governments and nonprofit organizations may establish capacity-building programs to help SMEs to comply with supply chain due diligence requirements. Unlike multinational corporations, SMEs may lack the knowledge, technology, and infrastructure to conduct supply chain due diligence.[1556] Therefore, capacity-building programs should pursue the overall enhancement of SMEs' capacity for supply chain due diligence. Legislators may provide visualized materials and videos to educate SMEs about supply chain due diligence.[1557] Governments may also engage with large corporations and industry associations to provide a comprehensive support network for SMEs.[1558] Promotion of technology for supply chain due diligence is also desirable.[1559]

Lack of clarity of obligations hinders compliance. At the domestic level, companies could be troubled by the vagueness of supply-chain-related legislation, which may not contain 'a lot of helpful guidance.'[1560] At the international level, the differences and gaps between jurisdictions also create challenges for companies in a highly globalized supply chain.[1561] Therefore, apart from making new rules, policymakers should also endeavor to interpret and clarify existing standards and harmonize supply chain due diligence requirements between different jurisdictions.

Supply chain due diligence may not be adequate absent the involvement of workers and businesses in its design and implementation, as there will always be a gap between the policies on paper and the realities.[1562] Therefore, the legislative process of supply chain due diligence requirements should include input from vulnerable communities and SMEs through an institutionalized process, although this would rely on international cooperation and mutual trust.

2. Certification programs

Although supply chain due diligence requirements may establish minimum requirements that businesses are expected to meet, the requirements may not be enough to clear the risks

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chain-due-diligence-a-net-cast-too-wide/; Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, Or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550, 555 (2021).

[1555] *See* Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, Or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550, 553 (2021).

[1556] *See* Smit, *supra* note 56, at 961.

[1557] *See* EUR. COMM'N, STUDY ON THE SUPPORT SYSTEM FOR SME SUPPLY CHAIN DUE DILIGENCE 11-12 (2017), https://op.europa.eu/en/publication-detail/-/publication/67a2c448-fb38-11e7-b8f5-01aa75ed71a1/language-en.

[1558] *See id.*

[1559] See Jorge Sellare et al., *Six Research Priorities to Support Corporate Due-Diligence Policies*, 606 NATURE 861, 862 (2022); Shoaib, *supra* note 30.

[1560] Smit, *supra* note 56, at 965; *see also* Krajewski, *supra* note 62, at 555.

[1561] *See* Smit, *supra* note 56, at 965; *see also* Krajewski, *supra* note 62.

[1562] *See* Justine Nolan, *Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in Global Fashion Supply Chains?*, 11 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY, 1, 7-8 (2022).

of forced labor in supply chains. Some companies may have the capability to conduct more comprehensive due diligence. Furthermore, there is evidence that customers may reward sustainability in the supply chain, which can encourage competition between companies in due diligence.[1563] But this positive interaction may rely on the accountability of customers and the visibility of the sustainability of products.[1564] Therefore, governments could cooperate with nonprofit organizations to set up voluntary certification programs, which could set a higher standard than the mandatory requirements. If businesses meet those standards, they may get certified as "forced-labor-free." The standards may also enable customers to understand the sustainability consequences of their purchasing choices and incentivize businesses to eliminate forced labor in their supply chains. Because the program does not create legal obligations, it still gives businesses with limited resources and indigent consumers space of choice. And for SMEs that choose to participate, it could reduce costs by eliminating duplicative social audits.[1565] In addition, it could provide nonprofits and governments an opportunity to engage with businesses more actively. For example, the ILO Better Work Initiative combines certification with capacity building and social dialogue to help companies improve their work conditions.[1566] With the help of the market, certification programs may balance the aspiration of sustainability and the needs of vulnerable communities.

IV. Conclusion

Policymakers should not take an oversimplified approach to trade and development. To achieve intergenerational and intragenerational equity, it is crucial to consider the various aspects of development and sustainability and balance the interests of all participants. Unilateral economic sanctions, on the one hand, might protect domestic workers from unfair competition. On the other hand, however, they might not directly improve the situations of workers subject to forced labor and could disrupt the supply chain of products essential to combat climate change and put excessive financial burden on SMEs. In addition, unilateral economic sanctions might fuel the hostility between countries and obstruct the solution to the forced labor issue, which requires the cooperation of all relevant parties. Therefore, it is preferable to adopt a comprehensive and cooperative approach to address forced labor issues in international trade.

This article argues for a cooperative approach is based on inter-governmental cooperation and incentive mechanisms for the private sector. At the inter-governmental level, governments might consider negotiating reciprocal multilateral or bilateral frameworks establishing a targeted enforcement mechanism and an assessment and review system that could incorporate the voices of vulnerable communities in an institutionalized way. For the private sector, a combination of mandatory supply chain due diligence requirements and optional certification programs may incentivize businesses and consumers to reduce the forced labor risks in the supply chains while preserving space of choice for SMEs and indigent consumers. These

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[1563] *See* Martin C. Schleper et al., *When It's the Slaves that Pay: In Search of a Fair Due Diligence Cost Distribution in Conflict Mineral Supply Chains*, 164 TRANSP. RSCH. 102801, 102813 (2022); *see also* Smit, *supra* note 56, at 965.

[1564] *See* Martin C. Schleper et al., *When It's the Slaves that Pay: In Search of a Fair Due Diligence Cost Distribution in Conflict Mineral Supply Chains*, 164 TRANSP. RSCH. 102801, 102813 (2022).

[1565] *See* INT'L LAB. OFF., PROGRESS AND POTENTIAL: HOW BETTER WORK IS IMPROVING GARMENT WORKERS' LIVES AND BOOSTING FACTORY COMPETITIVENESS 37 (2016), https://ilo.primo.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1245549820002676.

[1566] *See id.*, at 39-43; *see also* Noor Ibrahim, Sexual Assault, Forced Labor, Wage Theft: Garment Workers in Jordan Suffer for US Brands, GUARDIAN (Aug. 29, 2020), https://www.theguardian.com/business/2020/aug/29/sexual-assault-forced-labor-wage-theft-garment-workers-in-jordan-suffer-for-us-brands.

measures, however, might still not be enough to cover the interests of some communities impacted by forced labor and relevant trade policies. Therefore, it is essential to solicit input from all stakeholders in trade negotiation and the legislative process on top of the abovementioned mechanisms.

Pursuing a cooperative and comprehensive framework does not mean that unilateral economic sanctions should be avoided in all cases. Instead, unilateral economic sanctions can play a significant role in solving many development challenges by pressuring governments to start negotiations.[1567] But they should only be secondary to the measures discussed above. In times of conflict and tension, shutting the door can bring temporary comfort, but only the courage of opening a window of conversation can lead to long-term peace and prosperity.

[1567] *See* Alan Hyde, Getting China into the Game: Bilateral Labor Agreements in the System of Global Labor Rights, 23 THEORETICAL INQUIRIES L. 205, 218-19 (2022).

CHAPTER 19: A RACE TO THE BOTTOM AND THE BOTTOM LINE: MAKING THE CASE FOR WORKERS' RIGHTS IN TRADE AGREEMENTS

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Abstract

In the debate surrounding the inclusion of labor provisions in trade agreements, much of the literature focuses on the humanitarian and ethical reasons supporting inclusion. This paper instead focuses on the economic reasons supporting inclusion from the developing countries perspective. Specifically, this paper focuses on the efficiency wage theory, human capital formation, the impact of higher wages on the economy as a whole, and the increasing role that public pressure plays in the marketplace. This paper argues that trade agreements are the best tool for advancing workers' rights globally and that existing space in the trade world may already exist for doing so.

I. Introduction

The inclusion of labor provisions in trade agreements, also referred to as regional trade agreements (RTAs), has been hotly contested by some countries that are party to these agreements. The division over whether to include these provisions has mainly arisen between developed nations on one side and developing nations on the other. Developing nations fear that the inclusion of labor provisions in trade agreements is a way for developed nations to protect their local industries and chip away at the competitive advantage that low-wage labor provides. There is also an argument that these same nations pushing for the inclusion of labor provisions went through significant economic development before they raised their domestic labor standards. The argument follows that it is, therefore, hypocritical for these nations to push other nations to raise their standards while they are still in the process of catching up economically. Many developed economies, on the other hand, worry that they cannot protect the rights of their domestic workers while also maintaining consumption of domestic products if they are competing with nations that do not have these protections.

In terms of trade, labor standards include the norms, rules, and conventions that govern working conditions and industrial relations.[1568] This includes rules on minimum wage, health and safety standards, limits on working hours, and unionization.[1569] There has been a sharp increase in the inclusion of labor commitments in trade agreements in the twenty-first century. From 2005 to 2016, the number of agreements with this inclusion grew by 267%, most of which used language from the United States' free trade agreement (FTA) labor chapters.[1570] Not everyone is on board with this trend, however. Economists and nations alike have protested this upward trend in labor standards as harmful to development.

This paper sets out to disprove the notion that putting labor commitments in binding trade agreements prevents developing nations from catching up to the developed world. First,

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[1568] Vivek H. Dehejia and Yiagadeesen Samy, Labor Standards and Economic Integration In The European Union: An Empirical Analysis, 23 J. of Econ. Integration 817, 819 (2008).

[1569] *Id.*

[1570] Kathleen Claussen, Reimagining Trade-Plus Compliance: The Labor Story, 23 J. Int'l Econ. L. 6-7 (2020).

this paper will outline the history of labor in the trade context and the current debates surrounding it. Then, this paper explores arguments as to why better labor conditions and better pay benefit development and explains why trade agreements are in a unique position to achieve this change.

II. Background

The World Trade Organization (WTO) is a multilateral international organization comprised of 164 members established to coordinate among members on world trade negotiations and resolve disputes.[1571] Labor standards are, however, not currently included in the WTO rules,[1572] with the brief exception of prison labor in the General Exceptions clause in the General Agreement on Tariffs and Trade (GATT). There is also a carve out in Article XX of the GATT specifying that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals,"[1573] which could be applied in a labor context. In 1996, President Bill Clinton sought to change this. He proposed incorporating labor provisions in multilateral trade rules, but his proposal was swiftly rejected by developing nations.[1574] Developing nations asserted that this was a protectionist plot from developed economies to take away their competitive advantage of low-cost labor.[1575] In countries that do not have strict domestic laws on labor, costs of production stay low, allowing them to keep the prices of their products low as well. Along with this comes the danger that workers will put in long hours, under poor conditions, and for low compensation. Compare this to countries with strict domestic laws on labor where manufacturers must pay their employees higher wages, ensure better working conditions, with limits on the number of hours worked. The result is that their cost of production is higher, and the price of their goods reflects this as well. In a world of free trade, countries with lower standards for labor can export their goods at a lower cost than the price set by countries with higher standards.

When rejecting President Clinton's proposal, WTO Member States reaffirmed their belief that the International Labour Organization (ILO), not the WTO, was the correct institution for regulating labor standards.[1576] The ILO was founded in 1919 as part of the Treaty of Versailles. It is now an independent agency of the United Nations. Although the ILO has a supervisory system to ensure that countries follow ILO standards, the organization has weak enforcement capabilities.[1577]

The ILO, however, has developed both legally binding Conventions and Recommendations (non-binding guidelines), which are put forth by governments, employers, and workers. There are eight fundamental ILO Conventions: the Forced Labour Convention (1930), the Abolition of Forced Labour Convention (1957), the Freedom of Association and

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[1571] *See* The World Trade Organization, https://www.wto.org/english/thewto_e/thewto_e.htm.

[1572] CONGRESSIONAL RESEARCH SERVICE, Labor Enforcement Issues in U.S. FTAs, (Dec. 18, 2020), https://crsreports.congress.gov/product/pdf/IF/IF10972.

[1573] The General Agreement on Tariffs and Trade, art. xx, Oct. 30, 1947, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf.

[1574] *See* Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreement*, Megaregulation Contested: Global Economic Ordering After TPP, 140, 145 (Benedict Kingsbury et al. eds., 2019).

[1575] *See* WTO, Singapore Ministerial Declaration (Dec. 13, 1996) WT/ MIN(96)/ DEC, 36 ILM 218.

[1576] *See id.*

[1577] CONGRESSIONAL RESEARCH SERVICE, The International Labor Organization (ILO): Background in Brief, 2, 6 (Aug. 27, 2015), https://www.everycrsreport.com/reports/R44165.html#:~:text=The%20International%20Labor%20Organization%20(ILO)%20was%20created%20in%201919%20by,its%20most%20important%20financial%20supporter.

Protection of the Right to Organise Convention (1948), the Right to Organise and Collective Bargaining Convention (1949), the Equal Remuneration Convention (1951), the Discrimination (Employment and Occupation) Convention (1958), the Minimum Age Convention (1973), and the Worst Forms of Child Labour Convention (1999).[1578]

The Forced Labour Convention binds countries to "suppress" the use of forced or compulsory labor in the "shortest possible period" of time. There are several exceptions, such as prison labor, military service, times of emergency, etc. It also creates an affirmative obligation for the parties to penalize anyone within their borders who subject another to forced or compulsory labor.[1579] The Freedom of Association and Protection of the Rights to Organise Convention binds parties to ensure that domestic workers are free to join organizations created to defend and advance workers' interests.[1580] Under the Discrimination Convention, any nation who ratifies it must pursue "national policies" to promote equal opportunities in the labor market and eliminate discrimination on the basis of sex, race, gender, political association, and national origin. The convention specifies that under the national policy, nations must work with employers and workers' organizations, enact legislation promoting educational and vocational trainings, and repeal existing legislation that contradicts the non-discrimination policy.[1581]

Similarly, the Occupational Safety and Health Convention directs ratifying parties to implement a national policy designed to prevent workplace injuries. Such policy is specified to focus on the design, testing, and use of machinery and substances used in the workplace, trainings on how to achieve workplace safety, protecting workers who follow the plan from retaliation, and other similar considerations.[1582] Under the Minimum Age Convention, parties must set a minimum working age for their country and not allow anyone under it to participate in the labor force. Although the convention gives parties flexibility in choose their minimum age, it cannot be set lower than 15. There is an exception for countries whose "economy and educational facilities are insufficiently developed," which may set the age at 14.[1583]

Although workers' rights are often framed as part of a Western agenda, the data shows otherwise. The United States has only ratified two of the fundamental ILO instruments: Abolition of Forced Labor and the Elimination of the Worst Forms of Child Labour. In contrast, by 2013, 138 countries had ratified the eight fundamental ILO conventions. Many of whom are not considered Western.[1584] This has been a truly global movement.

[1578] *Maldives ratifies the eight ILO fundamental Conventions*, INTERNATIONAL LABOUR ORGANIZATION (Jan. 16, 2013), https://www.ilo.org/global/standards/WCMS_201895/lang--en/index.htm#:~:text='The%20eight%20ILO%20fundamental%20Conventions%20are%3A%20the%20Forced%20Labour%20Convention,Bargaining%20Convention%2C%201949%20(No.

[1579] ILO Forced Labour Convention, 1930 (No. 29), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

[1580] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C087:NO.

[1581] ILO, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C111:NO.

[1582] ILO Occupational Safety and Health Convention, 1981 (No. 155), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C155:NO.

[1583] ILO Minimum Age Convention, 1973 (No. 138), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312283.

[1584] *See supra* note 17; Ratifications of fundamental instruments by number of ratifications, INTERNATIONAL LABOR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=1000:10011:13447337643026::::P10011_DISPLAY_BY:2.

III. Economic Theories in Favor of Including Labor Provisions in Free Trade Agreements

There are a plethora of economic reasons why countries and the firms that operate within their borders are better off with strong labor standards and why both would benefit from the inclusion of labor chapters in trade agreements. This paper looks at empirical data showing the correlation between labor standards and the strength of a country's economy. It focuses on the efficiency wage theory, the effect of sanctions, human capital formation, collective bargaining, and public pressure.

A. Efficiency Wage Theory

There is a strong positive correlation between the cost of labor (net wages, cost of working conditions, and social protections) and GDP per capita. There are economic models that can explain this correlation, such as the efficiency wage theory, which posits that profits can be an increasing function of wages.[1585] Under this theory, firms in developing nations could increase their profits by paying their workers more, and, subsequently, the GDP of the nation would rise. Proponents of this theory explain that higher wages can attract higher quality workers, spur them to put in more effort, and reduce their turnover rate.[1586] This last factor is especially significant when considering the costs associated with recruiting and training new employees. Henry Ford pioneered this line of thinking. He famously believed that "a low wage business was always insecure," and paid his workers double what the rest of the industry was paying at the time while also reducing the length of their workday.[1587] This was a move that ultimately resulted in cutting costs and increasing profits.[1588] Turnover at the Ford factory dropped 87% and automobile production rose 15%.[1589] Not only did Ford have to spend less time training new employees, but the employees they retained became more skilled at their jobs. Comparatively, many other firms in history and at present under-invest in training their workforce because they worry high turnover rates makes training an inefficient use of time and money.[1590]

Not only did workers in Detroit flock to Ford to vie for a job, but workers from around the U.S. flocked to Detroit for a chance to work at the factory. The assumption could be made that competitive wages only work when there are other firms not paying the competitive wage, and the market clears so that the best workers move to the best firms. Thus, the highest quality workers are employed by the highest paying firm and increase their profits. An argument could subsequently be made that if countries implement domestic reform to their labor laws to be in compliance with trade agreements, then no overall effect will be seen since every firm pays efficiency wages. In Ford's case, however, he did not replace his old workforce after instituting the new wage, and business still boomed.[1591] Additionally, efficiency wages may attract workers who previously did not participate in the economy or draw workers from less productive areas

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[1585] *See* Daniel M. G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?* 5 Journal of Labor Economics, S58 (1987); Joseph Stiglitz, The Efficiency Wage Hypothesis, Surplus Labour, and the Distribution of Income in L.D.C.s, 28 Oxford Economic Papers 185, 186 (Jul. 1976).
[1586] *See supra* note 24.
[1587] *Id.* at S59, S69.
[1588] *See id.* at 59.
[1589] *Id.* at S76.
[1590] Rachel Thrasher & Kevin Gallagher, *21st Century Trade Agreements: Implications for Long-Run Development Policy*, The Pardee Papers 2, Frederick S. Pardee Center for the Study of the Longer-Range Future, 8 (2008).
[1591] *See* Daniel M. G. Raff & Lawrence H. Summers, Did Henry Ford Pay Efficiency Wages? 5 Journal of Labor Economics, S73-S74 (1987).

of the economy to more productive, profit maximizing areas that increase the GDP of the country as a whole.[1592] This could have great benefits for developing nations and their economies.

Paying workers more does not just benefit the business entity for which they work. It benefits the economy as a whole. When workers make more money, they inject it back into the economy by increasing their spending habits.[1593] This is especially true of low-wage workers, who are more likely than high-wage workers to spend each extra dollar earned.[1594] One study found that for that every extra $1/hour a low-wage household earns, they spend $2,800 more per year, and that for every extra dollar paid to a low-wage worker, $1.21 is added to the economy.[1595] Research also shows that when employees are paid more by their employers, they contribute most of the extra earnings to their local economies.[1596] The local economies in developing countries would benefit greatly from having a populace that earns more for their labor. At the country level, states also save money when firms pay their worker's more because they do not have to subsidize low wages through public benefits programs. States can instead invest this money into other areas or keep it in the hands of the taxpayers instead.[1597]

Similarly, standards on how many hours employees are permitted to work each week would give them more leisure time (especially if they are receiving a livable wage and not having to use their leisure time to pick up multiple jobs). These workers would then have more time to spend money, especially in the leisure industry. Whereas a person historically would not have had enough time to attend a musical performance, sports game, or restaurant, they now could, generating more jobs and wealth in the leisure industry in developing nations.

B. Human Capital Formation

Furthermore, human capital formation is a key market failure that prevents developing nations from developing.[1598] Protecting worker's rights promotes human capital formation. The ILO has categorized freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of the worst forms of child labor, and the elimination of discrimination in respect of employment and occupation as fundamental rights at work.[1599] These rights, if implemented into domestic policy via trade agreements, have significant positive effects on human capital formation and development.

Children who are protected from working long hours have more time and more opportunity to attend school, which improves the overall literacy and education of the nation and strengthens the skills of the next generation of workers.[1600] By the same token, poor health and safety conditions in the workplace impede the physical, mental, and intellectual

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[1592] *See* Jonathan Yoe, *A $15 minimum wage changes more than just take-home pay,* BUREAU OF LABOR STATISTICS (Sept. 2021), https://www.bls.gov/opub/mlr/2021/beyond-bls/a-15-minimum-wage-changes-more-than-just-take-home-pay.htm.

[1593] *See* Lily Roberts and Ben Olinsky, *Raising the Minimum Wage Would Boost an Economic Recovery—and Reduce Taxpayer Subsidization of Low-Wage Work*, (Jan. 27, 2021), https://www.americanprogress.org/article/raising-minimum-wage-boost-economic-recovery-reduce-taxpayer-subsidization-low-wage-work/.

[1594] *Id.*

[1595] *Id.*

[1596] *See id.*

[1597] *Supra* note 33.

[1598] Rachel Thrasher & Kevin Gallagher, *21st Century Trade Agreements: Implications for Long-Run Development Policy*, The Pardee Papers 2, Frederick S. Pardee Center for the Study of the Longer-Range Future, 6 (2008).

[1599] Ray Marshall, *Labor Standards, Human Capital, and Economic Development*, EPI Wkg. Paper No. 271, 5 (2005).

[1600] *See id.* at 2-3.

development of children.[1601] Although firms may see this as a profit-maximizing tradeoff in the short-run, the long-term effects are detrimental to the nation's development. Although child labor is discouraged by most countries, it is still a prevalent problem. In 2013, the ILO estimated that there are around 265 million working children in the world.[1602] This number is expected to rise because of the pressure that COVID-19 put on supply chains and the global economy.[1603] Developing countries would benefit in the long run by investing in their children and enforcing prohibitions on child labor.

Adults are also more productive when free of unsafe and unhealthy working conditions, and job-related diseases and injuries can greatly tax companies as well. They must find replacements for their workers and adjust to either the absence of an employee or the inefficiency of an unwell one.[1604]

Data shows that there is also a positive correlation between human capital formation and the abolition of forced labor.[1605]

C. Collective Bargaining

Although firms often oppose unionization, collective bargaining and worker's organizations can boost profits and develop human capital. Worker's organizations fight against inequalities, a byproduct of capitalism. These inequalities further the gap between rich and poor, educated and uneducated, sick and healthy, etc.[1606] When firms work with, not against, their employees, they benefit from the boots on the ground perspective. The contribution of their voices to workplace policymaking makes business models more sustainable for long-term growth.[1607] Expanding on this approach, including conversations with workers in developing nations in the drafting of trade agreements and getting their boots on the ground perspective creates a bottom up, rights-based approach to trade that can also contribute to long-term efficiency and productivity. Protecting collective bargaining and union activity in trade agreements and in developing nations can increase profitability, which again contributes to an overall higher GDP.

D. Public Pressure and Sanctions

Public pressure and consumer preferences for ethically sourced products weigh in favor of high labor standards as well. This can be leveraged into both social change and economic benefits through supply chain transparency provisions in trade agreements. Export companies must protect their brand and reputation to compete in an international economy. These companies cannot afford the scandal and shame associated with using products made in sweatshops, with forced labor, or in violation of recognized labor rights.[1608]

For instance, in 2020, the U.S. Treasury Department issued sanctions on Xinjiang Production and Construction Corps. The Treasury Department warned U.S. companies that

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[1601] *See id.* at 7.

[1602] Esteban Ortiz-Ospina & Max Roser, *Child Labor*, OUR WORLD IN DATA (2016), https://ourworldindata.org/child-labor#citation.

[1603] Thea Lee, *3 Ways the Pandemic Exacerbates Child Labor*, BUREAU OF LABOR STATISTICS (Sept. 29, 2021), https://blog.dol.gov/2021/09/29/3-ways-the-pandemic-exacerbates-child-labor#:~:text=The%20U.S.%20Department%20of%20Labor,for%20the%20world's%20vulnerable%20children.

[1604] *See id.* at 15-16.

[1605] *See id.* at 3.

[1606] Ray Marshall, *Labor Standards, Human Capital, and Economic Development*, EPI Wkg. Paper No. 271, 3-4 (2005).

[1607] *See generally id.*

[1608] *See* Alvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreement*, Megaregulation Contested: Global Economic Ordering After TPP, 140, 144-160 (Benedict Kingsbury et al. eds., 2019).

these factories often used forced labor and reminded them that the use of products made with forced labor is illegal. PVH Corp., which owns many visibly recognized subsidiaries, publicly cut ties with these factories to save face and save its relationship with consumers. Other companies, like Nike, made a point to announce that they do not use textiles or spun yarn from Xinjiang. The cotton industry in China suffered greatly from these sanctions while the U.S. market picked up, evidence that forced labor does not always equal better margins.[1609]

An additional economic argument relates to tariffs. Tariffs result in higher priced goods in the importing country, and as a result, quantity demanded in the importing country usually goes down.[1610] This creates a surplus in the exporting country.[1611] Furthermore, consumers in the importing country seek out substitutes for the good that now has a higher price tag.[1612] There is evidence this benefits the rest of the world's producers, namely developing countries that step in to fill the newly created gap in the market.[1613]

There is also evidence that firms are intentionally seeking out places with higher wages and better labor standards to operate as a result of public pressure. They have learned that it is "good business" to avoid the kinds of work environments that race-to-the-bottom theorists predict firms would seek out.[1614] Improvements in technology and communication heighten this effect. Consumers who may have previously been unaware of where their goods come from now have access to reports, news articles, and other methods of receiving information that shed light on the origin of a product. These same consumers are exercising moral power with their dollar and are willing to pay more for goods not made in sweatshops.[1615]

The humanitarian and social reasons for promoting workers' rights are staggering. These reasons are often viewed as unrelated to the economic arguments surrounding the debate, but that is far from the truth. Human rights and the economy are interconnected in a way that cannot be ignored. Higher wages and decent working conditions help reduce poverty, hunger, financial inequality, gender inequality, and promote health and well-being. Prohibitions on child labor strengthens education and equality. These are social goals deeply intertwined into the fabric of economic decisions. Even more, when these basic human needs are met, people are more productive workers, contribute to economic growth, and benefit industry and innovation. A sustainable future not only includes a prosperous financial system, it creates one.

[1609] Eva Dou, Sanctions on China's Top Cotton Supplier, WASHINGTON POST, (August 22, 2020), https://www.washingtonpost.com/world/asia_pacific/sanctions-china-cotton-xinjiang-uighurs-fashion/2020/08/20/188ec374-dd48-11ea-b4f1-25b762cdbbf4_story.html.

[1610] Brian Hergt, *The effects of tariff rates on the U.S. economy: what the Producer Price Index tells us*, BUREAU OF LABOR STATISTICS (Oct. 2020), https://www.bls.gov/opub/btn/volume-9/the-effects-of-tarifff-rates-on-the-u-s-economy-what-the-producer-price-index-tells-us.htm#:~:text=All%20other%20things%20being%20equal, surplus%20in%20the%20exporting%20country.

[1611] *Id.*

[1612] Caroline Freundmaryla, Maliszewska, & Cristina Constantinescu, *How are trade tensions affecting developing countries*?, WORLD BANK BLOGS (Mar. 18, 2019), https://blogs.worldbank.org/trade/how-are-trade-tensions-affecting-developing-countries#:~:text=The%20tariffs%20imposed%20on%20Chinese,the%20rest%20of%20the%20world.&text=Relative%20to%20country%20size%2C%20many%20poorer%20countries%20have%20also%20benefitted.

[1613] *See id.*

[1614] *See* Ray Marshall, *Labor Standards, Human Capital, and Economic Development*, EPI Working Paper No. 271, 11 (2005).

[1615] *See id.* at 16.

IV. Using Regional Trade Agreements to Improve Global Labor Standards

Regional trade agreements can serve as the ideal mechanism for implementing the improvements to labor conditions put forth in this paper. There is heightened enforceability in trade agreements and steep economic incentives for countries to comply, whereas organizations like the ILO do not have the same capability. Trade agreements also more effective for achieving this end than countries passing their own labor legislation because of the negative incentives developing countries have to do so. This inclusion in trade agreements, however, must occur on a mass scale or else it will not be as effective.

Although it has been proven that customers are willing to pay more for goods made in adequate working conditions, and companies are starting to recognize this, there are also companies that still do not buy into this belief that doing what is best for their workers can also be good for business.[1616] Suppose, for instance, that a developed nation enters into a bilateral treaty with a developing nation and includes a standalone chapter on labor. If this chapter were to include provisions on higher wages, health and safety standards, reduced working hours, etc., then corporations who buy into race-to-the-bottom theories would be tempted to move operations to a nation without a similar agreement. The global nature of the world's economy and the rise of multinational corporations makes this scenario especially plausible. This would likely deter nations from entering into such agreements in the first place or unjustly punish those who do enter in such agreements. The United States took this route in the 1980's and passed multiple unilateral trade instruments, such as the Caribbean Basin Initiative and amendments to the Generalized System of Preferences, demanding better working conditions and labor laws from developing nations.[1617] These trade instruments, while sometime viewed through the lens of development, were contentious and could be viewed as protectionist in their aims,[1618] since they are not negotiated and impact the policy space of sovereign states. Although an argument could be made that RTAs also infringe on the policy space of sovereign states, these are negotiated instruments which do so to a lesser degree than unilateral action.

It would be difficult to achieve better outcomes for workers if change was done through domestic legislation for similar reasons. Developing nations might see themselves as facing a prisoner's dilemma. If they all passed labor reform laws, then they would all be best off. If a country passed a labor reform law, but a nation they compete with for exporting does not, then corporations may move to the one with the lax laws. The incentive for developing countries to defect and all choose not to pass domestic reform is too strong. If all nations were acting alone as single players, then they would face a game theory situation in which their dominant strategy is to not implement labor reform.

A. Labor Chapters in RTAs

Trade agreements can solve this market failure by assuring countries that progress will be made on a larger scale and they are not being left vulnerable to defections. For example, a regional trade agreement like the African Continental Free Trade Area (AfCFTA) could incorporate a protocol on labor. Even though labor is not yet covered under the AfCFTA, if it did, then the 54 signatories would be held to the same standards.[1619] They would not have

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[1616] *See generally id.*

[1617] Desirée LeClercq, *The Disparate Treatment Of Rights In U.S. Trade*, 90 Fordham L. Rev. 1, 21- 22 (2021).

[1618] *See id.* at 22-24.

[1619] Tralac, *Status of AfCFTA Ratification*, (Feb. 20, 2023), https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

to fear being undercut by their neighbors. Imagine then what the impact would be if the members of the WTO adopted standards on labor.

Additionally, trade agreements could offer enforcement mechanisms that the ILO does not. If a complaint is lodged against a member nation, then the ILO can investigate. If there is evidence of wrongdoing, the organization can punish the member with negative publicity and give them guidance on how to comply with their labor standards. Outside of this, the ILO's enforcement options are limited. They cannot impose sanctions or withdraw trade benefits.[1620] Trade agreements, on the other hand, can make beneficial treatment conditional on either the implementation of labor reform or issue sanctions against countries or firms that violate labor standards and subject commitments to binding dispute settlement.

Some RTAs already contain labor sections with enforcement provisions, but these provisions are often weak. In the United States-Chile Free Trade Agreement, the parties reaffirmed their commitment to the ILO and to enshrining internationally recognized labor standards in domestic legislation. The agreement also stipulates that the parties "shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties."[1621] It also, however, clarifies that "nothing in this Chapter shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of the other."[1622]

Skeptics question whether labor provisions in trade agreements are actually more enforceable than through the ILO. The U.S.-Guatemala panel cast a shadow of pessimism on the impact of such provisions on actual workers, which was the first case ever brought under a labor provision of an FTA.[1623] The case originated out of five alleged instances of Guatemala failing to enforce its domestic labor laws.[1624] In particular, alleged violations of the unionization/collective bargaining rights and acceptable working conditions were submitted to the United States Department of Labor.[1625] Instead of rushing to prosecute Guatemala for the violations, the U.S. created a plan with their trading partner to bring the country into compliance with labor standards.[1626] A year after the creation of this plan, the U.S. decided that Guatemala had not taken enough steps to fulfill the requirements of the plan, so the U.S. brought the dispute to a panel under the terms of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), a trade agreement between the U.S., Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.[1627]

The terms of the CAFTA-DR stipulated that violations were enforceable if action or inaction was "through a sustained or recurring course… in a manner affecting trade."[1628] The panel found that while the allegations of labor violations were true and Guatemala did not enforce its laws as it should have, Guatemala did not do so in a manner affecting trade.[1629] Therefore, the nation could not be held accountable under the CAFTA-DR. The panel reached this decision by interpreting "in a manner affecting trade" as a competitive advantage unfairly conferred on the country refusing to adhere to the labor agreements and that the

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[1620] Gary Burtless, *Workers' Rights: Labor standards and global trade*, BROOKINGS INSTITUTION (Sept. 1, 2001).
[1621] Annex 18.5(2) of US-Chile (2004).
[1622] Id.
[1623] Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 23 J. Int'l Econ. L. 25, 11-12 (2020).
[1624] *See id.* at 12.
[1625] *See id.*
[1626] *See id.* at 13.
[1627] *See id.*
[1628] *Id.* at 14.
[1629] *See id.*

Guatemalan companies did not receive a competitive advantage by denying their workers the ability to effectively unionize or operate in acceptable working conditions.[1630] This decision came in 2017, a time when many other trade agreements had already adopted the "in a manner affecting trade" language. This sent an unfortunate signal that those agreements would be rendered essentially unenforceable.[1631] In order for trade agreements to enforce labor provisions, they need to better define language such as "in a manner affecting trade," with the ultimate goal of using trade agreements to protect workers.

The drafters of the USMCA learned from the U.S.-Guatemala panel. Under this agreement, there must still be a relationship between trade and the labor violation in order for enforcement actions to be taken.[1632] However, "in a manner affecting trade or investment" was more precisely defined through an explanatory note, and an evidentiary presumption was added that makes showing a violation easier.[1633] There does not have to be a competitive advantage gained by the party committing the violation.[1634] Although this is a step in the right direction, future trade agreements could go further in clarifying enforceability.

B. Other Approaches

Scholars argue that space already exists in the WTO to take action against products made in violation of basic labor standards.[1635] One relevant provision is GATT article III, which requires non-discrimination between domestic and imported products, where the labor standards used to make goods could be a consideration.[1636] Another potential space is in the GATT XX (a), the "necessary to protect public morals" exception, which could be used to justify measures that contravene other provisions, provided its conditions are met. Technical regulations and standards governed under the Technical Barriers to Trade (TBT) Agreement could also serve as a place for incorporating labor standards.[1637] TBT are a type of non-tariff measure (NTM). NTMs are essentially all policy driven initiatives that impact trade and are usually used to address negative externalities, and they do not impose tariffs.[1638] TBTs are a subset of NTMs that include technical regulations, standards, and conformity assessment procedures. One form of TBTs are labeling requirements, which could be an effective way to advance workers' rights. The U.S. has used labeling requirements in the past to advance specific policy goals.[1639]

[1630] *See Reimagining Trade Plus Compliance* at 15.

[1631] *See id.* at 12.

[1632] *See* Alvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 Am. J. Int'l L. 407, 408 (2019).

[1633] Katrin Kuhlmann, Handbook on Provisions and Options for lnclusive and Sustainable Development in Trade Agreements, United Nations 2023.

[1634] *Id.*

[1635] *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, 5 (2019).

[1636] *Id.*; Sherzod Shadikhodjaev, *National Treatment under GATT Article III:2 and its Applicability in the Context of Korea's FTAs*, 12 Journal of International Economic Studies 65, 67 (2008).

[1637] *Supra* note 72.

[1638] OECD, *Tariffs are the tip of the iceberg: How behind the border issues impact trade*, https://www.oecd.org/trade/topics/non-tariff-measures/.

[1639] *See generally* CONGRESSIONAL RESEARCH SERVICE, *The World Trade Organization Agreement on Technical Barriers to Trade and Recent Food Labeling Cases*, (Sept. 25, 2015). In 1990, Congress passed the Dolphin Protection Consumer Information Act (DPCIA). In 1990, Congress passed the Dolphin Protection Consumer Information Act (DPCIA). The DPCIA was enacted in response to a growing concern about the number of dolphins killed from tuna harvesting, and it allowed tuna companies to put a "dolphin-safe" label on their cans if they complied with certain procedures. These procedures differed based on whether the tuna was harvested in the eastern tropical

Labeling has the power to dramatically impact a company's profits. As previously mentioned, empirical data shows that consumers are willing to pay more for ethically sourced goods. A label could be created and implemented signaling which goods are made in compliance with labor standards. This would be particularly effective for international brands that must protect their reputation, as discussed in section II of this paper. A study was set out to quantify the relationship between labeling and consumers preferences at a retail store in New York City. The experiment consisted of putting labels on candles and towels with information about the fair labor standards in the factories from which the products came. In the first iteration of the experiment, the price of the goods was held constant, and sales of the labeled candles and towels rose by 10%. In the second iteration of the experiment, the prices of the goods was increased by 10-20%. In this scenario, the sales of these goods actually rose between 16-33%. With this markup in price, the brands that put fair labor standards labels on their candles and towels increased their market share by 20-42%.[1640]

Another potential issue with using TBT labeling to ensure fair labor standards is the difficulty of tracing products to the factories where they were made. As the worldwide economy becomes more interconnected, supply chains are increasingly woven together, creating a web of producers and locations. The idea of using labeling requirements to advance workers' rights is still worth exploring, however, because of the advancements being made in supply chain tracing. The Department of Labor is currently funding the STREAMS project-Supply Chain Tracing and Engagement Methodologies. This project seeks to untangle the supply chain web by mapping and categorizing the supply chain of goods made with child labor or forced labor. It will also develop new supply chain tracing technologies and work to disseminate these technologies on a larger scale.[1641] Even outside of the TBT labeling context, advancements of this type make it possible to include supply chain transparency provisions in trade agreements for the purposes of informing the public when violations of forced labor and child labor prohibitions are occurring and place pressure on firms to cease their activity.

If supply chain transparency is mandated in trade agreements, then exporting companies with brands to protect will be forced to reveal what factories they work with, giving power to consumers to boycott unethically sourced materials and reward companies that use materials from factories that pay fair wages in safe conditions without discrimination. Likewise, companies themselves will be put on notice about who they are doing business with.

V. Conclusion

Whether or not to include labor standards in trade agreements is an issue that nations do not see eye to eye on. Even more, academics, economists, and policymakers within nations do not agree on this issue either. Not only do nations and critics question the economic value and justice of including labor provisions, they are mistrustful of the intentions of developed nations for including them. Developed nations are said to include them to protect their own

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pacific (ETP) or not. Tuna captured in the ETP could only be labeled as dolphin-safe if both the boat's captain and an independent observer certified that the nets were not deployed with the intent of ensnaring dolphins, and that dolphins were not actually killed or seriously harmed. Conversely, tuna captured outside of the ETP could be labeled as "dolphin-safe" as long as the captain certified that there was no intent to capture dolphins.

[1640] Michael Hiscox & Nicholas Smith, *Is There Consumer Demand for Fair Labor Standards?* (Apr. 22, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1820642.

[1641] *See* DEPT. OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, *STREAMS – Supply Chain Tracing and Engagement Methodologies*, https://www.dol.gov/agencies/ilab/streams-supply-chain-tracing-and-engagement-methodologies; VERITÉ, *New Project to Support Enhanced Tracing of Goods Made with Child and Forced Labor* (Feb. 11, 2021), https://verite.org/streams-announcement/.

industries because they already have higher mandatory wages and labor standards. This prevents them from producing goods as cheaply as nations without such workers protections, putting them at risk of being undercut in the domestic market from imports and in exporting.

In terms of economic reasons, developing nations believe that implementing higher wages, maximum hours worked requirements, health and safety laws, child labor laws, etc. will slow down development. This paper has set out to show that this is not the case. Higher wages yield more productive workers, and so do safe working conditions. Workers who make more also have more time and money to spend in their local economies, stimulating them to grow quicker. These same economies cannot develop without human capital formation, which is hindered by child labor, forced labor, discrimination, and work-related injuries. Similarly, consumers have proven that they are willing to pay more for ethically produced goods. With today's technology and communication, they have a greater ability to actually do so. Therefore, labor provisions keep firms in compliance with what their customers want and are willing to pay for.

These goals will be difficult to accomplish through domestic legislation alone, and even through just the ILO. As long as race-to-the-bottom arguments infiltrate policy decisions, domestic legislation will be unable to solve this market failure. International cooperation at a large-scale will be needed to address labor reform. International cooperation, as history shows, is a large undertaking that often yields disappointing results. If it is possible, however, then a sustainable future with thriving economies and protected workers is within reach.

PART II

SOCIAL INCLUSION

Food Security and Fisheries Subsidies

CHAPTER 20: PROMOTING FOOD SECURITY THROUGH THE MULTILATERAL TRADING SYSTEM: ASSESSING THE WTO'S EFFORTS, IDENTIFYING ITS GAPS, AND EXPLORING THE WAY FORWARD

GIOVANNI DALL'AGNOLA*

Abstract

The COVID-19 pandemic and the conflict in Ukraine have unveiled the vulnerabilities of global food systems, resulting in food shortages, price spikes, and worsening food security. The World Trade Organization can play a key role in addressing these challenges through its developed body of rules. Its regulatory framework on agriculture, however, is affected by shortcomings and asymmetries that pose challenges to the long-term achievement of secure and sustainable food systems. Despite extensive negotiations among countries in the Committee on Agriculture ahead of the 12th Ministerial Conference, few concrete proposals were made to reform trade rules on agriculture. Additionally, the 12th Ministerial Conference itself failed to produce satisfactory results with respect to food security. The ongoing stalemate in agricultural negotiations since the outbreak of the COVID-19 pandemic indicates the need for a new, holistic approach to addressing food security at the World Trade Organization, particularly in preparation for the upcoming 13th Ministerial Conference in 2024. This approach should be informed by equity considerations and grounded in the notion of sustainable development and the human right to food. While a comprehensive reform of the Agreement on Agriculture informed by this approach is the ultimate goal, it is unlikely to occur in the short- to medium-term due to disagreement among countries on how to reform the three pillars of the Agreement. Therefore, an incremental approach could be adopted by prioritizing issues for which short- to medium-term reforms are more likely to garner consensus, such as sustainable agricultural production, and by employing soft law instruments. The latter favor a flexible approach and promote cooperation and trust among countries.

I. Introduction

Food insecurity is on the rise after decades of development gains.[1642] The COVID-19 pandemic and the conflict in Ukraine demonstrated that action is urgently needed to create a world free of hunger by 2030.[1643] The trade-restrictive measures adopted to limit the spread

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[1642] FAO, IMF, WB, WFP and WTO 'Joint Statement by the Heads of the Food and Agriculture Organization, International Monetary Fund, World Bank Group, World Food Programme, and World Trade Organization on the Global Food Security Crisis' (8 February 2023) <https://www.worldbank.org/en/news/statement/2023/02/08/joint-statement-on-the-global-food-and-nutrition-security-crisis>. Food security is defined when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life. Accordingly, there are four main dimensions of food security: physical availability of food, economic and physical access to food, food utilization, and stability of the three previous dimensions over time. See FAO, 'An Introduction to the Basic Concepts of Food Security' (Rome: FAO, 2008) <https://www.fao.org/3/al936e/al936e00.pdf>.

[1643] See SDGs targets 2.1 and 2.2. See UN General Assembly Res. 70/1, *Transforming our World: The 2030 Agenda for Sustainable Development* (21 October 2015).

of COVID-19 have had a significant impact on food supply chains.[1644] Lockdowns and supply chain disruptions have resulted in food shortages and price spikes.[1645] This has highlighted the vulnerability of global food systems and the need to improve resilience and sustainability to ensure adequate food supplies during crises. The conflict in Ukraine has disrupted local agricultural production, with farmers facing difficulties accessing their land and markets. Infrastructure networks have also been damaged, hindering transportation and food storage. This has contributed to food shortages and price increases, especially for staple foods. Additionally, the conflict has contributed to global food price volatility, particularly for wheat and other grains, of which Ukraine is a major exporter. This has undermined food security globally, especially in developing countries, least-developed countries (LDCs), and net food-importing developing countries (NFIDCs).[1646]

According to the Food and Agriculture Organization (FAO) and the World Food Program (WFP) data, 11.7% of the world's population faced severe food insecurity in 2021, with LDCs and NFIDCs suffering the most. In 2022, these countries were confronted with a worsening situation, with record food import bills.[1647] In both 2022 and 2023, the WFP warned that the world is facing "the largest hunger and nutrition crisis in modern history."[1648] To address this crisis, FAO recommended that countries pay particular attention to long-term food security, sustainability objectives, and the damaging effects of trade-restrictive measures.[1649]

In this context, the multilateral trading system is key in promoting food security, thanks to its developed, technical, and enforceable rules. Due to its limited scope, this paper addresses exclusively how the World Trade Organization (WTO) Agreement on Agriculture (AoA)[1650]

[1644] Ilaria Espa, 'Export Restrictions on Food Commodities during the COVID-19 Crisis: Implications for Food Security and the Role of the WTO' in Amrita Bahri, Weihuan Zhou, and Daria Boklan (eds), *Rethinking, Repackaging, and Rescuing World Trade Law in the Post-Pandemic Era* (Bloomsbury Publishing, 2021), at 43.

[1645] UN, 'Policy Brief: The Impact of COVID-19 on Food Security and Nutrition' (New York: UN, 2020), at 2-4; Anita Regmi, Nina Hart, and Randy Schnepf, 'Reforming the WTO Agreement on Agriculture', Congressional Research Service Report No. R46456 (Washington, D.C.: Congress, 2020), at 13 <https://crsreports.congress.gov/product/pdf/R/R46456>; UN General Assembly, *State of Global Food Insecurity: Draft Resolution by Brazil, Egypt, Fiji, Kenya, Lebanon, Pakistan, Qatar, Senegal, South Africa and Tunisia* (UN Doc. A/76/L.55, 2022).

[1646] Caitlin Welsh, 'Russia, Ukraine, and Global Food Security: A One-Year Assessment' (Washington, D.C.: Center for Strategic and International Studies, 2023) <https://www.csis.org/analysis/russia-ukraine-and-global-food-security-one-year-assessment>; WFP, 'War in Ukraine Drives Global Food Crisis: Hungry World at Critical Crossroads' (Rome: WFP, 2022) <https://docs.wfp.org/api/documents/WFP-0000140700/download/?_ga=2.39160160.2120755683.1681916556-1127570621.1681916556>; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (12 April 2022) G/AG/R/101, paras. 1.6, 3.8, 3.10.

[1647] WTO, 'Members Maintain Focus on Food Security, Discuss Farm Policies, Transparency' (28 March 2023) <https://www.wto.org/english/news_e/news23_e/agri_28mar23_e.htm>.

[1648] *Ibid.*; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (17 January 2023) G/AG/R/104, para. 3.25. Women are disproportionately affected by hunger and food insecurity, in part as a result of gender inequality and discrimination. While women contribute more than 50% of the food produced worldwide, they also account for 70% of the world's hungry. See UN General Assembly, *State of Global Food Insecurity* (n 4).

[1649] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 27-28 June 2022' (8 August 2022), para. 4.13.

[1650] Agreement on Agriculture (15 April 1994) 1867 U.N.T.S. 470, 33 I.L.M. 1226 (hereinafter AoA).

and other agricultural-related instruments at the WTO impact the advancement of food security.[1651]

The paper proceeds as such. Part II analyzes the WTO framework on agriculture ahead of Ministerial Conference (MC) 12 with a focus on the AoA and other WTO decisions relevant to the pursuit of food security. The framework covers numerous issues that are crucial for the achievement of food security, including import barriers, domestic support measures, export subsidies, safeguard mechanisms, public stockholding programs, investment subsidies, export restrictions, international food aid programs, and measures to protect LDCs and NFIDCs. The analysis shows that the WTO framework on agriculture is hampered by deficiencies that hinder the attainment of food security. These inadequacies arise from a variety of factors, such as Members circumventing rules and manipulating trade-distorting measures, certain rules lacking appropriate differentiation based on Members' different levels of development, some rules being temporary or yet to be put into practice, and others lacking comprehensiveness or a well-defined scope of application.

Part III delves into the proposals advanced by Members ahead of MC12 – between 2020 and 2022 – to amend the described WTO framework on agriculture with the aim of better protecting food security interests. The analysis reveals that Members had divergent views on most issues and lacked the ability to make concrete reform proposals, except for public stockholding and international food aid. Market access, safeguard mechanisms, export subsidies, and export restrictions were widely debated, although no concrete proposals for reform were made. Domestic support, due to its sensitive nature, received little attention. Notably, Members discussed other key issues for food security, including transparency, special and differential treatment (S&DT), and sustainability.

Part IV examines the limited outcomes achieved at MC12 and highlights the shortcomings of the Members in attaining any significant progress beyond the regulation of international food assistance. Members only agreed to exempt foodstuffs purchased for humanitarian purposes by the WFP from the imposition of export prohibitions or restrictions. No meaningful advancements were made on most of the key issues mentioned above. This is the reason why MC12 had a modest impact on food security.

In light of Members' failures to make relevant progress over the past years, part V advocates for the need to craft a comprehensive legal framework grounded in sustainable development and the right to food that goes beyond market access, subsidy regulations, and export measures in addressing the multifaceted nature of food security. This framework would be grounded on the premise that treating food security as an exception to the WTO rules is undesirable. Accordingly, part V explores the theoretical foundation and the legal basis for implementing a holistic approach to food security in the WTO framework on agriculture and proposes recommendations for adopting this innovative approach in the AoA. It also sheds light on the possibility of moving toward this approach at MC13.

Part VI concludes by showing that a shift toward the aforementioned approach would be possible at MC13. Progress will not happen all at once but will rather be incremental due to the consensus-based decision-making at the WTO. To streamline this process, Members could prioritize the issues that need to be discussed. This can be done by giving precedence to those

[1651] Other agreements that are relevant for the achievement of food security but that fall outside the scope of the present paper include the General Agreement on Tariffs and Trade (15 April 1994) 1867 U.N.T.S. 187, 33 I.L.M. 1153; the Agreement on Technical Barriers to Trade (15 April 1994) 1868 U.N.T.S. 120, 33 I.L.M. 1125; the Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) 1867 U.N.T.S. 493, 33 I.L.M. 1144 (hereinafter SPS Agreement); the Agreement on Trade Facilitation (27 April 2014) 2317 U.N.T.S. 69, 53 I.L.M. 23.

issues that are more likely to gain consensus in the short to medium term, such as sustainable agriculture, which has witnessed a renewed push following MC12. Additionally, Members could explore the use of soft law instruments, such as guidelines on good practices and voluntary commitments, to expand the legal tools employed. These instruments would favor a flexible approach that promotes cooperation, trust, and confidence among Members.

II. The WTO Framework on Agriculture Ahead of the 12th Ministerial Conference

During the Uruguay Round, Members negotiated the AoA to both liberalize agricultural trade and address food security concerns.[1652] The AoA is based on three pillars – market access, domestic support, and export subsidies. Each of them provides S&DT to developing countries and LDCs.[1653] The following sections critically analyze the key provisions of each pillar, as well as other matters relevant to food security covered by the AoA. Table 1 summarizes the key findings.

Table 1

Issue	The WTO framework on agriculture ahead of MC12	Limits
Market access	• Import barriers are converted into tariffs and then reduced. • Commitments (reductions and time frame) are differentiated for developed countries, developing countries, and LDCs.	• Non-product specific tariff reduction has resulted in "tariff peaks". • Many Members have maintained higher tariffs on processed products than on raw materials ("tariff escalation"). • Members artificially inflated their tariffs during the base period or overestimated the tariff equivalent of their non-tariff barriers ("dirty tariffication").
Domestic support	• Amber Box: programs that directly impact production and trade (to be reduced). • Green Box: programs that have minimal or no effects on trade (exempt from limitations). • Blue Box: Amber Box programs that have conditions to mitigate trade distortions (exempt from limitations).	• Trade-distorting measures have been manipulated to meet Green Box requirements. • Blue Box programs have been used almost exclusively by developed countries.

[1652] WTO, 'Agriculture: Fairer Markets for Farmers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/ agrm3_e.htm>.
[1653] AoA, Article 15.

Export subsidies	• Capping of existing subsidy programs and commitment to decrease expenditure and product coverage. • At MC10, Members committed to eliminating their remaining scheduled export subsidy entitlements, with different time frames for developed countries, developing countries, LDCs, and NFIDCs.	• Export subsidies can be substituted with domestic ones by eliminating the export contingency (this issue has not been addressed). • All countries, irrespective of their level of development and specific needs, are required to eliminate their export subsidies (no S&DT).
Safeguards	• A safeguard against sudden import surges or decreases in import prices is provided through additional tariffs on the products impacted (AoA Article 5).	• Use is restricted to products identified as being subject to the safeguard according to the country's tariff schedule. • Use is restricted to products that have been "tariffed." • Safeguards do not mitigate price increases.
Public stockholding programs	• May be classified as Green Box programs if they do not rely on supported or administered price systems. • At MC9, Members temporarily committed not to challenge public stockholding programs in developing countries.	• No permanent solution has been found. • Members hold divergent opinions regarding the role of public stockholding programs.
Investment subsidies	• Excluded from domestic support reduction commitments to promote agricultural and rural development subject to certain conditions (AoA Article 6(2)).	• Limited and unclear scope of application. • The investment subsidies exception does not constitute a comprehensive "food security box".
Export restrictions or prohibitions	• Allowed but subject to due consideration of the effects on importing Members' food security (AoA Article 12).	• Lack of transparency in the notification of export restrictions.
International food aid	• Must be needs-driven, provided in full grant form, not connected to the commercial export of other products, not linked to market development, and not re-exported (with exceptions).	• Aid providers independently assess the need of recipient countries. • An exception intended to grant Members "maximum flexibility" in the provision of aid might ease practices that distort local markets. • Export restrictions on foodstuffs purchased for

		humanitarian purposes are not addressed.
Measures to protect LDCs and NFIDCs	• The NFIDC Decision implemented measures to facilitate access to food for LDCs and NFIDCs.	• The NFIDC Decision has not been operationalized yet.

A. Market Access

The AoA sets up a mechanism where import barriers are converted into tariffs and then reduced.[1654] Developing countries were required to make smaller reductions and were given more time than developed countries, while LDCs were not obliged to reduce tariffs but had to establish tariff bindings for agricultural goods.[1655] Furthermore, for products with imports accounting for less than 5% of domestic production, Members agreed to allow a minimum amount of imports under low or minimal tariffs through the implementation of tariff-rate quotas.[1656] AoA Annex 5 describes the special treatment provisions regarding market access. In essence, its Section A allows Members to keep barriers in place and abstain from tariff reduction commitments with regard to primary agricultural products and their worked products.[1657] The permission to apply special treatment for these products reflects their significance for food security.[1658] Additionally, Section B provides an exemption from the obligations in AoA Article 4.2 for agricultural products that are the main staple in the traditional diet of a developing Member.[1659]

Loopholes in the AoA have enabled market access practices that do not serve the objective of furthering food security. First, tariff reduction is not product-specific, as it is based on the general tariff level. Accordingly, Members can maintain higher tariffs on certain products, such as sensitive crops, while making greater tariff cuts on less significant products.[1660] This has given rise to "tariff peaks", whereby specific products face exceptionally high tariffs.[1661] Tariff peaks curtail the ability of products from developing countries to compete with similar products in the importing country.[1662] Second, many Members have maintained higher tariffs on processed products than on raw materials ("tariff escalation").[1663] This hinders the ability of developing countries to transition from the production of primary agricultural products to higher value-added products.[1664] Third, Members (especially developed countries) have

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[1654] AoA, Article 4. See also Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International, 2002), at 67-70.

[1655] AoA, Articles 1(f) and 15(2). See also WTO, 'Agriculture: Fairer Markets for Farmers' (n 11).

[1656] In a tariff-rate quota system, a specific amount of a good is subject to a low tariff. Once the predetermined amount has been imported, any further imports of that good will be subject to a higher tariff rate. Tariff-rate quotas are sometimes considered a deceptive market access instrument because they can create uncertainty and limit transparency in international trade.

[1657] AoA, Annex 5.1.

[1658] AoA, Annex 5.1(d).

[1659] AoA, Annex 5.7.

[1660] Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill, 2017), at 166.

[1661] WTO, 'Glossary' <https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm>. See also Geboye Desta (n 13), at 62.

[1662] Ferguson (n 19), at 166.

[1663] WTO, 'Glossary' <https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm>.

[1664] Olivier De Schutter, 'International Trade in Agriculture and the Right to Food', Occasional Paper No. 46 (Geneva: Friedrich-Ebert-Stiftung, 2009), at 17.

engaged in "dirty tariffication," i.e., they have artificially inflated their tariffs during the base period or overestimated the tariff equivalent of their non-tariff barriers. As a result, Members made reduction commitments based on an inflated rate.[1665] Lastly, tropical products tend to face higher and more complex tariffs compared to products from temperate zones.[1666] This creates challenges for countries that produce a small number of crops.

B. Domestic Support

The AoA allows domestic support programs (subsidies) that do not directly impact production and limits those that do.[1667] Members agreed to reduce domestic support programs that directly impact production and trade, referred to as Amber Box programs, on the basis of a calculation called the "aggregate measurement of support".[1668] As with the provisions on market access, developing countries were allowed to make smaller reductions and were given a longer implementation period, while LDCs were not required to introduce any cuts.[1669] Additionally, the AoA allows Members to maintain *de minimis* levels of subsidies.[1670]

Programs that have minimal or no effects on trade, referred to as Green Box programs, are exempt from limitations and challenges under the AoA.[1671] However, they may still be challenged under other agreements due to the expiration of the "peace clause" in AoA Article 13.[1672] The peace clause regulated the application of other WTO agreements to subsidies in respect of agricultural products, preventing countervailing duty action or other subsidy action under the WTO Agreement on Subsidies and Countervailing Measures,[1673] as well as actions based on non-violation nullification or impairment of tariff concessions under the General Agreement on Tariffs and Trade (GATT).[1674] Members' opinions on the Green Box's future vary widely. Some appreciate the policy space offered to support vulnerable industries and regions.[1675] Others contend that some Members have exploited the Green Box by manipulating their trade-distorting measures to meet the requirements.[1676] Some also argue

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[1665] Geboye Desta (n 13), at 75; Kevin Gray, 'Right to Food Principles vis-à-vis Rules Governing International Trade' (London: British Institute of International and Comparative Law, 2003), at 17.
[1666] De Schutter (n 23), at 13.
[1667] AoA, Article 6; AoA, Annex 2.
[1668] Ferguson (n 19), at 211. For a detailed analysis of the contradictions and complications affecting the "aggregate measurement of support", see Ferguson (n 19), at 211-17.
[1669] AoA, Articles 1(f) and 15(2).
[1670] AoA, Article 6(4).
[1671] AoA, Article 6(1); AoA, Annex 2.1. As per AoA Annex 2, any support falling under the Green Box category must be financed through a government program and must not result in providing price support to producers.
[1672] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press, 2014), at 331. See also WTO, 'Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures', <https://www.wto.org/english/tratop_e/scm_e/ subs_e.htm>.
[1673] Agreement on Subsidies and Countervailing Measures (15 April 1994) 1869 U.N.T.S. 14, 33 I.L.M. 1194.
[1674] General Agreement on Tariffs and Trade (15 April 1994) 1867 U.N.T.S. 187, 33 I.L.M. 1153 (hereinafter GATT). See WTO, 'Other Issues' <https://www.wto.org/english/tratop_e/agric_e/ag_intro05_other_e.htm#:~:text=The%20Agreement%20in%20Agriculture%20contains,agricultural%20products%20(Article%2013)>.
[1675] Coppens (n 31), at 317.
[1676] *Ibid.*, at 321-22. For example, between 1995 and 2010, the EU's expenditure on Green Box subsidies surged from €9.2 billion to €68 billion. See Ferguson (n 19), at 208.

that Green Box programs resemble the programs of developed countries and do not encompass the type of support required by developing countries.[1677]

Lastly, Blue Box programs, which are essentially Amber Box programs that have conditions to mitigate trade distortions, are not subject to limitations.[1678] Historically, developed countries have been the main users of Blue Box programs, and currently, they are exclusively utilized by the European Union (EU), Iceland, Norway, Japan, the Slovak Republic, and Slovenia.[1679] Countries are divided on the future of the Blue Box as well. Some would transfer these measures to the Amber Box, as they are technically linked to production, which is generally not allowed under the AoA.[1680] Others advocate for keeping the Blue Box in place.[1681] Blue Box measures can also be subject to challenge due to the expiration of the peace clause in AoA Article 13.

MC9 made clear that some general service programs that offer specific services or advantages to agricultural or rural communities might be eligible for exemptions from domestic support restrictions.[1682] These exemptions could apply to programs that pertain to land reform and rural livelihood security, such as measures for soil conservation and drought management, intended to encourage rural development and alleviate poverty.[1683]

C. Export Subsidies

The AoA capped the existing subsidy programs and committed Members to decrease their expenditure and product coverage.[1684] This includes direct subsidies linked to export performance, export sales of non-commercial agricultural stocks below domestic market prices, payments for exported agricultural products, programs aimed at reducing the cost of producing export goods, preferential internal transportation and freight charges for exported goods, and subsidies on products that are components of exported goods.[1685] Developing countries committed to making smaller reductions over a longer period of time, while LDCs are not required to make reductions.[1686]

At MC10, further restrictions were imposed on agricultural export subsidies. Developed countries were required to eliminate their remaining scheduled export subsidy entitlements, while developing countries were instructed to eliminate their export subsidy entitlements by

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[1677] Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System', Activity Report, Briefing Note 4 (2011), at 6. See also Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011), at 185.

[1678] AoA, Article 6(5). See also WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' <https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm>; Coppens (n 31), at 316-17.

[1679] WTO, 'Domestic Support: Amber, Blue and Green Boxes' <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm>.

[1680] *Ibid.* If the Blue Box were to be eliminated, developing countries would lose the chance to support their agricultural sectors in the same ways as the developed countries did.

[1681] *Ibid.*

[1682] AoA, Annex 2.2.

[1683] WTO, 'Ministerial Decision of 7 December 2013: General Services' (11 December 2013) WT/MIN(13)/37 WT/L/912.

[1684] AoA, Articles 8 and 9. See also Terence Stewart and Stephanie Manaker Bell, 'Global Hunger and the World Trade Organization: How the International Trade Rules Address Food Security' (2015) 3 Penn State Journal of Law & International Affairs 113, 132.

[1685] AoA, Article 9(1).

[1686] WTO, 'Agriculture: Explanation, Export Competition/Subsidies' <https://www.wto.org/english/tratop_e/agric_e/ag_intro04_export_e.htm>.

the end of 2018.[1687] LDCs and NFIDCs can use export subsidies until the end of 2030.[1688] This decision contributed to progress on Sustainable Development Goal (SDG) 2.b, which calls for governments to address trade restrictions and distortions in agricultural markets as part of their efforts to ensure food security and promote sustainable agriculture. Although the achievement is noteworthy, distinguishing between export and domestic subsidies is not as straightforward as it may seem.[1689] Subsidies can be designed and presented in multiple formats, which means that an export subsidy can be substituted with a domestic one by eliminating the export contingency.[1690] Regrettably, domestic agricultural subsidies have not been curtailed. These subsidies persist and are increasing.

D. Other Matters Relevant for Food Security

In addition to the three pillars above, the AoA tackled other matters, including food security to a limited extent, specifically with respect to LDCs and NFIDCs. The AoA's Preamble emphasizes the importance of addressing non-trade concerns, recognizing that S&DT is crucial and taking into account the potential adverse consequences of the AoA on LDCs and NFIDCs.[1691] Accordingly, the AoA incorporates provisions that safeguard countries' ability to address food security concerns. The sections below provide an overview of such provisions.

1. Safeguards

The AoA provides a safeguard provision against sudden import surges or decreases in import prices that allows Members to impose an additional tariff on the products impacted.[1692] It is triggered without any need to test for injury or negotiate compensation.[1693] The safeguard has some limits that may hamper the ability of developing countries to protect domestic producers.[1694] The safeguard can only be used for products identified as being subject to the safeguard in the country's tariff schedule.[1695] Additionally, it is restricted to products that have been "tariffed" (e.g., quantitative restrictions converted to equivalent tariffs). Many developing countries that had unbound products, however, chose to offer ceiling bindings on those products, and they were not required to reduce their base rate.[1696] As a result, these countries relinquished their right to use the safeguard.[1697] Moreover, the implementation of safeguards does not mitigate price increases.[1698]

[1687] WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (21 December 2015) WT/MIN(15)/45, WT/L/980, paras, 6, 7.
[1688] *Ibid.*, para. 8.
[1689] Simon Lester, 'Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond' (Washington, D.C.: CATO Institute, 2016), at 1.
[1690] *Ibid.*
[1691] AoA, Preamble.
[1692] AoA, Article 5.
[1693] WTO, 'Agriculture Agreement: Explanation, Market Access' <https://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm>.
[1694] Carmen Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Columbia Journal of Environmental Law 433, at 479.
[1695] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 52).
[1696] Stephen Healy, Richard Pearce, and Michael Stockbridge, *The Implications of the Uruguay Round Agreement on Agriculture for Developing Countries: A Training Manual* (Rome: FAO, 1998), at para. 3.2.1.
[1697] See WTO, 'Agriculture: Negotiations, An Unofficial Guide to Agriculture Safeguards' <http://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm>.
[1698] De Schutter (n 36), at 12. Food prices have been rising over the past fifteen years and there is no effective response under AoA Article 5.

In 2015, Members agreed in the Ministerial Decision on Special Safeguard Mechanism for Developing Country Members to negotiate the implementation of a Special Safeguard Mechanism (SSM) for developing countries.[1699]

2. Public Stockholding Programs

Public stockholding programs may be classified as Green Box programs if they meet the general requirements – i.e., they are administered via a government program that is publicly funded and does not offer price support to producers – together with program-specific requirements.[1700] However, programs that rely on supported or administered prices (i.e., purchasing foodstuffs for stockholding at fixed prices) are not covered by the Green Box.[1701] This means that developing countries need to limit their spending to specific *de minimis* levels for each product.[1702]

A temporary solution was adopted at MC9, where ministers agreed that, on an interim basis, public stockholding programs in developing countries aimed at procuring primary agricultural products that are predominant staples in the traditional diet would not be challenged, even if a country's agreed limits for trade-distorting domestic support were breached.[1703] This commitment was reaffirmed at MC10, where Members were encouraged to agree on a permanent solution.[1704] The interim agreement has sparked controversy. For example, India relied on it to provide support to rice cultivators in excess of its domestic support limits, and the United States (US) contested that India did not adequately report the costs of its stockholding program to the WTO, which is a pre-condition to be exempt from challenges.[1705] Disagreement about compliance with the interim agreement has impeded WTO Members from reaching a permanent agreement.[1706]

3. Investment Subsidies

AoA Article 6(2) acknowledges that investment subsidies that are accessible to agriculture in developing Members, as well as agricultural input subsidies that are generally accessible to low-income or resource-poor producers in developing Members, shall be excluded from domestic support reduction commitments for the purpose of promoting agricultural and rural

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[1699] WTO, 'Ministerial Decision of 19 December 2015: Special Safeguard Mechanism for Developing Country Members' (19 December 2015) WT/MIN(15)/43, WT/L/978. The introduction of a special safeguard mechanism for developing countries has been debated also in the meetings of the WTO Committee on Agriculture ahead of MC12. See below, section III.B

[1700] AoA, Annex 2. See also WTO, 'Domestic Support' <https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm>.

[1701] Panos Konandreas and George Mermigkas, 'WTO Domestic Support Disciplines: Options for Alleviating Constraints to Stockholding in Developing Countries in the Follow-Up to Bali', FAO Commodity ad Trade Policy Research Working Paper No. 45 (Rome: FAO, 2014), at 6.

[1702] Ferguson (n 19), at 213.

[1703] WTO, 'Ministerial Decision of 7 December 2013: Public Stockholding for Food Security Purposes' (11 December 2013) WT/MIN(13)/38 WT/L/913, para. 2. See also WTO, 'Food Security' <https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm>; WTO, 'The Bali Decision on Stockholding for Food Security in Developing Countries' <https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm>.

[1704] WTO, 'Ministerial Decision of 19 December 2015: Public Stockholding for Food Security Purposes' (21 December 2015) WT/MIN(15)/44, WT/L/979. See also WTO, 'Food Security' (n 62).

[1705] Regmi, Hart, and Schnepf (n 4), at 12.

[1706] WTO, 'Ministerial Decision of 19 December 2015: Public Stockholding for Food Security Purposes' (n 63), para. 2.

development.[1707] However, the AoA fails to specify who should be considered a resource-poor producer.[1708]

4. Export Restrictions or Prohibitions

Although GATT Article XI allows for certain export restrictions or prohibitions, AoA Article 12 requires Members to consider the impact of an export restriction or ban on foodstuff on the food security of importing Members. Prior to enacting such a measure, a Member should submit written notice to the Committee on Agriculture (CoA) and, upon request, engage in consultations with importing Members.[1709] The provision does not apply to developing Members, except where the Member is a net-food exporter of the specific foodstuff.[1710] Countries are increasingly seeking greater transparency on the imposition of export restrictions.[1711]

5. International Food Aid

AoA Article 10 provides that Member donors shall ensure that the provision of international food aid is not tied to commercial exports of agricultural products to recipient countries and, to the extent possible, is provided in full grant form.[1712] Food aid that meets these criteria is not considered an export subsidy and hence is not limited.

At MC10, Members reaffirmed their food aid responsibilities to ensure that aid is available in humanitarian crises but does not serve as a covert export subsidy. Accordingly, Members agreed to maintain adequate levels of aid, take into account the interests of food aid recipients, and not unintentionally impede the delivery of food aid in emergencies.[1713] They also agreed that food aid must be needs-driven, provided in full grant form, not connected to the commercial export of other products or services, not linked to market development, and not re-exported (with exceptions).[1714] Moreover, governments must refrain from providing in-kind international food aid when it could negatively impact local production.[1715] In addition, food aid can be monetized – i.e., sold to fund development initiatives – only where there is a demonstrable need for the purpose of transportation and distribution, or to tackle the causes of hunger and malnutrition in LDCs and NFIDCs.[1716]

This framework has some notable weaknesses. First, food aid providers can independently assess the need of recipient countries for aid – no international or regional organization is involved in such assessment. Second, an exception intended to grant members "maximum flexibility" in the provision of aid might serve to continue undesirable practices that distort local markets.[1717] Third, re-exportation is allowed in many circumstances whose rationale is not always clear.[1718] Lastly, the imposition of export restrictions on foodstuffs purchased for

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[1707] AoA, Article 6(2), known as Development Box.
[1708] FAO, *WTO Agreement on Agriculture: The Implementation Experience—Developing Country Case Studies* (Rome: FAO, 2003).
[1709] AoA, Article 12(1).
[1710] AoA, Article 12(2).
[1711] See below, section III.F.
[1712] AoA, Article 10(4).
[1713] WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 46), para. 22.
[1714] *Ibid.*, para. 23.
[1715] *Ibid.*, para. 24.
[1716] *Ibid.*, para. 27.
[1717] *Ibid.*, para. 30.
[1718] *Ibid.*, para. 23(e). Re-exportation is allowed in the following circumstances: the agricultural products were not permitted entry into the recipient country; the agricultural products were determined inappropriate or no longer

humanitarian purposes was addressed only at MC12, where WFP purchases were exempted from these measures.[1719] Some authors have lamented that the WTO keeps influencing international aid policies, even though it is not its "business", and have further pointed out that, despite the renewed commitment to provide food aid and consider the needs of importing countries, this remains a "best endeavor" under the AoA.[1720]

6. Measures to Protect Least-Developed Countries and Net Food-Importing Developing Countries

Under AoA Article 16, developed Members are required to adhere to the NFIDC Decision,[1721] which deals with measures related to the potential adverse impacts of the AoA on LDCs and NFIDCs. The NFIDC Decision acknowledges that such countries may face challenges in terms of acquiring sufficient supplies of essential foodstuffs from external sources under fair conditions.[1722] The NFIDC Decision implemented various measures to facilitate access to food, including periodic reviews of the adequacy of food aid provided to developing countries, guidelines to ensure that LDCs and NFIDCs are provided with basic foodstuffs on appropriate concessional terms, the evaluation of requests made by LDCs and NFIDCs for financial and technical support, and S&DT with respect to rules governing agricultural export credits.[1723] Developing countries have claimed that the NFIDC Decision has not been operationalized and has brought little benefit.[1724] At MC12, Members committed to operationalizing the NFIDC Decision.[1725]

III. Members' Proposals on Food Security Ahead of the 12th Ministerial Conference (2020-22)

The following sections analyze Members' proposals on food security ahead of MC12. Since the COVID-19 pandemic and the conflict in Ukraine sparked renewed attention to the topic, the analysis is focused on submissions made between January 2020 and June 2022, when MC12 took place.[1726] Countries' submissions are grouped thematically.

Members mainly addressed the issues reported in section II. Market access, safeguards, export subsidies, and export restrictions have been widely debated, although no concrete proposals for reform have been made. Some countries have, however, advanced reform proposals with respect to public stockholding programs and international food aid. Domestic support, due to its sensitive nature, has received little attention. This is one of the major drawbacks of the debate ahead of MC12, since several Members resort extensively to domestic

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needed for the purpose for which they were received in the recipient country; re-exportation is necessary for logistical reasons to expedite the provision of food aid for another country in an emergency situation.

[1719] See below, section IV.A.

[1720] Christian Häberli, 'Food Security and the WTO Rules' in Baris Karapinar and Christian Häberli (eds), *Food Crises and the WTO: World Trade Forum* (Cambridge University Press, 2010), at 316.

[1721] WTO, 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries' (15 April 1994) LT/UR/D-1/2 (hereinafter NFIDC Decision).

[1722] *Ibid.*, para. 2. See also WTO Secretariat, *The WTO Agreements Series: Agriculture* (Geneva: WTO, 2003), at 22.

[1723] NFIDC Decision, paras. 3(i)-(iii) and 4.

[1724] James Hodge and Andrew Charman, 'An Analysis of the Potential Impact of the Current WTO Agricultural Negotiations on Government Strategies in the SADC region' in Basudeb Guha-Khasnobis, Shabd Acharya, and Benjamin Davis (eds), *Food Security: Indicators, Measurement, and the Impact of Trade Openness* (Oxford University Press, 2007), at 258.

[1725] See below, section IV.B.

[1726] The analysis is based on the minutes of the meetings of the WTO CoA, as well as other relevant communications submitted by the Members.

support measures, which can be very trade-distortive.[1727] However, Members also discussed other key issues for food security, including transparency, S&DT, and sustainability, although no detailed proposals have been made on these issues. The key findings of the analysis are summarized in the table below.

Table 2

Issue	Views expressed	Limits
Market access and supply chains	• Many Members favored keeping markets and supply chains open. They called for emergency measures to be no more trade-restrictive than necessary. • Some Members emphasized that open trade is a complement to domestic production, which plays a critical role in ensuring food security. Accordingly, they advocated for greater policy space to protect local production.	• No proposals were made to either keep markets open in times of crises and/or introduce greater flexibilities to protect domestic markets and local production.
Special safeguard mechanism	• Some Members conceive the SSM as a means of safeguarding vulnerable farmers against price volatility. Accordingly, the SSM should be user-friendly, offer effective remedies to counteract sudden surges in imports and price drops, and remedy the existing distortions. • Other Members see the SSM as a time-bound tool, meant to increase market access. Accordingly, its use should be constrained, and it should not be triggered by normal price fluctuations or regular trade expansion.	• No proposals were made to advance negotiations on a SSM.
Export subsidies	• Members stressed the need to implement the Ministerial Decision on Export Competition of 19 December 2015.	• No proposals were made to address transparency issues.

[1727] One of the most striking examples is provided by the EU and its Common Agricultural Policy, which has seen a considerable increase in funding over the years. See European Parliament, 'Fact Sheets on the European Union: Financing of the CAP' <https://www.europarl.europa.eu/factsheets/en/sheet/106/financing-of-the-cap>.

	• Members also reaffirmed their concern on transparency in the notification of export subsidies.	
Public stockholding programs	• The African Group, the G33 Group, and the African-Caribbean-Pacific Group suggested to amend the AoA to change the formula for calculating the amount of domestic support generated by public stockholding programs to increase their accessibility. • Brazil, on the other hand, suggested to restrict the use of domestic support in public stockholding programs to LDCs, NFIDCs, and countries requiring external assistance for food.	• Despite the detailed proposals, convergence toward a common solution is unlikely due to divergent views.
Export restrictions or prohibitions	• Many Members warned against the adoption of export restrictions as they are harmful to developing and low-income countries that rely on imports for their food needs. • Some developing Members, however, upheld the importance of export restrictions in protecting domestic markets from food shortages during worldwide crises.	• No proposals were made, including on transparency and notification issues, due to the different views on the impact of export restrictions on food security.
Transparency	• Most Members acknowledged the need for greater transparency in the notification of trade-restrictive measures to the WTO. • Views differed as to how transparency and notification mechanisms could be improved, especially with respect to the WTO Secretariat's role.	• No proposals were made.
International food aid	• Many Members supported Singapore's proposal, ultimately adopted at MC12, to exempt foodstuffs purchased by the WFP for non-commercial, humanitarian	• Only the WFP was exempted. • Trade barriers other than export restrictions were not addressed.

	purposes from export prohibitions and restrictions.	
S&DT	• S&DT received little attention.	• No proposals were made.
Sustainability	• A statement supporting a reform of the AoA to promote an "inclusive" vision of sustainable agricultural production was submitted.	• Only 16 Members joined the statement. • No proposals on how to reform the AoA were made.

A. Market Access and Supply Chains

In the aftermath of the COVID-19 pandemic, many Members expressed views in favor of keeping markets and supply chains open.[1728] They emphasized the importance of ensuring that production levels are maintained and safeguarding the ability of Members to import agricultural products to fulfill their domestic needs.[1729] The Cairns Group called on all Members to refrain from implementing trade barriers on imports of agricultural products.[1730] Russia also argued that, in tackling the pandemic, Members should keep food supply chains open and minimize the adoption of measures that impact global trade.[1731] The EU also took a stance in favor of maintaining open and predictable trade in agricultural products.[1732] Many countries, both developed and developing, called for making sure that emergency measures related to agricultural products designed to address COVID-19 be targeted, balanced, proportionate, transparent, temporary, WTO-consistent, science-based, not more restrictive than necessary, and not harmful to other countries.[1733]

[1728] Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.

[1729] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (29 May 2020) WT/GC/208/Rev.2 G/AG/30/Rev.2, paras. 1.2, 1.3, 1.6. See also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (17 August 2020) G/AG/R/94, para. 1.2; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5), para. 3.9. This group of countries emphasized that open and interconnected supply chains play a pivotal role in ensuring the movement of agricultural goods, which avoids food shortages and ensures global food security.

[1730] WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (17 June 2020) WT/GC/218 G/AG/31 TN/AG/44, Annex, para. 5. The Cairns Group is composed of Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay, Vietnam.

[1731] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.10.

[1732] *Ibid.*, para. 1.15.

[1733] Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, the EU, Georgia, Hong Kong, India, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Peru, Qatar, Russia, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, US, Uruguay, the ACP Group, and the Cairns Group. *Ibid.*, paras. 1.2, 1.4, 1.10, 1.11, 1.22, 1.25, 1.28, 1.29, 1.34. See also WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 88), para. 1.6; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (22 December 2020) G/AG/R/96, para. 2.22; WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 89), para. 1.6 and Annex, para. 1.

Other countries, while expressing views in favor of preserving market openness, also emphasized that local production plays a critical role in ensuring food security. The Philippines and Indonesia view open trade as a complement to domestic production.[1734] Indonesia argued that countries should not rely excessively on international trade for attaining food security, particularly to address small farmers' vulnerability.[1735] With respect to COVID-19 measures, Pakistan supported their temporary nature but also affirmed Members' right to invoke their policy space under WTO law to ensure the food security of their populations.[1736]

B. Special Safeguard Mechanism

While the 2015 Nairobi Decision on a Special Safeguard Mechanism for Developing Country Members pushed for the implementation of an SSM,[1737] disagreement among Members has prevented any meaningful progress.[1738]

G33 members have advocated for flexibilities in opening markets through a simple and accessible SSM as a means of addressing price instability risks and counterbalancing distortions in global agricultural trade.[1739] Other Members believe that discussion on SSM should be part of the broader debate on liberalizing agricultural markets and contend that an agreement is unlikely to be reached if there are no outcomes on market access more generally.[1740]

The disagreement reflects two different views on the rationale for an SSM. Some Members see the SSM as a means of safeguarding vulnerable farmers against price volatility. They believe that the SSM should be user-friendly, offer effective remedies to counteract sudden surges in imports and price drops, and remedy the existing distortions, including the subsidies provided by wealthy countries.[1741] Other Members see the SSM as a time-bound tool, meant to increase market access. They believe that the use of the SSM should be constrained and that tariffs should not be raised beyond the levels agreed upon before the Doha Round. Additionally, the SSM should not be triggered by normal price fluctuations or regular trade expansion. This perspective is rooted in the idea that enhanced market access is crucial for farmers striving to overcome poverty.[1742]

Due to these different perspectives, no progress has been made since 2020 on the SSM negotiations, and few countries have addressed the issue. South Africa urged for advancements in the negotiations, stating that developing countries should be permitted to implement tailored approaches within their WTO commitments.[1743] Similarly, Jamaica noted that COVID-19 highlighted the urgency to address SSM to achieve a balanced outcome in the

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[1734] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.30.
[1735] *Ibid.*, para. 1.35.
[1736] *Ibid.*, para. 1.27.
[1737] WTO, 'Ministerial Decision of 19 December 2015: Special Safeguard Mechanism for Developing Country Members' (n 58).
[1738] WTO Committee on Agriculture, 'Committee on Agriculture in Special Session: Report by the Chairperson, H.E. Ms Gloria Abraham Peralta, to the Trade Negotiations Committee' (23 November 2021) TN/AG/50, para. 7.1.
[1739] WTO, 'An Unofficial Guide to Agricultural Safeguards' <https://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm>. The G33 Group, also called "Friends of Special Products" in agriculture, is a coalition of developing countries (forty-seven WTO Members) pressing for flexibility to undertake limited market opening in agriculture.
[1740] *Ibid.*
[1741] *Ibid.*
[1742] *Ibid.*
[1743] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.7.

agriculture negotiation with S&DT at its core.[1744] Egypt also flagged the need to deliver on SSM.[1745]

C. Export Subsidies

Since MC10, where stricter rules on export subsidies were established, no progress has been made. Since 2020, Members have focused on the implementation of the Nairobi Decision on Export Competition,[1746] as well as on transparency in the notification of export subsidies.

The EU has emphasized that the modification of export subsidy schedules in accordance with the Nairobi Decision should result in the complete eradication of such subsidies, "not only de jure, but also de facto," advising developing countries against using these tools.[1747]

The EU, together with Switzerland, the US, and Ukraine, has also called for increased transparency and more stringent requirements toward the implementation of the Nairobi Decision and the use of AoA Article 9.4. These Members are concerned on the lack of notifications related to export subsidies under AoA Article 9.4, which received a more extended phase-out period in the Nairobi Decision.[1748] AoA Article 9.4 grants S&DT to developing Members with respect to export subsidies.[1749] The provision allows them to provide marketing cost subsidies and internal transport subsidies, as long as these subsidies are not utilized to circumvent the commitment to reduce export subsidies.[1750] Export subsidies must be notified each year to the CoA and, as part of this obligation, Members also have to provide a list of those measures that may be used under AoA Article 9.4.[1751] Many countries, however, have not complied with these obligations.

D. Public Stockholding Programs

Public stockholding is one of the most controversial subjects in agricultural negotiations. Stockholding per se is not a problem. Issues arise when governments set prices for purchases into the stocks (so-called "administered prices"), thereby involving domestic support, rather than relying on market prices.[1752] Since 2020, Members have expressed different views on how to permanently regulate public stockholding programs for developing countries.

Many Members have urged developing countries to exercise restraint when introducing domestic food stocks of agricultural products that are typically exported in order to prevent disruptions or distortions in global trade.[1753] The Cairns Group also called for transparency

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[1744] *Ibid.*, para 1.11.
[1745] *Ibid.*, para 1.36.
[1746] WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 46).
[1747] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.5.
[1748] *Ibid.*, paras. 2.5, 2.7, 2.8. See also WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 46), para. 8.
[1749] WTO, 'Agriculture: Explanation, Export Competition/Subsidies' (n 45).
[1750] *Ibid.*
[1751] *Ibid.*
[1752] WTO, 'Food Security' (n 62).
[1753] Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Guatemala, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Pakistan, Paraguay, Peru, Philippines, Qatar, Saudi Arabia, Singapore, South Africa, Switzerland, Taiwan, Thailand, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Vietnam. See WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 88), para. 1.6; WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 89), Annex, para. 3.

and consistency with the WTO agreements and the Nairobi Decision on Export Competition in the disposal of food stocks built up in public storage facilities, or as a result of the public subsidization of private storage facilities.[1754] Egypt, India, and South Africa called for more engagement on public stockholding but did not clarify how they would address the issue.[1755] Despite these general remarks, only two concrete (and divergent) proposals have been advanced.

The African Group,[1756] the G33 Group, and the African-Caribbean-Pacific Group (ACP),[1757] suggested amending the AoA to make the calculation of domestic support less stringent.[1758] However, they also emphasized that public stockholding "shall not substantially distort trade or adversely affect the food security of other [Members]."[1759] The proposal suggests changing the formula for calculating the amount of domestic support generated by (i) redefining the base price reference used to calculate how much price support is given and (ii) redefining "eligible production" to encompass only the amount actually purchased, instead of the amount that could potentially be purchased.[1760] The current base reference price, fixed at prices in 1986-88,[1761] would be replaced with either more recent prices or adjustments that consider inflation.[1762] This would reduce the disparity between the reference prices and the current government-fixed prices, leading to a decrease in the level of trade-distorting domestic support.

Brazil submitted the first-ever counter-proposal due to its concerns that the proposal from the African Group and its allies could enable major producers to distort markets and negatively impact food security.[1763] Rather than proposing amendments to the AoA, Brazil suggested restricting the use of domestic support in public stockholding programs to those countries that rely on food imports or are not major traders, while also introducing stricter rules, including additional transparency obligations. On the one hand, Brazil's proposal is more radical than the one advanced by the African Group and its allies, as it suggests that the difference between the acquisition price of food stocks and the external reference price should not be included in the calculation of domestic support.[1764] However, this would only apply to a select group of eligible countries, namely, (i) LDCs, (ii) NFIDCs,[1765] and (iii) countries

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[1754] See WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 89), Annex, para. 4.

[1755] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), paras. 1.7, 1.36; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.31.

[1756] The African Group comprises the African Members and Observers of the WTO (forty-four).

[1757] ACP comprises African, Caribbean and Pacific countries with preferences in the EU (sixty-two WTO Members).

[1758] MC12, General Council, 'Public Stockholding for Food Security Purposes: Proposal by the African Group, the ACP, and G33' (6 June 2022) WT/MIN(22)/W/4 WT/GC/W/850, para, 11.1.

[1759] *Ibid*., para. 5.1.

[1760] *Ibid*., para. 3.

[1761] WTO, 'Agriculture: Fairer Markets for Farmers' (n 11).

[1762] MC12, General Council, 'Public Stockholding for Food Security Purposes: Proposal by the African Group, the ACP, and G33' (n 117), para. 3(a) and (b).

[1763] Two years before submitting this proposal, Brazil was claiming that, despite needing updates, the AoA already provided Members with ample policy space and the tools to manage food crises in the least distorting way possible. See WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), paras. 1.18, 1.31.

[1764] MC12, General Council, 'Communication from Brazil' (6 June 2022) WT/MIN(22)/W/5 WT/GC/W/851, para. 2.

[1765] See WTO, 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries' (n 80).

requiring external assistance for food (as defined by FAO) at least once in the past two years.[1766] In order to meet the criteria for the last two categories, the country must not be a major player in the relevant product, based on its share of exports (not exceeding 2% of global exports in any case) and the size of its stockpiles compared to the product's total production.[1767] Under this system, for example, India would meet the eligibility requirements for wheat based on the 2020 figures, as its share of exports was roughly 0.5%, but not based on the 2021 figures, as its share of exports exceeded 3%. In the case of rice, India would not be eligible at all, as its export share exceeds 30%.[1768]

Overall, the proposal presented by the African Group appears preferable, as it ensures that public stockholding programs are accessible to a larger number of countries. However, Brazil's proposal is worthy of consideration, not only because it is more impactful with respect to the calculation of domestic support, but also because it highlights certain aspects of food security that have frequently been overlooked. Brazil stressed that food security issues are "multifaceted", and, for this reason, they require the adoption of a "comprehensive approach" to be effectively tackled. Public stockholding is merely one component of such a "comprehensive package."[1769] Brazil's statements draw attention to the lack of a holistic approach in the way food security has been addressed at the WTO. This shortcoming will be further addressed in section V below.

E. Export Restrictions or Prohibitions

In the aftermath of the COVID-19 pandemic, many countries resorted to food export restrictions to ensure food supplies for their own populations, prevent shortages, and stabilize prices within their markets.[1770] Countries reacted differently to the introduction of such measures.

Many Members warned against the adoption of export restrictions due to their negative impact on global food security. Canada, together with other countries,[1771] argued that export restrictions on agricultural products create an unpredictable trading environment that might result in a widespread food security crisis due to supply chains disruptions, price spikes, price volatility, and shortages.[1772] Vulnerable populations would bear the brunt of increased export restrictions.[1773] Brazil, similarly, noted that export restrictions rarely achieve the desired objectives and rather distort international trade.[1774] Along the same lines, the ACP Group held

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[1766] MC12, General Council, 'Communication from Brazil' (n 123), para. 5.
[1767] *Ibid*., para. 6.
[1768] Peter Ungphakorn, 'Two Last-Minute Agriculture Proposals Land as WTO Conference Approaches' (Tradebetablog, 2022) <https://tradebetablog.wordpress.com/2022/06/01/two-proposals-ag-wto-conference/>.
[1769] MC12, General Council, 'Communication from Brazil' (n 123), Preamble.
[1770] Jonathan Hepburn, David Laborde, Marie Parent, and Carin Smaller, 'COVID-19 and Food Export Restrictions: Comparing Today's Situation to the 2007/08 Price Spikes' (Geneva: IISD, 2020) <https://www.iisd.org/system/files/2020-08/covid-19-food-export-restrictions.pdf>.
[1771] Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.
[1772] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 88), para. 1.3; WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.1.
[1773] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 88), para. 1.4.
[1774] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.5.

that export restrictions could have aggravated the COVID-19 crisis.[1775] The EU highlighted that export restrictions are particularly harmful to developing and low-income countries that rely on imports for their food needs and urged Members to promptly notify those measures to the WTO.[1776] Japan urged Members to withdraw their export restrictions due to their potential to cause artificial food shortages.[1777] Switzerland emphasized, both after the outbreak of the COVID-19 pandemic and the conflict in Ukraine, that export restrictions amplify food insecurity concerns, especially for vulnerable populations.[1778] The FAO, the International Monetary Fund (IMF), the World Bank (WB), the WFP and the WTO also stressed that export restrictions can impede access to food for poor consumers in low-income food-importing countries.[1779] Lastly, the WFP noted that export restrictions result in increased costs and longer delivery times for its procurement operations.[1780]

Not every Member, however, especially developing economies, upheld the view that export restrictions are always a threat to food security. Pakistan highlighted the significance of these measures in protecting domestic markets from food shortages during worldwide crises. By citing the research of Amartya Sen on the famines in Ireland and Bengal, Pakistan emphasized that market failures and food shortages during global crises jeopardize the ability of poor people to access food, as purchasing power becomes the primary factor in acquiring food from the market.[1781] Similarly, India warned against the narrative of prohibiting export restrictions to facilitate the access of developing countries to agricultural products. India contended that this narrative overlooks the practical reality that, in times of scarcity, producers would prioritize selling their products to the highest bidders, who may not originate in developing countries.[1782]

The different views on the impact of export restrictions on food (in)security prevented any meaningful reform, including on transparency and notification, which are crucial during crises.

F. Transparency in the Notification of Trade-Restrictive Measures

The COVID-19 pandemic has unveiled the inadequacy of the existing provisions on transparency and notification of trade-restrictive measures to the WTO. Without sufficient

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[1775] *Ibid.*, para. 1.11.

[1776] *Ibid.*, para. 1.24; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 17-18 June 2021' (13 July 2021) G/AG/R/99, para. 5.7. The EU referred to the Export Restrictions Tracker released by the International Food Policy Research Institute and expressed its concern over the fact that several measures documented on the tracker had not been reported to the WTO since the beginning of the Covid-19 pandemic.

[1777] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.22; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.45; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5), para. 3.11.

[1778] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.23; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5), para. 3.12.

[1779] FAO, IMF, WB, WFP and WTO 'Joint Statement' (n 1).

[1780] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (4 February 2021) G/AG/R/97, para. 2.9.

[1781] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.27.

[1782] *Ibid.*, para. 1.34.

transparency, it is not possible to assess Members' compliance with WTO rules.[1783] Since 2020, many countries have adopted restrictive measures to deal with the pandemic without giving proper notification to the WTO, especially with respect to export restrictions.[1784] Members have generally acknowledged the need for greater transparency. However, views differ as to how transparency and notification mechanisms could be improved, especially with respect to the WTO Secretariat's role in facilitating information collection and management.

Canada, together with other countries,[1785] encouraged Members to share with the WTO information on their trade-restrictive measures affecting agricultural products, as well as information on their levels of food production, consumption, stocks, and food prices.[1786] Canada held that information-sharing should be Member-driven.[1787] Similarly, the EU held that greater involvement of the WTO Secretariat is unrealistic in the absence of Members' inputs,[1788] and the U.S. contended that the Secretariat's monitoring should not prejudge how Members should notify their measures.[1789] Along the same lines, India held that the information-sharing process should remain Member-driven, to avoid an "overarching role" for the Secretariat,[1790] and Indonesia cautioned against turning information-sharing into a "policing mechanism."[1791]

Setting forth a different view, Australia encouraged the WTO Secretariat to assist Members by compiling information on their agricultural trade-restrictive measures. The country noted that, due to the capacity constraints of developing countries and LDCs, formal notifications to the Secretariat can take too long. For this reason, greater assistance would be valuable.[1792] New Zealand and Chile also called on the Secretariat and Members to work together.[1793]

Allowing the WTO Secretariat to play a greater role in the collection and management of information on trade-restrictive measures and their effects on food security has potential benefits and drawbacks. While it could enhance transparency and facilitate informed decisions,

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[1783] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (19 October 2020) G/AG/R/95, para. 3.3.

[1784] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.35.; WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.22.

[1785] Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.

[1786] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 88), para. 1.6. See also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.2.

[1787] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 142), para. 3.5.

[1788] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.35.

[1789] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 139), para. 2.14.

[1790] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 142), para. 3.15; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para. 2.31.

[1791] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 142), para 3.13.

[1792] *Ibid*., para. 3.4.

[1793] *Ibid*., paras. 3.7, 3.19; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92), para.2.34; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 139), para. 2.13.

as well as monitoring and impact assessments, there are also considerations around resource limitations and sovereignty concerns among some Members.

G. International Food Aid

In 2020, Singapore proposed to not impose export prohibitions and restrictions on foodstuffs purchased by the WFP for non-commercial, humanitarian purposes.[1794] Singapore emphasized the importance of exempting WFP's food purchases to contribute to the SDG 2 on "zero hunger", especially in light of the increased humanitarian food needs as a result of the COVID-19 pandemic.[1795] The Cairns Group supported this proposal and encouraged other Members to do so.[1796] Singapore's proposal was ultimately adopted at MC12.[1797]

H. Special and Differential Treatment

S&DT for developing countries did not receive great attention in the aftermath of the COVID-19 pandemic. South Africa called for progress on S&DT, noting that developing countries need "tailored approaches" within their WTO commitments.[1798] The ACP Group stressed the vulnerabilities of developing countries and their need for S&DT.[1799] However, no concrete reform proposals have been advanced.

I. Sustainability

Argentina, Australia, Brazil, Canada, Chile, Colombia, Ecuador, Guatemala, New Zealand, Paraguay, Peru, the Philippines, South Africa, Ukraine, Uruguay, and Vietnam are the only Members that devoted significant attention to sustainability through a joint statement.[1800]

Relying on FAO's recommendations, they supported the need to reform the AoA to ensure agricultural production that is economically, socially, and environmentally sustainable to contribute to poverty reduction and the responsible use of natural resources,[1801] in line with SDG 1 on "no poverty" and SDG 12 on "sustainable consumption and production." However, they warned against the adoption of "one development model that can be applied to all nations," arguing that it is fundamental to have an "inclusive vision of the sustainability of food systems," with solutions "adapted" to local needs.[1802] On this basis, the transition

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[1794] WTO Committee on Agriculture, 'Proposal on Agriculture Export Prohibitions or Restrictions Relating to the World Food Programme: Draft General Council Decision' (4 December 2020) WT/GC/W/810 TN/AG/46.

[1795] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 17-18 June 2021' (n 135), para. 5.5.

[1796] WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 89), Annex, para. 8. See also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), paras. 1.25, 1.29.

[1797] See below, section IV.A.

[1798] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 88), para. 1.7.

[1799] *Ibid.*, para. 1.11.

[1800] WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (26 March 2021) G/AG/GEN/186. Brazil also introduced a concept paper on "Food Security, Agriculture Trade and Stability of Agricultural Markets in the Long term" (RD/AG/79). The document, however, is not publicly available.

[1801] *Ibid.*, paras. 1.2, 7. See also WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 29-30 March 2021' (12 May 2021) G/AG/R/98, para. 4.10.

[1802] WTO Committee on Agriculture, 'Communication from Argentina, Brazil, Chile, Paraguay and Uruguay: Principles and Values of the Region Regarding the Production of Food Within the Framework of Sustainable Development' (1 June 2021) G/AG/GEN/187 WT/CTE/GEN/24, para. 1.4.

toward sustainable production systems should be "gradual" and follow the format and timeframes decided by each Member.[1803]

In line with SDGs 2.b and 2.c,[1804] these countries also supported the elimination or reduction of unjustified import barriers, export restrictions, and trade-distorting subsidies to achieve sustainable food systems.[1805] In light of the challenges posed by climate change, they also acknowledge the need to focus on adaptation, in order to ensure the resilience of food systems.[1806] This group of countries also acknowledged the role of rural women in food security, particularly in family, rural and indigenous production, and urged Members to agree on effective mechanisms to close gender gaps, which are key to reducing poverty and achieving sustainable food systems.[1807]

IV. Outcomes Achieved at the 12th Ministerial Conference on Food Security

At MC12, two main outcomes were achieved on food security.[1808] The two documents, analyzed below, were intended to complement the Draft Ministerial Decision on Agriculture.[1809] However, due to Members' disagreement, the agriculture package of MC12 is incomplete and misses its primary component on agricultural negotiations. This is the reason why no meaningful advancements were made on most of the issues addressed under section III, including market access, safeguards, export subsidies, public stockholding programs, export restrictions, transparency, S&DT, and sustainability. Progress was made only with respect to the regulation of international food aid. Overall, MC12 had a modest impact on food security.

A. The Ministerial Decision on World Food Program Food Purchases Exemption from Export Prohibitions or Restrictions

Due to its role in offering a lifeline to the most disadvantaged communities, Members agreed to endorse Singapore's proposal[1810] and decided to not impose export prohibitions or restrictions on foodstuffs purchased for noncommercial humanitarian purposes by the WFP.[1811] Specifically, the WFP was selected as it provides critical humanitarian support and

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[1803] *Ibid*., para. 1.4.

[1804] To achieve food security, SDG 2.b requires to "[c]orrect and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect", while SDG 2.c promotes the adoption of "measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information".

[1805] WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (n 159), para. 5.

[1806] WTO Committee on Agriculture, 'Communication from Argentina, Brazil, Chile, Paraguay and Uruguay: Principles and Values of the Region Regarding the Production of Food Within the Framework of Sustainable Development' (n 161), para. 1.1.

[1807] *Ibid*., para. 1.6.

[1808] Other important results have been achieved on issues that indirectly impact food security and the achievement of sustainable food systems. In particular, Members agreed on a multilateral Agreement on Fisheries Subsidies, which responds to the SDG 14.6, and on a Declaration on Responses to Modern SPS Challenges. See, respectively, MC12, 'Ministerial Decision of 17 June 2022: Agreement on Fisheries Subsidies' (22 June 2022) WT/MIN(22)/33 WT/L/1144; MC12, 'Ministerial Declaration adopted on 17 June 2022: Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges' (22 June 2022) WT/MIN(22)/27 WT/L/1138.

[1809] MC12, 'Draft Ministerial Decision on Agriculture' (10 June 2022) WT/MIN(22)/W/19.

[1810] See above section III.G

[1811] MC12, 'Ministerial Decision on World Food Program Food Purchases Exemption from Export Prohibitions or Restrictions' (22 June 2022) WT/MIN(22)/29 WT/L/1140.

always makes procurement decisions guided by the principles of avoiding harm to the supplying Member and promoting local food procurement.[1812]

The Decision strikes a delicate balance by, on the one hand, granting the aforementioned exemption, and, on the other hand, reaffirming that Members retain the right to implement measures aimed at securing their food security, if compliant with WTO law.[1813] The hope is that the WFP exemption will be interpreted in good faith and that Members will ensure that the domestic measures enacted to promote food security do not hinder the exemption. However, it remains to be seen whether this will always be the case.

The WFP exemption represents a symbolically important achievement that demonstrates the determination of Members to address the ongoing food crisis. According to the WFP, the exemption could help save time and guarantee that crucial aid reaches those most in need.[1814] By agreeing on this exemption, Members showed that the WTO can serve as a platform for advancing non-trade concerns. This outcome is also in line with SDG 2 on the achievement of food security and improved nutrition. Despite its symbolic importance, however, the Decision could have been more ambitious. First, it could have exempted not only the WFP but also other humanitarian organizations.[1815] Second, it could have also addressed other trade barriers aside from export prohibitions or restrictions that may hinder the procurement efforts of the WFP.

B. The Ministerial Declaration on the Emergency Response to Food Insecurity

The Ministerial Declaration on the Emergency Response to Food Insecurity (WTO Food Security Declaration) emphasizes the importance of open agricultural trade flows and urges avoiding export restrictions that are inconsistent with WTO law.[1816] Notably, it commits Members to establish a dedicated work program in the CoA to operationalize the NFIDC Decision.[1817] Among other things, the work program shall consider "the best possible use of flexibilities" to enhance the agricultural production of LDCs and NFIDCs.[1818]

Despite the above positive statements, the WTO Food Security Declaration does not contain any binding and enforceable provision on the use of export restrictions.[1819] Although

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[1812] *Ibid.*

[1813] *Ibid.*

[1814] Export restrictions have negatively impacted the WFP's ability to procure food efficiently, resulting in longer processing times, increased transportation expenses, and, in cases of export bans, meal losses and higher procurement costs. See WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 139), para. 2.9.

[1815] WFP food purchases represent less than 1% of global food purchases. This is probably one of the reasons why Members managed to reach an agreement to ban export prohibitions or restrictions on WFP's purchases. See Facundo Calvo, 'Global Food Crisis May Take Centre Stage at MC12 Agriculture Negotiations' (Geneva: IISD, 2022) <https://www.iisd.org/articles/policy-analysis/global-food-crisis-mc12-agriculture-negotiations>.

[1816] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (22 June 2022) WT/MIN(22)/28 WT/L/1139, para. 4.

[1817] See above, section II.D.6.

[1818] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 175), para. 8. See also above section II.D.6. A work program has been approved, and can be found here: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/35.pdf&Open=True. The work program outlines four primary themes to guide future discussions: access to international food markets, financing food imports, agricultural and production resilience of LDCs and NFIDCs, and a set of horizontal issues to foster collaboration. It also aims to facilitate the identification of the challenges faced by LDCs and NFIDCs, as well as the responses of Members to food insecurity in these countries, through questionnaires.

[1819] Facundo Calvo, 'How Can the WTO Contribute to Global Food Security?' (Geneva: IISD, 2022) <https://sdg.iisd.org/commentary/policy-briefs/how-can-the-wto-continue-delivering-good-outcomes-on-food-security/>.

it is commendable that Members expressed a commitment to ensuring that emergency measures introduced to address food security "minimize trade distortions as far as possible" and are "temporary," "targeted," and "transparent,"[1820] this is a non-binding commitment that is part of a broader best-endeavor declaration. Members could have at least committed to prohibiting the imposition of export restrictions by Members who are major exporters of certain food products when such products are purchased by LDCs and NFIDCs for their domestic use.

The International Food Policy Research Institute noted that developing countries are the main users of export restrictions, which have severe consequences for other developing countries. Such restrictions commonly target commodities and staple food and, therefore, place LDCs that rely on these products to fulfill their dietary needs at the greatest disadvantage.[1821] To ensure that positive food security outcomes are achieved at MC13, Members could consider clarifying existing regulations on export restrictions, including by amending GATT Article XI and AoA Article 12.

The WTO Food Security Declaration symbolically shows that Members could collectively respond to acute challenges in today's agricultural markets. However, its weak and non-binding commitments prevent it from bringing about any significant improvement.

V. The Way Forward at the WTO

The lack of progress since 2020 in promoting food security concerns at the WTO suggests that a new approach is needed in the way these concerns are addressed. The following sections elaborate on the necessity for a new, holistic approach and its potential implementation in the WTO framework on agriculture.

A. The Need for a New Approach

Section IV reveals that the food security outcome at MC12 has been rather disappointing. Essentially, Members only agreed to (i) avoid implementing export prohibitions or restrictions on foodstuffs purchased by the WFP for humanitarian purposes and (ii) establish a specific work program in the CoA to implement the NFIDC Decision.

This outcome is especially unsatisfactory considering the extensive negotiations that have occurred in the CoA since the outbreak of the COVID-19 pandemic. During these negotiations, Members discussed all the significant issues related to the food security part of the WTO framework on agriculture, such as market access, safeguards, domestic support, export subsidies, public stockholding, investment subsidies, export restrictions, international food aid, measures to protect LDCs and NFIDCs, transparency, and S&DT. They also addressed issues that have been traditionally overlooked, particularly sustainability. The lack of relevant progress in reshaping the fundamental pillars of the AoA demonstrates that the negotiation strategy typically employed for agricultural and food security concerns, based on conceiving the various issues as being "autonomous" and not interrelated, is not the most effective.

The WTO regulatory framework on agriculture and food security, the debate ahead of MC12, and the outcomes achieved there, reveal that food security is still treated as an

[1820] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 175), para. 5.

[1821] Joseph Glauber, David Laborde, Abdullah Mamun, Elsa Olivetti, and Valeria Piñeiro, 'MC12: How to Make the WTO Relevant in the Middle of a Food Price Crisis' (Washington, D.C.: IFPRI, 2022) <https://www.ifpri.org/blog/mc12-how-make-wto-relevant-middle-food-price-crisis>.

exception, while commercial transactions are the rule.[1822] The multilateral trading system lacks a comprehensive legal framework that addresses food security beyond market access, subsidy disciplines, and export measures. After the COVID-19 pandemic, the conflict in Ukraine has further highlighted the necessity of placing food security at the forefront of trade discussions. As Brazil outlined in its submissions to the CoA ahead of MC12, food security issues are "multifaceted", and they need to be addressed through a "comprehensive approach."[1823] Brazil's remarks highlight the lack of a holistic approach in the way food security has been addressed at the WTO.

B. The Development of a Holistic Approach to Food Security for Implementation in the WTO Framework on Agriculture

The sections below explore the theoretical foundation and the legal basis for implementing a holistic approach to food security in the WTO framework on agriculture. Following this analysis, the paper proposes recommendations for implementing this approach in the AoA, with a particular focus on its three pillars.

1. The Theoretical Foundation for a Holistic Approach to Food Security

To address food security holistically, the notion of sustainable development, which encompasses an economic, social, and environmental pillar,[1824] is a useful tool to go beyond the "pure" market-based trade law perspective and embrace a cross-cutting approach that draws on human rights law and the right to food.[1825] The traditional trade tools aimed at improving access, distribution, and market stability are insufficient to frame a holistic approach to food security. The implementation of this approach would result in a greater focus on all the dimensions of sustainability, not only the environmental one, and on the intra- and inter-generational equity implications of agricultural and food security policies.[1826] Intra-generational equity refers to the fair distribution of resources, opportunities, and benefits among individuals and groups within the same generation or time period. Inter-generational equity, on the other hand, focuses on the fair distribution of resources and the responsibility for sustainable development between different generations. Greater attention to equity considerations would shift the focus from market dynamics to farmers and resource-poor countries.[1827]

A rights-based approach would also conceive food as an entitlement rather than a commodity, and it would require examining food systems in their entirety, together with the

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[1822] De Schutter (n 36), at 16.

[1823] MC12, General Council, 'Communication from Brazil' (n 123), Preamble. See also above, section III.D.

[1824] Sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." See World Commission on Environment and Development, Our Common Future (1987) [Bruntland Report] <https://sustainable development.un.org/content/documents/5987our-common-future.pdf>.

[1825] See Katrin Kuhlmann, 'Trade, Sustainable Development, and Food Security', Presentation at Georgetown's International Economic Law Colloquium (Washington, D.C.: Georgetown University, 2022). According to Rayfuse, realizing the right to food presumes sustainable agricultural development, which ensures that the small-scale farming sector is not left out. Similarly, also biodiversity protection requires "diverse" farming systems. See Rosemary Rayfuse and Nicole Weisfelt, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Elgar, 2012), at 87. For an overview of the different conceptions of the right to food, especially as an individual right versus a community right, see Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press, 2019), at 123-24.

[1826] Kuhlmann (n 184).

[1827] Katrin Kuhlmann, 'Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development' (2021) 2 African Journal of International Economic Law 48, at 81.

ways in which people interact with those systems.[1828] In this respect, the notion of food sovereignty provides a stimulus for thinking outside the boundaries of trade law by placing greater emphasis on bottom-up approaches, the local level, and sustainability in food production, access, and distribution. Food sovereignty focuses on local food production as opposed to mass production by large corporations, the practice of small-scale sustainable agriculture that is environmentally and culturally appropriate, agroecology principles as opposed to advanced and expensive technologies to increase food production, the protection of biodiversity, and the recognition of the role of small farmers for achieving food security.[1829] Giving more consideration to these aspects would lead to increased focus on matters such as biodiversity, genetic resources, agricultural inputs, the role of farmers, and the significance of local markets as a complement to non-distorted international markets.[1830]

This approach links with several SDGs, including SDG 1 on ending poverty, SDG 2 on achieving food security and promoting sustainable agriculture, SDG 3 on ensuring healthy lives, SDG 12 on ensuring sustainable consumption and production patterns, and SDG 15 on promoting the sustainable use of ecosystems and protecting biodiversity.

2. The Legal Basis for a Holistic Approach to Food Security

The foundational agreements of the WTO provide the legal hooks for advocating in favor of a holistic approach to food security. The Preamble to the Agreement Establishing the WTO adopts a comprehensive approach to sustainable development and tries to balance trade needs with non-trade values.[1831] The Preamble acknowledges that trade relations should be aimed at promoting higher standards of living, full employment, and higher incomes, while also ensuring the optimal use of natural resources according to sustainable development.[1832] The Preamble also specifies that international trade should benefit the economic development of developing countries and LDCs.[1833] This is the basis for the many S&DT provisions in several WTO agreements, focused on intra-generational equity.

The Preamble to the AoA reaffirms some of these concepts.[1834] It acknowledges that the aim of the AoA is to establish a "fair" and "equitable" agricultural trading system, having regard to "non-trade concerns," such as "food security."[1835] In implementing market access commitments, developed Members should consider the "needs" of developing Members

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[1828] Priscilla Claeys and Nadia Lambek, 'Introduction: In Search of Better Options: Food Sovereignty, the Right to Food and Legal Tools for Transforming Food Systems' in Nadia Lambek, Priscilla Claeys, Adrienna Wong, and Lea Brilmayer (eds), *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (Springer, 2014), at 1-25.

[1829] See World Food Summit Nyéléni, 'Declaration of the Forum for Food Sovereignty' (2007); Saab (n 184), at 41-42; Peter Halewood, 'Trade Liberalization and Obstacles to Food Security: Toward a Sustainable Food Sovereignty' (2011) 43 University of Miami Inter-American Law Review 115, at 134-36.

[1830] Katrin Kuhlmann et al., 'Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens' (Washington, D.C.: New Markets Lab, 2020), at 13, 22-23 <https://www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf>; IFAD, 'Rural Poverty Report 2011—New Realities, New Challenges: New Opportunities for Tomorrow's Generation' (Rome: IFAD, 2010), at 94, 115.

[1831] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 U.N.T.S. 154, 33 I.L.M. 1144 (WTO Agreement). See also Emily Barrett Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing' (2012) 11 World Trade Review 621, 623-25.

[1832] WTO Agreement, Preamble.

[1833] WTO Agreement, Preamble.

[1834] Ahmad Mukhtar, *Policy Space for Sustainable Agriculture in the World Trade Organization Agreement on Agriculture* (Rome: FAO, 2020), at 9.

[1835] AoA, Preamble.

through S&DT provisions and mechanisms to tackle the adverse effects of liberalization on LDCs and NFIDCs.[1836]

Both preambles provide Members with the legal hooks to move away from the current conception of food security as an exception, as they both acknowledge the importance of pursuing social and environmental interests, in addition to the economic ones, including by providing flexibilities to developing countries, LDCs, and NFIDCs. What is missing, however, is an approach to address concerns for future generations.[1837] The principle of inter-generational equity, established in international law, envisages the right of future generations to enjoy a fair level of common patrimony.[1838] When it comes to agriculture, inter-generational equity means ensuring that future generations have access to comparable opportunities as the current generation, while also avoiding the deterioration of natural, social, or economic capital as a whole.[1839]

C. The Implementation of a Holistic Approach to Food Security in the WTO Agreement on Agriculture

The following sections set forth some proposals to reform the three pillars of the AoA according to a holistic and comprehensive approach to food security grounded in the notion of sustainable development.

1. Market Access

Despite commitments to reduce tariffs on agricultural products, tariff levels remain high, and it is therefore difficult for developing countries to benefit from the current tariffication system. Further tariff cuts could be aimed at increasing the access of producers from developing countries to markets in developed countries, while also ensuring that these reductions do not hinder the ability of developing countries to use tariffs for the promotion of food security.

Greater access to markets in developed countries should be a priority. This can be achieved through further reductions in the tariff levels of developed countries in order to address dirty tariffication.[1840] Farmers' improved ability to access developed country markets would result in higher incomes for them.[1841] Higher incomes would incentivize them to grow more products, thereby increasing agricultural productivity. In turn, increased production would facilitate the achievement of the right to food, as more individuals would find participation in agriculture lucrative.[1842] Market access could also be enhanced by

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[1836] AoA, Preamble.

[1837] Rayfuse and Weisfelt (n 184), at 84.

[1838] ILA, 'Report of the Seventieth Conference held in New Delhi 2-6 April 2002' (London: Cambrian Printers, 2002), at 22-29.

[1839] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, 1989); Keith Aoki, 'Food Forethought: Intergenerational Equity and Global Food Supply – Past, Present, and Future' (2011) 2 *Wisconsin Law Review* 399.

[1840] See above, section II.A. See also Guled Yusuf, 'The Marginalization of African Agricultural Trade and Development: A Case Study of the WTO's Efforts to Cater to African Agricultural Trading Interests Particularly Cotton and Sugar' (2009) 17 African Journal of International and Comparative Law 213, at 239.

[1841] It has also been argued, however, that some protections should be granted to small farmers in developing countries to be protected from international competition. See Rayfuse and Weisfelt (n 184), at 87.

[1842] Shelton Mota Makore, Patrick Osode, and Nombulelo Lubisi, 'Re-Theorising International Agricultural Trade Regulation to Realise the Human Right to Food in Developing Countries' (2022) 47 Journal for Juridical Science 88, at 106.

implementing product-specific tariff reductions to prevent selective tariff cuts,[1843] by eliminating tariff escalation on products that are of export interest to developing countries, and by increasing tariff transparency to prevent abuses and promote fair trade.[1844] Developed Members could also be required to establish a generalized system of preferences for developing countries that would allow a specific percentage of their goods to enter the market.[1845] To support LDCs, the percentage could be set higher. This would ensure a minimum level of free and fair agricultural trade.

The AoA could provide developing Members with flexibility in implementing tariff reductions, as they rely on tariff revenues to fund measures to boost domestic production and promote food security. Any additional tariff reduction in those countries should also be subject to careful evaluation of the risk of displacing domestic production with cheap imports from developed countries that heavily rely on domestic subsidies. This displacement could have detrimental effects on domestic farmers, rural livelihoods, and national food security goals. Developing countries could also be exempt from tariff reduction obligations for sensitive agricultural commodities, including food staples and other essential food items that are critical for ensuring a stable food supply and affordable prices for the population.[1846]

To promote sustainable development, market access could be made contingent upon adherence to transparent sustainability standards, such as internationally recognized good agricultural practices tailored to the needs and capacities of developing countries.[1847] This would ensure that the requirements are realistic and achievable, taking into account factors like resource availability, technological capacity, and the socio-economic conditions of small-scale farmers. This approach would "qualify" market access and ensure small farmers' participation.

2. Domestic Support

The need for reform in domestic support to agriculture becomes apparent when considering the annual worldwide expenditure, exceeding USD 500 billion, with only 35% of these funds reaching farmers.[1848] Much of this support incentivizes inefficient use of resources, distorts global markets, or undermines environmental sustainability, public health, and agricultural productivity.[1849] This funding could be repurposed towards temporary, better-targeted programs for global food security and sustainable food systems, considering the key aspects of efficiency, cost and fiscal sustainability, flexibility, administrative complexity, equity, and strengthened resilience and sustainability.[1850] The strategy of inducing every Member to

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[1843] See above, section II.A.

[1844] Gonzalez (n 53), at 485.

[1845] Emmanuel Asmah and Brandon Routman, 'Removing Barriers to Improve the Competitiveness of Africa's Agriculture' (Washington, D.C.: Brookings, 2016) <https://www.brookings.edu/wp-content/uploads/2016/06/0601_improving_agoa_asmah_routman.pdf>.

[1846] Gonzalez (n 53), at 485-86.

[1847] FAO attempted to develop some balanced and worldwide applicable good agricultural practices. See FAO, 'Development of a Framework for Good Agricultural Practices' (13 March-4 April 2003) COAG/2003/6.

[1848] OECD, 'Governments Should Renew Efforts to Reform Support to Agriculture' (2019) <https://www.oecd.org/agriculture/oecd-ag-policy-monitoring-2019/>; Madhur Gautam, David Laborde, Abdullah Mamun, Will Martin, Valeria Piñeiro and Rob Vos, 'Repurposing Agricultural Policies and Support: Options to Transform Agriculture and Food Systems to Better Serve the Health of People, Economies, and the Planet' (Washington, D.C.: WB and IFPRI, 2022), at vii.

[1849] FAO, IMF, WB, WFP and WTO 'Joint Statement' (n 1).

[1850] For example, domestic support could target the adoption of good agricultural practices, research and innovation (including on fertilizers), extension and advisory services, improved infrastructure and logistics, and digital technologies that improve productivity sustainably.

reduce domestic support measures, irrespective of its level of development, should however be avoided, as it risks hampering development since it does not sufficiently account for the food security needs of developing Members.[1851]

With specific regard to developed countries, the Green Box and Blue Box rules could be redesigned. These countries are the major users of domestic subsidies,[1852] which have been employed to indirectly support agricultural production by boosting farmers' income (Green Box) and directly subsidize agricultural production (Blue Box). For this reason, they could be re-categorized as trade-distorting Amber Box subsidies, and they could be reduced. In the alternative, a more precise definition of Green Box measures could be adopted and an expenditure limit set, since countries have easily transformed Blue Box subsidies into Green Box subsidies. The latter could also be more closely tied to sustainability goals by requiring countries to demonstrate how their Green Box programs contribute to environmentally friendly and sustainable agricultural practices, such as organic farming, conservation farming, or agroforestry.[1853]

With regard to developing countries, a revised AoA could acknowledge the role of domestic subsidies in promoting food security and could expand the investment subsidies exception in AoA Article 6(2) to turn it into a "food security box".[1854] This box could allow for subsidies that increase domestic food production, particularly those directed toward low-income farmers, as well as food price subsidies, direct food provision, and income safety nets.[1855] With regard to domestic subsidies falling outside the "food security box", developing Members could be afforded the flexibility to adjust their aggregate measurement of support to inflation.

A revised AoA could also allow for a smoother shift from product-specific to non-product-specific measures of support, considering the non-trade concerns of agriculture, including sustainability and the right to food.[1856] Product-specific subsidies incentivize farmers to adopt mechanized production techniques that rely on fertilizers and pesticides to maximize their income from the subsidies. This results in environmental degradation, biodiversity loss, and ultimately undermines the realization of the right to food.[1857] Product-specific measures could be turned into an exception to the general rules. Accordingly, WTO members would be allowed to use this type of support only in situations where such measures would be beneficial for developing Members.

3. Export Subsidies

Despite Members' obligation to refrain from incentivizing the export of agricultural products through export subsidies,[1858] countries still heavily subsidize their exports. Export subsidies, in the form of direct payments, export loans, and tax benefits, have distorted market prices leading to higher-than-market prices and surplus production in exporting countries and

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[1851] See above, section II.D.2.
[1852] See above, section II.B.
[1853] Timothy Josling, 'Rethinking the Rules for Agricultural Subsidies' (Geneva: International Trade Center, 2015), at 4-5 <https://ageconsearch.umn.edu/record/320153/>.
[1854] See above, section II.D.3.
[1855] Gonzalez (n 53), at 489.
[1856] James Simpson and Thomas Schoenbaum, 'Non-Trade Concerns in WTO Trade Negotiations: Legal and Legitimate Reasons for Revising the "Box" System' (2003) 2 International Journal of Agricultural Resources, Governance and Ecology, at 399.
[1857] Christophe Bellmann, 'Subsidies and Sustainable Agriculture: Mapping the Policy Landscape' (London: Chatham House, 2019), at 6.
[1858] AoA, Article 8. See also the exceptions in AoA, Articles 9 and 10.

lower prices and less production in importing countries.[1859] In the long-term, this system undermines the competitiveness of food production in both exporting and importing countries. The outcome achieved at MC10 – a commitment to eliminate export subsidies, with different time frames for developed countries, developing countries, LDCs, and NFIDCs – has room for improvement.

On the one hand, AoA Articles 8 and 9 could be revised to implement a comprehensive ban on export subsidies for developed countries, which hinder the realization of the right to food in developing countries due to cheap imports that undermine the development prospects of local producers.[1860] The AoA could also include a prohibition on measures that aim to evade this ban, like direct subsidies to producers that are not linked to export performance. As contemplated by AoA Article 10(2), a revised AoA could also have binding obligations on minimum interest rates and maximum credit terms to avoid that developed countries promote exports through government credit on concessional terms.[1861] If developed countries decreased export subsidies and measures alike, the products of developing countries would gain competitiveness in both domestic and global markets, ultimately leading to increased production of both cash crops and subsistence crops.[1862] Nevertheless, it should not be ignored that a decrease in export support by developed countries may lead to higher food prices, resulting in higher import costs and greater food insecurity for food-importing countries. For this reason, a revised AoA could include a commitment to provide financial aid to LDCs and NFIDCs to offset the effects of higher prices.[1863]

On the other hand, pursuant to S&DT, developing countries should have leeway to utilize export subsidies to promote their agro-export industry and generate employment and export revenues.[1864] Export subsidies could encourage developing countries to diversify their exports beyond primary agricultural products. By subsidizing the export of value-added or processed agricultural products, these countries could move up the global value chain and increase the value of their exports, which could lead to higher export revenues and economic resilience. However, this proposal faces the problem that only a minority of the developing countries have the necessary resources to subsidize their exports, and it would thus favor only the wealthier ones, exacerbating inequalities within the group of developing countries.[1865] One solution may be to allow subsidies only when justified by food security concerns, including the necessity to diversify agricultural production and reduce reliance on a few export commodities. A diverse agricultural sector is better equipped to withstand external shocks and market fluctuations, helping to protect the livelihoods of farmers and maintain economic stability.

[1859] Heinz Strubenhoff, 'The WTO's Decision to end Agricultural Export Subsidies is Good News for Farmers and Consumers' (Washington, D.C.: Brookings, 2016) <https://www.brookings.edu/articles/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/>.

[1860] James Scott, 'The Future of Agricultural Trade Governance in the World Trade Organization' (2017) 93 International Affairs 1167, at 1175.

[1861] Gonzalez (n 53), at 487.

[1862] *Ibid.*, at 475.

[1863] UNCTAD Secretariat, 'Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address their Concerns in Multilateral Trade Negotiations' (23 June 2000) TD/B/COM.1/EM.11/2, at 1 <https://unctad.org/system/files/official-document/c1em11d2.en.pdf>.

[1864] The use of export subsidies should, however, be moderate, as an excessive focus on exports risks making small-scale farmers even more vulnerable. See Rayfuse and Weisfelt (n 184), at 87.

[1865] This problem also draws attention to the broader issue of the inappropriateness of the current three-fold country classification at the WTO. See Fan Cui, 'Who Are the Developing Countries in the WTO?' (2008) 1 The Law and Development Review 124.

D. The Road Ahead to the 13th Ministerial Conference

It might be ambitious to expect that, at MC13, Members will agree to move toward a holistic approach to food security, grounded in sustainable development, the right to food, and enhanced flexibilities to address the needs of all. However, there are optimistic signs that Members are increasingly aware of these needs.

Already ahead of MC12, Argentina, Australia, Brazil, Canada, Chile, Colombia, Ecuador, Guatemala, New Zealand, Paraguay, Peru, the Philippines, South Africa, Ukraine, Uruguay, and Vietnam, delivered a joint statement urging to reform the AoA to boost sustainable agricultural production on the basis of an "inclusive vision" of sustainability that provides flexible solutions tailored to the specific needs of different local contexts.[1866] In the aftermath of MC12, Members further demonstrated interest in moving toward a holistic and inclusive approach to food security.

Paraguay urged Members to move toward "sustainable production", gradually and in line with their "developmental needs". The country stressed that the transition toward sustainability should respect "local realities", including their "social, economic, and environmental" peculiarities. Paraguay also advocated for the introduction at the WTO of the environmental law concept of "common but differentiated responsibility" for the implementation of environmental measures, in line with internationally established norms.[1867]

New Zealand shared the need to enable small agricultural producers to participate "fairly" in global trade and grant them adequate policy tools to improve agricultural productivity and resilience.[1868] Essentially, it called for the adoption of flexibilities and exceptions that meet the needs of small-scale farmers.

China urged Members to make progress toward environmental sustainability. The country warned against the "detrimental impacts" of fertilizers and pesticides. Accordingly, it called for "a framework and a formula" to reduce those detrimental effects.[1869]

Nigeria suggested that Members should make efforts to address existing asymmetries in the AoA and provide additional flexibilities and policy space to developing countries, LDCs, and NFIDCs, to enable them to upscale their agricultural production capacities.[1870] Egypt also addressed the need for greater flexibilities and the proper implementation of those already existing.[1871]

Lastly, Japan, New Zealand, and China recognized the importance of reaching an agreement on well-targeted and appropriately safeguarded public stockholding programs.[1872]

Although some of the major players at the WTO, such as the U.S. and the EU, have not spoken up yet in favor of a new approach to food security centered around sustainability and

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[1866] WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (n 159), paras. 1.2, 1.4, 7. See also above, section III.I.

[1867] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (n 7), para. 3.59.

[1868] *Ibid.*, para. 3.30.

[1869] *Ibid.*, para. 3.38.

[1870] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 14-15 September 2022' (31 October 2022) G/AG/R/103, para. 3.23. See also *ibid.*, para. 3.45.

[1871] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 27-28 June 2022' (n 8), para. 4.29.

[1872] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 14-15 September 2022' (n 229), paras. 3.40, 3.41; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (n 7), para. 3.38.

inclusivity, the statements above signal an initial shift in the approach to food security. This will, in any case, require time, as decisions are ordinarily made by consensus at the WTO.

VI. Conclusion

Despite some progress being made at MC12, the current WTO framework on agriculture is still affected by shortcomings and asymmetries that pose challenges to the achievement of food security. This paper's proposals suggest a redesign of this framework, particularly the AoA, to ensure that the multilateral trading system facilitates all Members' access to adequate, safe, and nutritious food at all times. To attain this objective, there needs to be a shift toward a holistic approach to food security to ensure that "all our peoples" benefit from the welfare gains that the multilateral trading system generates.[1873]

Although a comprehensive reform of the AoA is the ultimate goal, it is unlikely to occur in the short to medium term. This is due to the consensus-based mechanism for amending treaties at the WTO, where it is challenging to gain agreement among Members due to the political considerations that come into play.

The challenges associated with decision-making at the WTO have become increasingly apparent in recent years. Between 2020 and 2022, no proposals were presented to reform the disciplines on market access, safeguards, domestic support, export subsidies, export restrictions, transparency in the notification of trade-restrictive measures, and S&DT.[1874] While detailed submissions were made on public stockholding, a lack of agreement among Members prevented any progress. This suggests that it is unlikely that any headway will be made on these issues during MC13. Accordingly, an incremental approach could be adopted to achieve short to medium-term reforms on other topics while long-term agreement on these issues is more feasible.

In the short term, particularly in preparation for MC13, Members could consider discussing other issues that are more likely to garner consensus, such as sustainability. Prior to MC12, several countries supported an "inclusive" vision of sustainable agriculture that includes solutions tailored to local contexts.[1875] The MC12 Ministerial Declaration on the Emergency Response to Food Insecurity urges Members to "promote[] sustainable agriculture and food systems" and "implement resilient agricultural practices".[1876] The MC12 Ministerial Declaration on Sanitary and Phytosanitary (SPS) Measures is more detailed and provides that the SPS Committee should explore how the implementation of the SPS Agreement can "facilitate global food security and more sustainable food systems, including through sustainable growth and innovation in agricultural production and international trade, and through the use of international standards, guidelines, and recommendations […]".[1877] Following MC12, there has been a renewed push toward sustainable agriculture. Paraguay, for example, advocated for a transition toward sustainability that respects "local realities" and proposed the adoption of the environmental law concept of "common but differentiated responsibility" at the WTO. Similarly, China urged progress toward environmental sustainability.[1878]

[1873] MC4, 'Ministerial Declaration Adopted on 14 November 2001' (20 November 2001) WT/MIN(01)/DEC/1, para. 2.
[1874] See above, section III.
[1875] See above, section III.I.
[1876] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 175), Preamble.
[1877] MC12, 'Ministerial Declaration adopted on 17 June 2022: Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges' (n 167), para. 8.
[1878] See above, section V.C.

In preparation for MC13, Members could discuss what role the CoA could play in facilitating a transition toward sustainable agricultural production and how this goal could be implemented in its work program on food security.[1879] They could also reflect on the role of the Trade and Environmental Sustainability Structured Discussions as a new avenue that facilitates debate.[1880] One way to establish a solid foundation for promoting sustainability in agricultural systems is by strengthening cooperation efforts, ideally under the supervision of a dedicated committee.[1881] In such a forum, Members could discuss various issues, including the role of voluntary sustainability standards, regulations, and conformity-assessment procedures. For instance, they could explore how recognized voluntary standards could be utilized to demonstrate compliance with mandatory regulations, providing producers with more flexibility, lower compliance costs, and improved mutual recognition and equivalences.[1882] Other potential topics for discussion include granting additional market access for sustainably produced goods, developing guidelines for sustainable agricultural practices, and promoting their adoption through capacity-building programs. In general, addressing these issues would favor a shift in the way the WTO approaches sustainability – from being an exception to becoming a rule.

Other issues raised by countries after MC12 are less likely to result in any tangible outcomes at MC13. New Zealand, for instance, raised the issue of the participation of small farmers in global trade and the implementation of policy tools that meet their needs.[1883] Although an important issue to discuss in the long run, finding short-term solutions to enable small farmers to participate fairly in global trade poses significant practical difficulties. One of these is how to consult small farmers and what questions to ask them. Another challenge is the likely lack of resources and capacity of small farmers to engage in complex policy discussions. Furthermore, the diversity of farming systems and practices across different regions can make it difficult to develop policies that are specifically tailored to their individual needs and contexts. This fits into the larger debate on the purpose of WTO rules and the interests they should serve—the interests of the people on the ground, who are the ultimate recipient of the rules, in addition to state-level interests.

Similarly, Nigeria's and Egypt's call for additional flexibilities and policy space for developing countries fits into a broader issue that Members should start discussing, that of reconsidering exceptions that enable countries to justify trade restrictions individually, as the simultaneous use of exceptional measures by several countries can harm food security.[1884]

[1879] See above (n 177).

[1880] The Trade and Environmental Sustainability Structured Discussions are a series of informal and open-ended discussions that take place within the WTO to facilitate dialogue and exchange of information between Members on the intersection of trade and environmental sustainability. See WTO, 'New Initiatives Launched to Intensify WTO Work on Trade and the Environment' <https://www.wto.org/english/news_e/news20_e/envir_17nov20_e.htm>.

[1881] This approach has been adopted by the EU since 2021 when the European Commission published a proposal for a "Sustainable Food Systems" chapter to be included in its new preferential trade agreements. See Robert Francis, 'EU FTAs: Commission Unveils New Chapter on Sustainable Food Systems' (London: Borderlex, 2021) <https://borderlex.net/2021/06/14/eu-ftas-commission-unveils-new-chapter-on-sustainable-food-systems/>. To date, the only finalized (but not yet in force) agreement containing a "Sustainable Food Systems" chapter is the EU-New Zealand Free Trade Agreement (see its chapter 7).

[1882] Christophe Bellmann, 'Fostering Cooperation on Sustainable Agriculture and Trade at the WTO' (Geneva: IISD, 2023) <https://www.iisd.org/articles/policy-analysis/fostering-cooperation-sustainable-agriculture-trade-wto>.

[1883] See above, section V.C.

[1884] Katrin Kuhlmann, 'Critical Questions: Trade and Food Security—What is the Debate on Trade and Food Security About?' (Washington, D.C.: CSIS, forthcoming).

The current WTO rules on agriculture were created during times of overproduction and decreasing prices, while current challenges include disruptions in supply chains, high prices, volatile markets, and limited resources.[1885] The current rules need to be reshaped to ensure that during crises, importing countries can rely on international markets while also developing more resilient agricultural systems that can withstand external shocks like climate change.

Relevant issues to address include regulations on market access, domestic subsidies, export restrictions, public stockholding programs, food aid, and sustainable agricultural production. Progress will not happen all at once but will rather be incremental due to the consensus-based decision-making at the WTO. To facilitate this process, Members should prioritize the issues that need to be discussed. This could be done by giving priority to those issues that are more likely to gain consensus in the short to medium term. Additionally, Members could explore the use of soft law instruments, such as guidelines on good practices and voluntary commitments, to expand the legal tools employed. These instruments would favor a flexible approach that promotes cooperation, trust, and confidence among Members.

[1885] Christophe Bellmann, 'Fostering Cooperation on Sustainable Agriculture and Trade at the WTO' (n 241).

CHAPTER 21: HOW THE AGREEMENT ON FISHERIES SUBSIDIES CAN DEAL WITH SOCIAL AND DEVELOPMENTAL CONCERNS OF COASTAL COMMUNITIES

DAISUKE TAKAHASHI*

Abstract

Fisheries subsidies are generally regarded as harmful for the marine environment and coastal development by reducing the cost and providing incentives for increased production, which encourage unsustainable fishing practices. On the other hand, some fisheries subsidies play a positive role in coastal development and local food security through supporting livelihoods of small-scale or artisanal fisheries, a fact that is overlooked in the Agreement on Fisheries Subsidies (AFS) text agreed in 2022. In order to address this gap, this paper recommends that the AFS should incorporate tailored and specific special and differential treatment (S&DT) provisions in order to take into account the potential negative outcomes of removing the subsidies on social and developmental concerns of small-scale fisheries. This paper also proposes that the S&DT provisions should be implemented fairly and effectively through a mechanism for periodic review and an institutional arrangement for facilitating inter-agency coordination. Such a framework would exemplify how trade law can reconcile different sustainable development concerns that may otherwise conflict with each other in the context of the regulation of fisheries subsidies.

I. Introduction

The harmful effects of fisheries subsidies on both the environment and sustainable development are widely recognized, and regulation of the subsidies has been addressed through World Trade Organization (WTO) negotiations that spanned two decades. While fisheries play a significant socio-economic role, especially in supporting coastal community development and food security, overfishing could cause harm to the marine environment by depleting fish stocks. Fisheries subsidies could promote this negative aspect by reducing cost and providing incentives for increased production, which may encourage unsustainable fishing practices.[1886] Economists estimate that global fisheries subsidies exceeded $35.4 billion in 2018.[1887] What is worse, these environmental detriments cause other problems associated with sustainable development concerns such as poverty and food insecurity in the coastal development.[1888] This issue arises especially in the context in which wealthier countries subsidize fleets that surpass small-scale fishers in developing countries, as well as for small and vulnerable economies.[1889]

On the other hand, some fisheries subsidies play a positive role in coastal development and local food security by supporting livelihoods of small-scale or artisanal fisheries, a factor

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1886 Alice Tipping, *Building on progress in fisheries subsidies disciplines*, Marine Policy 69, 202–208, 202-203 (2016).

1887 Schuhbauer A, Skerritt DJ, Ebrahim N, Le Manach F & Sumaila UR, *The Global Fisheries Subsidies Divide Between Small- and Large-Scale Fisheries*, Front. Mar. Sci., 7, 5 (2020).

1888 Switzer S, Morgera E, Webster E., *Casting the net wider? The transformative potential of integrating human rights into the implementation of the WTO Agreement on Fisheries Subsidies*, 31(3) RECIEL, 360-361 (2022).

1889 Hamna Viriyam & Tariq Khan, *Neither Fish nor Flesh: The Status of Special and Differential Treatment as a Treaty-Embedded Right*, 28 ILSA J. Int'l & Comp. L., 255, 257-258 (2022).

that is often overlooked. Although the mandate from the previous WTO Ministerial Conferences and target 14.6 within the Sustainable Development Goals (SDGs) recognizes the importance of S&DT from this perspective, the text of the AFS agreed to in 2022 insufficiently considers social and developmental concerns. Based on this understanding, this paper argues that the AFS should incorporate tailored and specific S&DT provisions, along with a periodic review mechanism and an institutional arrangement, in order to take into account the potential negative outcomes of removing the subsidies on social and developmental concerns of small-scale fisheries.

Part II explains why and how fisheries subsidies should be regulated, focusing on the typical incentives and unfavorable consequences on trade, the environment, and socio-economic conditions of providing the subsidies. Part III points out that the current AFS text does not adequately deal with the potential negative consequences of restricting fisheries subsidies by overlooking the contributions of some subsidies on coastal development and local food security. Part IV proposes that the AFS should incorporate tailored and specific S&DT for exempting subsidies for legitimate objectives of protecting social and developmental needs of small-scale fisheries, along with a mechanism for periodic review and an institutional arrangement for fair and effective implementation of the S&DT. Part V concludes that tailored and specific S&DT, supported by a monitoring mechanism and an institutional arrangement, would adequately balance the social and developmental interests that the subsidies intend to protect, on the one hand, and the marine biodiversity that the subsidies potentially damages, on the other hand.

II. How and Why Fisheries Subsidies Are Regulated

In this section, I explain the development of fisheries subsidies regulation through the WTO, including recent outcomes from the 12th Ministerial Conference in 2022. To this end, I will explain harmful effects of fisheries subsidies on trade, the environment, and socio-economic conditions, even though sustainable development concerns often drive governments to subsidize fisheries.

A. Harmful Effects of Fisheries Subsidies on Trade, the Environment and Socio-economic Conditions

In the short-term, providing fisheries subsidies can yield an increased catch and sustain profits.[1890] However, in the long run, fisheries subsidies have a negative influence on trade, the environment, and socio-economic conditions.

Fisheries subsidies not only distort international trade, but also pose unique threats, including irreversible damage to the marine environment and increased instability for coastal communities.[1891] Certain types of fisheries subsidies can lead to the buildup of excessive fishing capacity.[1892] According to recent global estimates, USD 18.3 billion was provided in a form that enhances fishing capacity subsidies, accounting for almost 52% of all fisheries subsidies.[1893] These subsidies provide incentives for increased production by reducing the cost of fishing operations or enhancing revenues.[1894] They often amount to overcapacity and

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[1890] Stephen Floyd, *Fishing for Answers: Illegal Fishing, Depleted Stocks, and the Need for WTO Fishing Disciplines*, 52 GEO. J. INT'l L. 797, 803 (2021).
[1891] *Id.* at 802.
[1892] Tipping, *supra* note 1, at 202.
[1893] Schuhbauer A, Skerritt DJ, Ebrahim N, Le Manach F & Sumaila UR, *supra* note 2, at 5.
[1894] Switzer S, Morgera E, Webster E., *supra* note 3, at 360-361.

overfishing or illegal, unreported, and unregulated (IUU) fishing of certain stocks,[1895] encouraging unsustainable levels of fishing and contributing to the depletion of fish stocks.[1896] As a result, they can also undermine economic stability and threaten food security.[1897] Small-scale fishers in developing countries are most affected by these subsidies, as developed countries subsidize fleets that surpass the capacity of the small-scale fishers.[1898]

B. Discussion on Regulating Fisheries Subsidies

Recognizing the negative effect of fisheries subsidies on both trade and the environment, the regulation of fisheries subsidies has been developed under the WTO.

1. Negotiation of the AFS for Addressing Both Trade and Environmental Harms

The negotiations on an agreement to curb fisheries subsidies began in 2001 at the WTO.[1899] At the 2001 Doha Ministerial Conference, WTO members decided to put the issue of fisheries subsidies on the organization's agenda.[1900] This original mandate was then supplemented by a more detailed one agreed upon at the 2005 Hong Kong Ministerial Conference.[1901] The 2005 mandate called for WTO members to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing."[1902] In 2015, the topic of new rules on fisheries subsidies was highlighted in target 14.6 within the SDGs.[1903] Since the negotiations at the 11th Ministerial Conference in Buenos Aires in 2017, WTO members made considerable progress refining options and alternatives around three main pillars of substantive disciplines: (a) a prohibition of subsidies to IUU fishing, (b) a prohibition of subsidies to the fishing of stocks that are already overfished, and (c) a prohibition of subsidies that contribute to overcapacity and overfishing.[1904] These efforts led to the AFS in June 2022.

2. The Significance of the AFS Text Agreed at the WTO 12th Ministerial Conference

In June 2022, at the 12th Ministerial Conference, WTO members agreed on the text of the AFS. The AFS represents a historical achievement, because it is the first WTO commitment to deal with environmental issues progressively and to directly contribute to the SDGs.[1905] The AFS is regarded as a "win-win" deal to address the problem of both trade distortion and environmental destruction.[1906]

[1895] *Id.*
[1896] Tipping, *supra* note 1, at 202.
[1897] Switzer S, Morgera E, Webster E., *supra* note 3, at 360-361.
[1898] Viriyam & Khan, *supra* note 4, at 257-258.
[1899] WTO, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001).
[1900] *Id.*
[1901] Tristan Irschlinger and Alice Tipping, *The WTO Agreement on Fisheries Subsidies: A Reader's Guide*, International Institute for Sustainable Development, 1 (2023).
[1902] World Trade Organization. (2005). Ministerial declaration (WT/MIN(05)/DEC). Doha Work Programme.
[1903] UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015) (SDGs) Goal 14.6.
[1904] Alice Tipping, *Addressing the Development Dimension of an Overcapacity and Overfishing Subsidy Discipline in the WTO Fisheries Subsidies Negotiations*, A discussion paper by IISD, 1 (2020).
[1905] *The WTO Agreement on Fisheries Subsidies, What it does and what comes* next, WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm
[1906] *Win-win-win situations, Disciplining fisheries subsidies*, WTO, https://www.wto.org/english/tratop_e/envir_e/win_e.htm

The AFS covers subsidies to marine wild capture fishing and fishing related activities at sea, with aquaculture and inland fisheries excluded from the scope.[1907] The AFS has substantive disciplines on: (a) subsidies to vessel or operator engaged in IUU fishing,[1908] (b) subsidies for fishing regarding overfished stocks,[1909] and (c) subsidies for fishing outside of the jurisdiction of a coastal member and outside the competence of regional fish management organizations (RFMOs).[1910] The AFS also includes procedural requirements related to notification and transparency to ensure that information is available to monitor the implementation of the substantive obligations.[1911] The AFS also establishes a Committee on Fisheries Subsidies with the mandate to oversee the AFS,[1912] including gathering and examining information from the member countries for the purpose of facilitating the implementation of the AFS.[1913] Across these provisions, there are some provisions on S&DT, including technical assistance and capacity building schemes,[1914] which will be discussed in detail in the following sections.

3. Why the Disciplines on Subsidies Regarding Overcapacity and Overfishing Were not Agreed

Of the three main categories of fisheries subsidies negotiated under the AFS: (a) subsidies for IUU fishing, (b) subsidies for the fishing of overfished stocks, and (c) a prohibition of subsidies that contribute to overcapacity and overfishing, the disciplines on the first two categories, subsidies for IUU fishing and overfished stocks were finally agreed because they were relatively stable.[1915] On the other hand, WTO members could not find consensus on rules that would have prohibited subsidies that contribute to overcapacity and overfishing.[1916] It would have established a general prohibition on the third pillar, specifying that such subsidies include an illustrative list of particular subsidy types, which are generally considered the most likely to encourage overfishing and overcapacity.[1917] The members' inability to reach agreement on these rules, in particular, on the broader prohibition of subsidies that contribute to overcapacity and overfishing, was a real disappointment for many delegations.[1918] Rather than risk the failure of the AFS, it was agreed that the members would continue negotiations on these issues with a view to making recommendations for the next WTO Ministerial Conference for additional provisions that would achieve a comprehensive agreement on fisheries subsidies.[1919] To strengthen the credibility of this commitment, the AFS provides that if comprehensive rules are not agreed in the four years that follow its entry into force, the AFS will be terminated, unless the members decide otherwise.[1920]

[1907] WTO, Agreement on Fisheries Subsidies, WT/MIN(22)/33, WT/L/1144 (22 June 2022) (AFS) Art. 1.
[1908] AFS, Art. 3.
[1909] AFS, Art. 4.
[1910] AFS, Art. 5.
[1911] AFS, Art. 8.
[1912] AFS, Art. 9.1.
[1913] AFS, Art. 3, 8 & 9.
[1914] AFS, Art. 3.8, 4.4, 6, 7 & 8.1 footnote.
[1915] Tipping, *supra* note 19, at 1.
[1916] Irschlinger & Tipping, *supra* note 16, at 25-26.
[1917] *Id.*
[1918] *Id.* at 26.
[1919] Switzer S, Morgera E, Webster E., *supra* note 3, at 368.
[1920] AFS, Art. 12.

The discussion of approaches to the overcapacity and overfishing disciplines was overly controversial during talks at the 12th Ministerial Conference.[1921] This is because some developing countries argued that these kinds of subsidies are an important part of government efforts to ensure domestic food security.[1922] For them, increasing capacity may align with core development objectives through the protection of cultural rights of small-scale fishers.[1923] On the other hand, many of the members strongly supported prohibiting them due to the potential to cause a range of deleterious impacts on fish stocks, ecosystem health and, ultimately, food security.[1924]

III. Problems Associated with Effects of Fisheries Subsidies on Coastal Development and Local Food Security

In this section, after explaining both the positive and negative consequences of regulating fisheries subsidies on coastal development and local food security, I suggest the AFS text agreed upon at the 12th Ministerial Conference overlooks potential negative outcomes.

A. Positive and Negative Consequences of Regulating Fisheries Subsidies on Coastal Development and Local Food Security

Restricting fisheries subsidies has both positive and negative consequences on coastal development and local food security.

It is generally regarded that regulating fisheries subsidies improves food security by removing the unsustainable fishing practices that deplete fish stocks. The underlining rationale is that eliminating subsidized overfishing will improve ocean health and, ultimately, the rights and access to adequate food for individuals within local coastal communities.[1925]

However, on the other hand, removing fisheries subsidies can undermine local food security if the subsidies are provided for maintaining local coastal community livelihoods. Given the important role that small scale fisheries play in supporting food security and livelihoods for vulnerable coastal populations, through providing job opportunities and food sources,[1926] it is acknowledged that fisheries subsidies can be an important economic tool for supporting coastal development.[1927] For example, in Ghana, USD 40 million are provided as subsidies on nets, outboard motors, and fuel for small-scale fisheries to protect their right to food.[1928] In India, subsidies are mainly provided on fuel and purchase of vessel, gears, and engines, which allow small and medium sized trawlers to continue their operations effectively.[1929] These cases exemplify that some potentially environmentally harmful fisheries subsidies targeting small-scale fisheries could also have a positive impact on food security, meaning that their removal could have negative social impacts as a result.[1930] Thus, restricting

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[1921] Switzer S, Morgera E, Webster E., *supra* note 3, at 368.
[1922] Tipping, *supra* note 1, at 206.
[1923] Switzer S, Morgera E, Webster E., *supra* note 3, at 368.
[1924] Tipping, *supra* note 1, at 206.
[1925] Danish Institute for Human Rights, *The Human Rights Impacts of Fisheries Subsidies: Analysis, Implications and Recommendations*, Working Draft, 8 (2022).
[1926] OECD, *Eliminating Government Support to Illegal, Unreported and Unregulated Fishing*, n°178, 7 (2022); Ana Luisa Soares Peres & Leticia de Souza Daibert, *Negotiating Agriculture in the World Trade Organization: Food Security as a Non-Trade Concern*, 14 BRAZ. J. INT'l L. 55, 56 (2017).
[1927] Nedumpara, James J; Tewari, Sunanda, *Sustaining the Blue Economy: Negotiating Disciplines on Fisheries Subsidies at the WTO*, Economic and Political Weekly, Vol. 57, Issue No. 11, 12 (2022).
[1928] Switzer S, Morgera E, Webster E., *supra* note 3, at 363.
[1929] Nedumpara, James J; Tewari, Sunanda, *supra* note 42.
[1930] Switzer S, Morgera E, Webster E., *supra* note 3, at 363.

or prohibiting the grant of these kinds of subsidies could negatively impact coastal development and local food security.[1931]

This tradeoff is reflected in different sustainable development concerns which may otherwise conflict with each other. SDGs target 14.6 calls for the elimination of fisheries subsidies harmful for trade, the environment, and food security[1932], while some fisheries subsidies aim to protect local food security, as represented by SDGs target 2.3[1933] and the right to food or goals of raising the productivity and incomes of small-scale fishers, as represented by SDGs target 14.b.[1934]

Therefore, efforts to regulate fisheries subsidies to protect fish stocks may have both positive and negative outcomes with regard to protecting local communities from economic deprivation, guarding indigenous communities' pursuit of traditional practices, and promoting food security.[1935]

B. The AFS Failing to Address the Potential Negative Consequences of Restricting Fisheries Subsidies

Concerns over sustainable development and local food security outcomes have been recognized in the AFS negotiations, especially in the context of granting S&DT treatment for developing countries. At the 2005 Hong Kong Ministerial Conference, WTO members agreed that "appropriate and effective S&DT for developing and least developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihoods and food security concerns."[1936] In 2015, SDGs target 14.6 explicitly confirmed this consideration by calling upon members to recognize "appropriate and effective" S&DT for developing and least developed countries (LDCs), and declared that they must be an "integral part" of new fishing disciplines.[1937] In accordance with the mandate from the previous WTO Ministerial Conferences and SDGs target 14.6, some S&DT provisions are reflected in the AFS text. For example, there are two-year peace clauses for WTO disputes relating to subsidies granted by developing countries and LDCs for IUU fishing,[1938] as well as for fishing overfished stocks.[1939] The AFS also requires members to exercise due restraint when raising matters involving an LDCs and to take into account that member's specific situation when exploring solutions.[1940]

However, these provisions are insufficient in terms of maintaining local food security interests, because there is no explicit tailoring based on sustainable development or local food security needs.[1941] The final AFS text lacks explicit and special considerations of the needs of specific communities, such as small-scale fishers.[1942] The absence of clear provisions addressing the specific needs of small-scale fishers is inherently problematic, because it does not recognize that fisheries subsidies have significant human rights impacts for these particular

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[1931] Nedumpara, James J; Tewari, Sunanda, *supra* note 42.
[1932] SDGs Goal 14.6.
[1933] SDGs Goal 2.3.
[1934] SDGs Goal 14.b.
[1935] Gregory Messenger, *Substantial Development and the Commodities Challenge: the Eventual Greening of the World Trade Organisation*, 9 TRADE L. & DEV. 54, 70 (2017).
[1936] World Trade Organization. (2005). Ministerial declaration (WT/MIN(05)/DEC). Doha Work Programme.
[1937] SDGs Goal 14.6.
[1938] AFS, Art. 3.8.
[1939] AFS, Art. 4.4.
[1940] AFS, Art. 6.
[1941] Switzer S, Morgera E, Webster E., *supra* note 3, at 368.
[1942] *Id.* at 368-369.

communities.[1943] Furthermore, the fact that the eligibility to receive S&DT is based on the self-judging principle does not reflect the heterogeneity of countries claiming developing country status.[1944] For example, certain developing countries such as Brazil, China and India already have significant fleet capacity but may also host small-scale fishers.[1945] Such self-selection cannot fully capture the heterogeneous nature of developing countries, the composition of their fishing fleets, and the impact of fisheries subsidies on particular communities.[1946] Therefore, the AFS does not consider the social and developmental outcomes of granting or removing fisheries subsidies as much as trade or environmental dimensions.

IV. Incorporating Tailored and Specific S&DT with Carve-outs for Local Development and Food Security Needs

In this section, I argue that the AFS should incorporate tailored and specific S&DT for exempting subsidies for legitimate objectives of protecting social and developmental needs of small-scale fisheries. I also recommend that a mechanism for periodic review and monitoring and an institutional arrangement for inter-agency coordination should support the effective and fair implementation of the S&DT provisions.

A. Tailored and Specific S&DT Provisions with Exemptions for Protecting Legitimate Development Needs

Given the insufficient consideration of sustainable development and local food security concerns, the AFS should incorporate S&DT provisions with carve-outs specific to development and food security needs of small-scale fisheries. The AFS should account for the needs of artisanal fishing and vulnerable communities,[1947] so that the socio-economic impacts of removing support are carefully considered in order to avoid unintended negative consequences on these communities.[1948] S&DT provisions with tailored and specific exemptions would allow policy space for subsidies with the rationale of protecting legitimate development needs, which the current S&DT provisions based on self-judging development status cannot address. Through this type of provision, the AFS could grant leeway to subsidies that benefit social and developmental goals, such as enabling members to continue providing subsidies that improve economic, social and labor rights.[1949] This consideration is especially important in the context of regulating fisheries subsidies regarding overcapacity and overfishing, which was left for future negotiation, because of their special role in poverty reduction, livelihoods, and food security.[1950]

B. Regional Trade Agreements (RTAs) and the Agreement on Agriculture (AoA) as Models for a Tailored Approach

The AFS could follow provisions on fisheries subsidies in RTAs. For example, the provisions on fisheries subsidies in the Comprehensive and Progressive Agreement for Trans-

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[1943] *Id.*
[1944] *Id.* at 367.
[1945] *Id.*
[1946] *Id.*
[1947] Floyd, *supra* note 5, at 832.
[1948] OECD, *supra* note 41, at 7.
[1949] The Danish Institute for Human Rights, *The Human Rights Impacts of Fisheries Subsidies: Analysis, Implications and Recommendations*, Working Draft, 27 (2022).
[1950] Tipping, *supra* note 19, at 2.

Pacific Partnership (CPTPP) focused on social and developmental priorities might be a good model for the potential tailored provision of the AFS. While the CPTPP does not include exemptions specifically for developing countries in respect to the prohibitions of subsidies for IUU fishing and overfished stocks,[1951] it seems to address the potential social, developmental, and food security concerns of its members in the context of regulating subsidies related to overcapacity and overfishing.[1952] It does so by allowing a CPTPP party to "[take] into consideration a Party's social and developmental priorities, including food security concerns" when applying its "best efforts" to refrain from implementing new subsidies as set out in that provision,[1953] presumably leading to differential treatment for developing countries parties.[1954] Through this type of provision, the CPTPP parties seem to have struck an appropriate balance between attempting to reduce overfishing and overcapacity, on the one hand, and recognizing the social challenges faced by developing countries, on the other hand.[1955]

While the CPTPP-like provisions could allow developing countries to continue providing subsidies with legitimate developmental rationales, they still fall short of carving out specific types of subsidies with clear and specific language. For complementing this dimension, the provision of certain subsidies under the AoA might be applicable in the context of fisheries subsidies. The AoA allows developing countries to provide assistance for agriculture and rural development in the form of investment subsidies for all farmers and input subsidies for low-income or resource-poor producers.[1956] Article 6.2 of the AoA provides that "investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments" considering that "government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries."[1957] These detailed exemptions for low-income farmers in developing countries may provide an adequate structure for the AFS in crafting exceptions for small-scale fishers, although parties to the AFS would still need to consider the context specific to fisheries subsidies and the potential negative effects on the marine environment.

C. A Mechanism Supporting the Fair and Effective Implementation of the S&DT Provision

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[1951] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, incorporating Trans-Pacific Partnership, Art 20.16 (5), https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents.

[1952] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, incorporating Trans-Pacific Partnership, Art 20.16 (7), https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents (The Agreement between the United States of America, the United Mexican States, and Canada (USMCA) has the same type of provision, although it lacks the wording, "food security concerns.")

[1953] Amanda Rologas Tsangalis, *Fisheries Subsidies under the Trans-Pacific Partnership: Towards Positive Outcomes for Global Fisheries Sustainability and Regime Interaction under International Law*, 17 MELB. J. INT'l L. 445, 468 (2016).

[1954] Margaret A. Young, *Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies*, 17 INT'l ENV't Agreements: POL. L. & Econs. 371, 380 (2017).

[1955] Tsangalis, *supra* note 68, at 469.

[1956] Franziska Sucker, *Reflections on Agricultural Subsidies*, available at SSRN: https://ssrn.com/abstract=3925066, 462 (2021).

[1957] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410, Art. 6.2.

Even if tailored and specific S&DT provisions are incorporated into the AFS, a balanced consideration is still required to make sure that the subsidies do not deleteriously impact biological sustainability. For the effective and fair implementation of S&DT provisions that appropriately balance development considerations with environmental demands, I recommend that the ASF should also incorporate a mechanism for periodic review and monitoring the social and developmental outcomes of fisheries subsidies, as well as environmental harms.

1. Potential Abuse of S&DT Provision to the Detriment of Marine Biodiversity

Although tailored S&DT provisions could help protect the developmental interests of local communities, there are criticisms against these potential carve-outs due to the fear that they could undermine efforts to abolish environmentally harmful subsidies. Especially, allowing for considerable flexibility in subsidy commitments for WTO members that are large fishing nations could have an impact on the overall effectiveness of the agreement.[1958] For example, the world's top three fishing nations, China, Indonesia, and Peru, are developing countries and, taken as a group, developing countries account for close to 70% of global marine capture production.[1959] As another example, Ecuador's fishing industry consists of 115 large industrial ships and 400 semi-industrial vessels, and the country has the largest tuna fleet in the Eastern Pacific.[1960] Even though the overwhelming majority of direct subsidies supported small-scale and artisanal fishers in these countries, the small-scale fishers and the subsidies they receive contribute to unsustainable fishing practices.[1961] A tailored approach, which effectively allows some states to continue to apply subsidies recognized as harmful, cannot be the long-term solution, even though such an approach provides flexibility for developing countries to grant subsidies in pursuit of their developmental objectives.[1962] It could ultimately be detrimental to all, including developing countries themselves, since any beneficial development effects in allowing them to continue to apply these subsidies would be negated in the long-term if domestic fish stocks were depleted.[1963] Therefore, if the exception is granted widely, the risk of contributing to the depletion of fish stocks and, eventually, undermining the achievement of better livelihoods and food security becomes greater in the longer term.[1964]

2. A Mechanism for Reviewing the Social and Developmental Effects of Fisheries Subsidies

To prevent the potential abuse of the tailored S&DT provisions, which could undermine the overall objective of regulating fisheries subsidies, the AFS needs to be aware of the tradeoff between protecting social and developmental needs of small-scale fisheries, on the one hand, and maintaining ocean health, on the other hand. For the purpose of this balancing consideration, WTO members should establish a mechanism for monitoring and reviewing, on a periodic basis, not only environmental harms but also social and developmental outcomes

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[1958] Tipping, *supra* note 19, at 2-3.
[1959] T. Irschlinger and A. *Tipping, A World Trade Organization Deal on Fisheries Subsidies: Across the Finish Line?*, IISD, https://www.iisd.org/articles/policy-analysis/world-trade-organization-deal-fisheries-subsidies.
[1960] Floyd, *supra* note 5, at 833.
[1961] *Id.*
[1962] Tsangalis, *supra* note 68, at 469.
[1963] *Id.*
[1964] Tipping, *supra* note 19, at 13.

of granting or removing fisheries subsidies.[1965] With this mechanism, the appropriate balance could be maintained between providing some flexibility to developing country members from a development perspective and preventing the depletion of fish stocks.[1966] If the implementation of the provisions is periodically reviewed, the AFS could ensure that all the carve-outs are tailored to protecting legitimate developmental needs of small-scale fisheries without undermining marine biodiversity.[1967]

D. An Institutional Arrangement Facilitating the Mechanism for Periodic Review

In order for the periodic review mechanism to work, the WTO needs to have the expertise for reviewing and assessing the social and developmental outcomes of granting or removing fisheries subsidies. I will argue that an institutional arrangement to facilitate inter-agency coordination between the WTO and other pertinent institutions is required to complement the WTO's lack of expertise in these non-trade issues.

1. An Institutional Arrangement Required to Address Non-trade Concerns

One problem with establishing the mechanism for periodically reviewing the social and developmental outcomes is that the WTO lacks the expertise to assess these issues. Even if tailored S&DT provisions are included in the AFS text, the issue remains of how the WTO, without expertise in non-trade issues including fisheries and food security, could evaluate whether subsidies are funded for food security needs of small-scale fisheries if a dispute were to arise.[1968]

The insufficient expertise to deal with fishing and social issues implies the need for appropriate arrangements to be made with specialized institutions, like the Food and Agriculture Organization of the United Nations (FAO).[1969] The promotion of inter-agency coordination and information sharing across a network of interested parties, including state and non-state actors, could play a significant role in efforts to bring together different regimes and promote sustainable fisheries management.[1970] Close cooperation and institutional links to support regular interaction between the WTO and other pertinent international organizations, such as the FAO, will be important in effective implementation of the AFS.[1971]

2. Inter-agency Coordination in Information Sharing and Transparency Practices

The current AFS text might seem to encourage coordination with other institutions, such as the FAO, by recognizing that other actors play a central role in setting sustainability standards and implementing them, including through inspections and enforcement actions. In fact, the AFS provides for cooperation with the FAO and the International Fund for Agricultural Development (IFAD) in the establishment of a voluntary funding mechanism for technical assistance and capacity building,[1972] as well as a Committee on Fisheries Subsidies

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[1965] Floyd, *supra* note 5, at 834.
[1966] Irschlinger & Tipping, *supra* note 74.
[1967] Floyd, *supra* note 5, at 832.
[1968] Tsangalis, *supra* note 68, at 463.
[1969] Bernard M. Hoekman, Petros C. Mavroidis, & Sunayana Sasmal, *Managing Externalities in the WTO: The Agreement on Fisheries Subsidies*, RSC Working Paper 76, 21 (2022).
[1970] Tsangalis, *supra* note 68, at 463.
[1971] Bernard M. Hoekman, Petros C. Mavroidis, & Sunayana Sasmal, *supra* note 84, at 22.
[1972] AFS, Art. 7.

coordinated with the FAO and other relevant international organizations, including relevant RFMOs.[1973]

However, this institutional coordination is inadequate for dealing with social and developmental concerns including food security, because it is limited in the field of fisheries management.[1974] The current notification and transparency provision of the AFS only require members to provide certain information on fisheries management, such as type or kind of fishing activity for which the subsidy is provided.[1975] The information not only on the potential outcome of the marine environment, but also on the interests that the proposed subsidies intend to protect, along with the expected social and developmental consequences, should be required for review.

Thus, in addition to inter-agency coordination on the marine environment, the integration of social and developmental concerns into the implementation of the fisheries subsidies regime is required for effective and fair implementation of the tailored S&DT provisions.[1976] The Committee on Fisheries Subsidies should be open to increased inter-institutional cooperation, not only "with the FAO and other relevant international organizations in the field of fisheries management,"[1977] but also with international organizations in the field of sustainable development and food security.[1978] Although certain FAO departments have already provided review and input into the AFS negotiations, it will be important to involve other FAO departments and other institutions with relevant expertise, particularly on indigenous peoples and small-scale fishers.[1979] Other institutions could include the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Office of the High Commissioner for Human Rights, which could help further develop the general link between fisheries and social impacts.[1980] The mechanism might as well include consultation procedures with relevant stakeholders representing local developmental needs such as NGOs and groups of indigenous peoples. Through such an arrangement, these organizations could help integrate stronger social and developmental considerations into the implementation of the AFS.[1981] The institutional arrangement across these agencies should provide adequate and sufficient expertise on both social and environmental concerns for the periodic review mechanism.

V. Conclusion

The AFS should incorporate tailored and specific S&DT provisions, along with a periodic review mechanism and an institutional arrangement, in order to mitigate the potential negative outcomes of removing the subsidies on social and developmental concerns of small-scale fisheries.

Fisheries subsidies are generally regulated in the AFS because of their harmful effects on fair trade conditions, the healthy marine environment and, eventually, costal development. Fisheries subsidies can, however, also play an essential role in supporting local livelihoods and protecting food security in coastal communities. This paper has focused on this dimension, which is largely overlooked in the current text of the AFS.

[1973] AFS, Art. 9.5.
[1974] AFS, Art. 8 & 9.
[1975] AFS, Art. 8.1 (a).
[1976] Switzer S, Morgera E, Webster E., *supra* note 3, at 372.
[1977] AFS, Art. 9.5.
[1978] The Danish Institute for Human Rights, *supra* note 64, at 28-29.
[1979] Switzer S, Morgera E, Webster E., *supra* note 3, at 371.
[1980] The Danish Institute for Human Rights, *supra* note 64, at 27.
[1981] *Id.*

As a recommendation to overcome this difficulty, I have proposed that the ASF should incorporate S&DT provisions tailored and specific to social and developmental concerns, including food security of small-scale fisheries. S&DT provisions that exempt these kinds of subsidies from the general regulation of the ASF would help protect social and developmental interests. S&DT provisions should also be implemented fairly and effectively through a monitoring mechanism and an institutional arrangement. To address the risk that the provisions are abused to the detriment of the marine environment, these frameworks will include periodic review and monitoring of the implementation of the S&DT provisions, such as the social and developmental outcomes of providing or removing the subsidies. Also, the institutional arrangement should be strengthened to facilitate coordination between the WTO and other competent agencies, international food and human rights institutions to complement the limited expertise of the WTO in non-trade issues.

Tailored and specific S&DT, supported by a monitoring mechanism and an institutional arrangement, would adequately balance the social and developmental interests that the subsidies intend to protect, on the one hand, and the marine biodiversity that the subsidies potentially damages, on the other hand. Such a legal framework provides one example of how trade law could reconcile different sustainable development concerns that may otherwise conflict with each other in the context of the regulation of fisheries subsidies. Through overcoming important tradeoffs in regulating fisheries subsidies under the AFS, WTO members could use the forum not only to defensively carve out non-trade concerns but also to work together for progressively promoting social common good.

CHAPTER 22: OPPORTUNITIES WITH THE WTO AGREEMENT ON FISHERIES SUBSIDIES

Abstract

The WTO's passing of the Agreement on Fisheries Subsidies in June 2022 represented a historic achievement for the organization. Hailed as the first multilateral agreement with an explicit environmental dimension and the first agreement to fully meet a United Nations Sustainable Development Goal, the Agreement represents major progress in the realm of fisheries subsidies, which are currently inextricably linked to concerns about the overfishing of global fishery stocks. The history and process of negotiations that led to this historic Agreement are vitally important to understanding how the Agreement was ultimately passed. Although the Agreement may seem like it has a narrow focus as it seeks to impose disciplines on fisheries subsidies, a closer examination of the Agreement's language and provisions reveals exciting opportunities to explore sustainable development goals within the context of fisheries subsidies. This paper will explore the background, history, and language of the Agreement before unpacking the special and differential treatment adopted in the provisions. It will then turn to the WTO's claims about the accomplishments of the Agreement, compare the Agreement to other trade agreements that discipline subsidies, and finally examine the potential for fascinating sustainable development opportunities. At the heart of the Agreement is a need to balance sustainable development concerns like food security, livelihood, and even human rights with the environmental concerns about overfishing, exploitation of fish populations by the world's largest fishing nations, and loss of biodiversity. As the theme of this work will continue to involve finding that balance, the unique situation of the Agreement as a trade, environmental, and development-oriented agreement presents opportunities to tackle forced labor, give special considerations to small-scale and artisan fishermen, and empower parties to regional trade agreements to achieve sustainable development goals.

I. Background to the Agreement

On June 12, 2022, the World Trade Organization (WTO) adopted the WTO Agreement on Fisheries Subsidies (the AFS or the Agreement) at the 12th Ministerial Conference in Geneva. The Agreement awaits formal acceptance by two-thirds of WTO members in order to formally enter into force.[1982] The adoption of the Agreement marked a culmination of more than two decades of negotiations that started in Doha Ministerial Conference in 2001. Many attribute the completion of the Agreement to the momentum created by both the adoption of the Sustainable Development Goals (including Sustainable Development Goal 14.6, which calls for disciplines on harmful fisheries subsidies)[1983] and the WTO mandate issued at the 11th Ministerial Conference in Buenos Aires to specifically address the prohibition of certain

[1982] As of this date, seventeen member countries have accepted the Agreement; *see* World Trade Organization, "Members Submitting Acceptance of Agreement on Fisheries Subsidies." wto.org (last visited May 16, 2023) https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm.

[1983] United Nations Sustainable Development Goals: The Sustainable Development Agenda, (last visited May 16, 2023) [hereinafter SDG 14.6] https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

forms of fisheries subsidies that contribute to overcapacity, overfishing, and illegal, unreported, and unregulated (IUU) fishing.[1984] [1985]

From a broad perspective, the Agreement represents an unprecedented multilateral effort by the WTO to address global fisheries, which are "an important source of food, nutrition, income and livelihoods for hundreds of millions around the world."[1986] It has been a long time since a multilateral agreement has been adopted by the WTO, with the last agreement being the WTO Agreement on Trade Facilitation in 2017. With the emergence of Regional Trade Agreements (RTAs) and with the recent U.S. block on appointments to the WTO appellate body, there have been many questions about the WTO's viability as a continued global leader in trade agreements. In this sense, the AFS represents a historic achievement for the WTO. From a viewpoint that includes environment, biodiversity, and sustainability concerns, the Agreement is a major step towards addressing the ramifications of overfishing. The question about fisheries subsidies has been at the forefront of WTO negotiations for more than two decades.

However, an agreement to discipline fisheries subsidies was not a guaranteed outcome. In economic terms, subsidies provide economic incentives for fishers to increase their fish production. Given that many countries depend on fisheries exports for production and income, and many fishermen depend on the countries for subsidies to finance their labor, subsidies make economic sense. Yet the economic dimension is just one part of the picture. Overfishing, over-exploitation of fisheries, and the depletion of the global fish stock threatens sustainable development and jeopardizes the role that fisheries play in providing food security and livelihoods for millions of people. The need for WTO disciplines on harmful fisheries subsidies is clear from a sustainable development and environmental perspective. Yet, despite this need, many developing countries remain concerned about their low-income fishers who rely heavily on subsidies to survive. The Fisheries Subsidies Agreement falls among the midst of these tensions.

Fisheries subsidies had not been governed by a multilateral agreement before the adoption of the AFS.[1987] Many, but not all WTO members, follow the United Nation Convention for Law of the Sea (UNCLOS),[1988] which establishes territorial seas (up to 12 miles offshore) and Exclusive Economic Zones (up to 200 miles of ocean offshore) to help countries demarcate fishing regions for regulatory purposes.[1989] In addition, the United Nations Fish Stock Agreements supplements UNCLOS, especially in designating Regional Fisheries Management Organizations (RFMOs) to regulate regional fisheries and their subsidies.[1990]

[1984] Agreement on Fisheries Subsidies, June 22, 2022, WTO Doc. WT/MIN(22)/33 WT/L/1144 [hereinafter the AFS or the Agreement] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True.

[1985] James Nedumpara and Sunanda Tewari, *Sustaining the Blue Economy: Negotiating Disciplines on Fisheries Subsidies at the WTO,* ECONOMIC AND POLITICAL WEEKLY (2022) https://www.proquest.com/magazines/sustaining-blue-economy-negotiating-disciplines/docview/2642226249/se-2.

[1986] United Nations Food and Agriculture Organization, *Report on the "State of World Fisheries and Aquaculture*, January 28, 2016, (last visited May 16, 2023) https://www.fao.org/3/i5555e/i5555e.pdf.

[1987] *See* Mary Ann Palma-Robles, Martin Tsamenyi, and W. Edeson, *Promoting Sustainable Fisheries : The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Brill 6 LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT 55–92 (2010).

[1988] United Nations Convention on the Law of the Sea, November 16, 1982, 1833 UNTS 3 [hereinafter UNCLOS].

[1989] Julia Kindlon, *Can Fish Save the WTO: Current Problems and Potential Outcomes of the WTO Fisheries Subsidies Negotiations*, 28 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL, 282 (2022).

[1990] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, December 11, 2001, 2167 *UNTS* 3.

The WTO's legal mandate to address fisheries subsidies flows from the WTO Agreement on Subsidies and Countervailing Measures (ASCM).[1991] The 2022 AFS does not supersede the ASCM but rather adds specific requirements for fisheries subsidies. In a technical legal sense, fisheries subsidies are still subject to the provisions of the ASCM, as are all WTO-related subsidies. However, it is important to note that one of the main motivations in negotiating and passing the AFS was due to the ASCM's inability to effectively regulate fisheries subsidies specifically. Since it is rare to characterize fisheries subsidies as contingent on performance or on the use of domestic goods over imported goods, or to claim alternatively that a fisheries subsidy has an "adverse effect,"[1992] the ASCM hardly ever reaches fisheries subsidies in enforcement.[1993] Thus, with the pressing environmental need to address the threat of overfishing, combined with the absence of an effective regulatory framework, the WTO began negotiations on a potential multilateral agreement.

II. Historical Points Leading Up to the Agreement[1994]

Formal negotiations at the WTO to address the effects of fisheries subsidies began during the 2001 Ministerial Conference in Doha. The focus in Doha was to understand the negative impact of fisheries subsidies and to clarify their connection to overfishing. The debate continued through the Hong Kong Ministerial Conference in 2005, where the members received a mandate to emphasize disciplining subsidies that contributed to overfishing. The main debate throughout these first rounds revolved around whether a multilateral agreement should generally prohibit all fisheries subsidies or only prohibit certain subsidies. When the two sides could not come to agreement, negotiations stalled around this point of contention. The WTO's Negotiating Group on Rules then produced a draft text that attempted to reconcile the debate in 2007, but negotiations continued to stall. Nearly ten years after Hong Kong, the adoption of the 2030 Agenda for Sustainable Development Goals by the UN Membership in 2015 proved to be a catalyst for renewed negotiations. Specifically, the adoption of the SDG agenda spurred talks about the elimination of IUU and overfishing-related subsidies in accordance with SDG 14.6.[1995] The negotiations picked up momentum at the 2017 Buenos Aires MC, and ultimately the historic agreement was reached and adopted at the Geneva MC in June of 2022.

III. Examining the Language of the Agreement

Broadly speaking, the Agreement centers around three main prohibitions:[1996]

i. Article 3: Prohibition on subsidies for Illegal, Unreported, and Unregulated (IUU) fishing[1997]

[1991] Agreement on Subsidies and Countervailing Measures, January 1, 1995, WTO Doc. 1869 UNTS 14, Articles 1–3 [hereinafter ASCM].

[1992] One example of an adverse effect is if the ASCM finds that the subsidy is "trade distorting."

[1993] Kindlon, *Can Fish Save the WTO* at 287–90.

[1994] *For detailed explanations of the history of WTO negotiations in fisheries subsidies, see* Julian Eduardo Becerra Sanchez, *The Present and Future of the 2022 WTO Agreement on Fisheries Subsidies* 55 INTERNATIONAL LAW AND POLITICS 169-171; and Kadijatu Zainab Bangura and Abraham Zaqi Kromah, *The WTO's Fisheries Subsidies Agreement: What's New and What's Next?* KLUWERS LAW INTERNATIONAL BV 17 GLOBAL TRADE AND CUSTOMS JOURNAL 433–35 (2022).

[1995] United Nations Sustainable Development Goals: The Sustainable Development Agenda, (last visited May 16, 2023) [hereinafter SDG 14.6] https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

[1996] WTO Introduction to Agreement (AFS) Fact Sheet (last accessed May 16, 2023) https://www.wto.org/english/res_e/booksp_e/impfishag_part_1_e.pdf.

[1997] IUU fishing refers to activities in paragraph 3 of the United Nations Food and Agriculture Organization *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001).

ii. Article 4: Prohibition on subsidies for fishing on overfished stocks
iii. Article 5: Prohibition on subsidies for fishing on the unregulated high seas

For the IUU fishing subsidies prohibition, the Agreement adopts a determination and notification system, whereby members make affirmative determinations that a subsidy is going to a vessel or operator conducting prohibited IUU fishing.[1998] The overfished stocks subsidies prohibition also turns on a member's determination that a subsidy is enabling fishing in an overfished stock, consistent with the definitions provided by UNCLOS and UNFSA.[1999] Third, the unregulated high seas subsidies prohibition also runs on a determination that a subsidy is contributing to fishing in the unregulated high seas.[2000] The effect of each prohibition is that the subsidizing member must stop any illegal subsidies and cannot grant any new subsidies to the vessel or operator that would similarly run afoul of the prohibitions.

One of the major issues in negotiations and discussions around fisheries subsidies was which subsidies should be subject to discipline. The Agreement adopts the meaning of a subsidy in the ASCM Agreement as any "financial contribution" or any form of income or price support, by a government or public body, conferring a "benefit" and is "specific" in nature.[2001] Specifically, the ASCM separates subsidies into either "prohibited" or "actionable" subsidies.[2002] However, researchers are quick to point out that not all subsidies are created equal. Some subsidies have a greater impact on overfishing and sustainability concerns. For example, subsidies that increase capacity, such as subsidies for boat construction, fuel, and fishing equipment serve to incentivize economic production and thus contribute in a greater degree to overfishing, whereas subsidies for research on sustainable fishing practices serve to mitigate the threat of overfishing. However, the 2022 Agreement chose not to differentiate and prohibit "capacity" subsidies specifically. Instead, it opted to prohibit subsidies based on the nature of fishing activities (such as fishing on the high seas or IUU fishing). One scholar remarks that these kinds of subsidies prohibitions may have been easier to reach consensus on, because it is difficult to make principled arguments against prohibiting IUU fishing or overfished stocks.[2003]

The AFS provides for a dispute settlement mechanism between members. Specifically, the agreement provides that Article 4 of the ASCM applies to Articles 3, 4, and 5 of the AFS (which are the main prohibitions on IUU subsidies and overfished stock subsidies). Article 4 details the steps that a member can take when it has reason to believe a prohibited subsidy is being granted or maintained by another member.[2004] For all other provisions outside of Articles 3–5, the Agreement applies the WTO's Dispute Settlement Understanding, which draws from Articles XXII and XXIII of the 1994 GATT.

While the structure of the WTO's dispute settlement mechanism may have been one of the main reasons that negotiators pushed for the AFS to reside under the WTO's auspices,

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[1998] WTO Summary of Agreement Fact Sheet Part 2, WTO.ORG (last accessed May 16, 2023) https://www.wto.org/english/res_e/booksp_e/impfishag_Part_2_e.pdf.
[1999] *Ibid.*
[2000] *Ibid.*
[2001] *Ibid.*
[2002] Amanda Rologas Tsangalis, *"Fisheries Subsidies Under the Trans-Pacific Partnership: Toward Positive Outcomes for the Global Fisheries Sustainability and Regime Interaction Under International Law,"* 17 MELB. J. INT'L L. 445 (2016); prohibited means being contingent upon export performance or the use of domestic over imported goods; actionable means being subject to challenge by a member state where these have adverse effects on that member state's interest; (the ASCM has received criticism that it cannot regulate fisheries subsidies effectively); see Tsangalis at 458–59.
[2003] Alice Tipping, *Building on Progress in Fisheries Subsidies Discipline*, 69 MARINE POLICY 202–208 (2016).
[2004] ASCM, *supra note 12,* Art. 4 https://www.wto.org/english/docs_e/legal/e/24-scm.pdf.

there is some current uncertainty about disputes mediated by the WTO.[2005] Currently, appointments to the WTO's appellate court have been blocked by the United States, which has consequently halted the progress of many dispute settlements. The political environment surrounding the appellate court appointments issue has caused many to question the future of the WTO as a viable continued source of multilateral trade agreements, given that it cannot pass appeal judgments.[2006] While it is unlikely that the passing of the AFS itself will tip the scales on the appellate court appointments impasse, the inclusion of WTO dispute settlement provisions within the AFS language perhaps demonstrates a hopeful vote of confidence in the WTO's future as a settler of disputes between member countries in trade agreements.

IV. Special and Differential Treatment in the AFS: The Concern with China

The negotiations leading up to the Agreement highlighted the debate between countries that sought wholesale elimination of harmful fisheries subsidies and countries that fought for the identification and prohibition of specific harmful subsidies, in order to protect their fisheries and those who depended on them. With an eye towards the development needs of certain countries, this debate proved to be a precursor for the discussion on including special and differential treatment within the agreement's language. The mandate from the 11th WTO Ministerial Conference stated that "appropriate and effective special and differential treatment (S&DT) for developing country Members and least developed country Members should be integral to the negotiations." This assertion is in line with the UN Adoption of SDG 14.6, which similarly refers to S&DT as "integral."[2007] The Agreement carries out this intention to integrate S&DT through several provisions. Article 3.8 exempts developing countries, including least developed country (LDC) members, from actions related to the prohibition of subsidies for IUU fishing for two years.[2008] Article 4.4 contains a similar exemption for developing countries with respect to the prohibition on subsidies for overfished stocks.[2009] Article 6 also calls for members to exercise due restraint in raising matters involving LDCs members.[2010]

The broad nature of these S&DT exemptions raises important questions. Given the importance of S&DT to least developed countries that depend on their fisheries for livelihood and food security, it is not surprising that these provisions were a major focal point of the negotiations. However, with the passing of the Agreement, one major concern is that countries like China, which accounts for 15% of the world's total fish capture production by itself, can claim "developing country" status and take full advantage of the two-year exemptions.[2011] Additionally, China is currently the world's largest fisheries subsidizer, providing 21% of the total amount of global subsidies. The difficulty, as one article notes, is that subsidies from a country like China have a vastly different impact on the global fishing stocks than subsidies from countries that greatly depend on fisheries for subsistence or have large artisanal fishing populations. Yet both these countries and China are eligible for the exemption.[2012]

[2005] Mitchell Lennan and Stephanie Switzer, *Current Legal Developments World Trade Organization: Agreement on Fisheries Subsidies*, 38 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 174 (2023).
[2006] *See* Giorgio Sacredoti, *Adjudication of International Trade Disputes: From Success to Crisis: What's Next?* BRILL THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 1–31 (2023).
[2007] SDG 14.6, *supra note 2*.
[2008] AFS Art. 3.8, *supra note 3*.
[2009] AFS Art. 4.1.
[2010] AFS Art. 6.
[2011] United Nations Food and Agriculture Organization, *Fishery and Aquaculture Statistics,* FAO YEARBOOK (last accessed May 16, 2023) https://www.fao.org/fishery/en/statistics/yearbook.
[2012] Lennan and Switzer, *Agreement on Fisheries Subsidies* at 172.

It is likely that the Agreement would not have been passed without blanket S&DT provisions which include countries like China, no matter what percentage of the world's subsidies and fishing production China accounts for. Historically, China has resisted disciplines on its subsidies and has pushed strongly for broad SD&T provisions that it can take advantage of.[2013] Yet, as the stark example of China's position in the fisheries subsidies trade demonstrates, the insistence on exemptions by such a major player in the global fishing trade like China may come at the expense of other developing countries and may ultimately run counter to the environmental and sustainability goals of the Agreement.[2014]

V. Special and Differential Treatment in the AFS: A Different Model?

Could the Agreement have passed customized S&DT provisions that account for China's and other large subsidizers' impact on fish production? Starting from an entirely blank slate from an S&DT perspective in negotiations may not have been a viable option: the tradition of broad S&DT provisions for developing countries and LDCs had already been a mainstay in WTO negotiations by 2006, when China first started subsidizing its fisheries.[2015] However, at least one scholar argues that the negotiations should have departed from the traditional S&DT model. Youngjeen Cho contends that since the fisheries subsidies negotiations had a such a prominent environmental dimension and since granting broad exemptions to subsidy disciplines to the world's biggest fishers (like China) would exacerbate environmental concerns like overfishing, the negotiators should have pushed for a new SD&T model.[2016] The new SD&T model would not exempt large fisheries like China's, but would rather customize special considerations to countries that depend on fisheries subsidies for livelihood and food security for their artisanal and subsistence fishermen.[2017] The new model would thus further the environmental aims of the agreement without compromising the development goals of such countries.

Another scholar agrees that blanket exemptions would not further sustainability goals if high-capacity fishery countries can take advantage of them. Stephen Floyd called for the WTO to "adopt a more nuanced, case-specific approach for developing countries that can be periodically reviewed."[2018] However, he warned that tailoring S&DT approaches for individual countries can prove to be complex. He gives an example of a developing country, Ecuador, whose artisanal and subsistence fishermen heavily depend on subsidies, but the reality shows that much of those subsidies ends up funding the fishermen to conduct now-prohibited IUU fishing, such as fishing in protected waters or illegally harvesting shark fins.[2019] How countries like Ecuador will enforce the AFS's ban on IUU fisheries subsidies through proper channels of notice and transparency is a development to keep an eye out for, once the agreement is entered into force.

The concept of special and differential treatment that departs from the traditional parameters of a "developing" country, and is not merely based on economic factors and

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[2013] *See* Kristen Hopewell, *Clash of Powers: US-China Rivalry in Global Trade Governance*, CAMBRIDGE UNIVERSITY PRESS 15 (2020) (this is a good source for an in-depth analysis of China's position on subsidies and SD&T).
[2014] Hopewell, *Clash of Powers* at 94–132.
[2015] Hopewell, *Clash of Powers*, at 94–132.
[2016] Youngjeen Cho, *The Concept of 'Developing Countries in the Context of the WTO Fisheries Subsidies Negotiation*, 9 BEIJING LAW REV. 137–152 (2018).
[2017] *Ibid.*
[2018] Stephen Floyd, *Fishing for Answers: Illegal Fishing, Depleted Stocks, and the Need for WTO Fishing Disciplines*, 52 GEO. J. INT'L L. 834 (2021).
[2019] *Ibid* at 833–34.

catalyzed by self-election mechanisms in the GATT and WTO, is compelling to think about.[2020] Whether such a new model would ever get past the rounds of negotiations and manifest into an actual agreement with the consent of members like China, remains to be seen. But perhaps Cho's point about the environmental aspect will resonate with future negotiators. Since the AFS represents the first multilateral agreement with a demonstrated environmental focus, a distinct possibility remains that countries will be willing to consider the environmental impacts of subsidies and will adopt customized special considerations instead of blanket exemptions.

Interestingly, several drafts from the Chair of the negotiations suggest that modified SD&T provisions were, in fact, on the table, as late as 2021.[2021] For example, some texts suggest that LDCs (of which China is not a member) would be indefinitely exempt from prohibitions on subsidies for overfished stocks. Other drafts provide for a negotiation mechanism for LDCs graduating from LDC status to extend their exemption period. Significantly, one proposed footnote excluded countries with a higher than 10% share in global marine capture production from S&DT with regards to subsidies for overfished stocks. In a similar vein, there was a proposal for an exemption for IUU subsidies and subsidies for overfished stocks for countries that demonstrate that their "measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries a biologically sustainable level."[2022] In the final language of the Agreement, however, the negotiators opted to use the word "rebuild" instead of "maintain." While the indefinite exemption, negotiation mechanism, and 10% threshold did not make it into the final Agreement, it is worth noting that the negotiators were at the very least considering customizing S&DT language, especially with a view towards sustainability criteria.

Beyond the conceptual and political difficulties of implementing a new SD&T model focused on sustainability, some scholars (and actual players at the negotiation table) have proposed S&DT language based on the principle of common but differentiated responsibility (CBDR).[2023] Drawing from the larger environmental context in which CBDR has been invoked, CBDR advocates for developed countries that have allegedly contributed more to environmental degradation should bear a greater responsibility to protect the environment than developing countries. This approach is appealing to consider, since it would provide a basis for customizing different treatment for different countries.

But there remain several questions to answer: how can CBDR language be framed so that it does not fall into the developed country-developing country dichotomy (which would not solve the concern about countries like China)? Furthermore, are there reliable sustainability metrics to measure a countries' impact on overfishing (the measure of environmental degradation)? Significantly, what would a greater responsibility look like for the biggest culprits of overfishing? At this point, there are more questions than answers, and since specific CBDR language did not make it into the final language of the AFS, utilizing CBDR may seem like an afterthought or an option considered but not followed through on. But the role of CBDR

[2020] Cho, *The Concept of "Developing Countries,"* at 137–152.

[2021] Ranja Sengupta, *Fisheries Subsidies Negotiations Towards the WTO's 12th Ministerial Conference: Considerations for Developing Countries and LDCs*, www.twn.my THIRD WORLD NETWORK (May 27, 2022) https://twn.my/title2/briefing_papers/MC12/briefings/Fisheries%20subsidies%20TWNBP%20MC12%20Sengupta.pdf.

[2022] Article 5.1.1 WTO Draft Document of AFS TN/RL/W/276 (May 11, 2021) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276.pdf&Open=True.

[2023] Lennan and Switzer, *Agreement on Fisheries Subsidies* at 22; Sengupta, *Fisheries Subsidies Negotiations* at 1–6.

remains relevant in the future of fisheries subsidies disciplines, especially as a way to potentially differentiate countries based on their environmental impact.

The agreement also provides for targeted technical assistance and capacity building assistance to developing country members and LDC members. This assistance will be supported in part by voluntary WTO funding in cooperation with international organizations, such as the UN Food and Agriculture Organization and the International Fund for Agricultural Development. Yet while the funding mechanism represents the right step in terms of assisting developing country members, given its voluntary nature, generalized language, and theoretical viability, it remains to be seen whether this will prove to be helpful.

VI. Analyzing WTO Claims about the Agreement

The WTO claims that the AFS "represents a historic achievement for the membership as 1) the first Sustainable Development Goal (SDG) target to be fully met, 2) the first SDG target met through a multilateral agreement, 3) the first WTO agreement to focus on the environment, 4) the first broad, binding, multilateral agreement on ocean sustainability, and 5) only the second agreement reached at the WTO since its inception."[2024] The last four claims are easily verifiable as broad, sweeping achievements, given the WTO's general prominence in multilateral trade instruments. But the first claim necessitates a careful look at the UN's SDG language.

Sustainable Development Goal 14.6 states in full:

> By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.

Upon a cursory glance at the language of SDG 14.6, it appears that the Agreement fully meets the SDG target. However, with a closer examination of the Agreement's negotiation history, it is clear that the Agreement does not effectively prohibit certain forms of subsidies which contribute to overcapacity and overfishing (O-O-related subsidies).[2025] While the agreement does prohibit subsidies for IUU fishing and for fishing in overfished stocks, the AFS's Ministerial Decision explicitly acknowledges that the O-O-related subsidies remain an "outstanding" issue and thus commissions the Negotiating Group on Rules to continue negotiations on that point.[2026] Significantly, the combination of this acknowledgement with the language of Articles 9.4 and 12 gives the negotiators four years upon entering the Agreement to reach consensus on how to discipline O-O-related subsidies. If comprehensive disciplines are not adopted within four years, the Agreement will be terminated. Drafts of the AFS had included provisions that prohibited these O-O-related subsidies in essence, but were not adopted in the final language. A further issue involves the criteria of an overfished stock,

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[2024] World Trade Organization, "Agreement on Fisheries Subsidies." WTO.ORG (last visited May 16, 2023) https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm; numbering added for emphasis; the other agreement that the WTO has passed since its inception is the Agreement on Trade Facilitation in 2017. Many thanks to Professor Kuhlmann for helping with this detail!

[2025] Kindlon, *Can Fish Save the WTO* at 284 (overcapacity relates to when fishing operations have the ability to catch greater than the desired amount of fish due to an excessive supply of resources).

[2026] *See* Lennan and Switzer, *Agreement on Fisheries Subsidies* at 274; Bangura and Kromah, *The WTO's Fisheries Subsidies Agreement* at 433–435, *supra note 16*.

as member countries are divided between an objective scientific approach or a subjective assessment made by the country's RFMO.[2027]

Given the consequences of failing to prohibit subsidies for O-O-related subsidies within the four-year deadline, it may have been premature on the part of the WTO to claim that the SDG Target 14.6 had been fully met. It is clear that the members consider a prohibition on O-O-related subsidies to be important enough to jeopardize the existence of the whole Agreement, since it can trigger the termination of the AFS. However, it is also likely that negotiators are confident that an agreement on O-O-related subsidies can be reached eventually, and that the celebration surrounding the passage of the AFS will not be in vain.

Yet even if one accepts the WTO's claims that SDG 14.6 is the first target that will be fully met (upon the passage of an agreement regarding O-O-related fishing), the role of fisheries inherently implicates a broader perspective than just this one SDG target. As many scholars point out, the importance of fisheries in the populations of developing countries and least developed countries also implicate Sustainable Development Goal 2 (maintaining food security) and Goal 1 (ending poverty) with many dependent on fish for a food source and means of livelihood.[2028] Especially since developing countries hold a greater share in the fisheries markets than developed countries, the discussion on the Agreement's impact on other SDGs remains important.[2029] Relatedly, the complexity of fisheries subsidies brings into tension the economic benefits provided by fishing and the sustainability concerns about overfishing. In some ways, this tension represents two sides of the same coin, or a cyclical pattern. Fishers depend on the subsidies, but overfishing will also hurt the collective commons of global fisheries and will likely hurt their livelihoods in the long run. So a balance must be struck. Some researchers argue that sustainability is not actually the true driving force behind the subsidies discipline, but rather the driving force are political motives aimed at reducing the number of players in the fishing market.[2030] For example, one researcher notes that the Hong Kong Ministerial Declaration in 2005 mentions development priorities, poverty reduction, livelihood and food concerns of developing countries that "need to be reconciled" with subsidies disciplines.[2031] The researcher goes on to conclude that a direct elimination of all fisheries subsidies will have an overall highly adverse effect on the goal of achieving the SDGs.[2032]

VII. Fisheries Subsidies Provisions in Other Trade Instruments

During the years of negotiation of the WTO Agreement, several members made plurilateral efforts to include fisheries subsidies disciplines in their respective trade agreements. One example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[2033] Article 20.16.5 prohibits parties from granting

1) subsidies fishing that negatively affect fish stocks that are in an overfished condition; and

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[2027] *See* Floyd, *Fishing for Answers* at 830.
[2028] *See* Kumar et al., *The Effectiveness of Fisheries* at 132–140.
[2029] *Ibid.*
[2030] *Ibid.*
[2031] *Ibid.*
[2032] *Ibid.*
[2033] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership Chapter 20 *Environment*, March 8, 2018 [hereinafter CPTPP] https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/20.-Environment-Chapter.pdf. "The CPTPP is a revised version of the original Trans-Pacific Partnership (TPP) and

2) subsidies provided to any fishing vessel while listed by the flag State or a relevant RFMO or Arrangement for IUU fishing in accordance with the rules of that RFMO or arrangement….[2034]

Furthermore, parties are required to make best efforts to refrain from introducing new, or extending or enhancing existing subsidies that contribute to overfishing or overcapacity.[2035] Interestingly, the CPTPP provision does not include any exemptions for developing countries like the AFS does with its S&DT language. But the CPTPP does include sustainable development language in its requirement for parties to refrain from subsidies that contribute to overfishing or overcapacity.[2036] It allows the party to take into consideration its social and developmental priorities, including food security concerns.

The United States-Mexico-Canada Agreement also contains nearly identical provisions prohibiting subsidies for overfished stocks and vessels engaged in IUU fishing.[2037] The United Kingdom-New Zealand Free Trade Agreement similarly has provisions disciplining subsidies, with additional prohibitions on subsidies that enhance vessel capacity, subsidies to vessels who violate conservation and management measures, and subsidies for the transfer of vessels from the party to other states.[2038]

How does the subsidy language in these trade agreements compare to the AFS? On one hand, these trade agreements do not have exemptions for developing countries in the context of S&DT. But perhaps that is merely a consequence of there being so few parties to each agreement and thus lacking the heterogeneity that necessarily accompanies a multilateral agreement like the WTO's AFS. On the other hand, the provisions do refer to social and developmental priorities and calls upon the parties to consider them when they give best efforts not to provide subsidies that contribute to overfishing and overcapacity. It is fascinating to think about whether the negotiators of the AFS, given their mandate to draw up provisions on subsidy disciplines for overfishing and overcapacity within four years of the agreement being in force, will take up similar language to these plurilateral trade agreements. The choice to not make stringent prohibitions on O-O-related subsidies but to rather opt for a "best efforts" approach is also a choice the AFS negotiators will have to confront. Given the failure to pass an outright prohibition on O-O subsidies last June, it will be compelling to see what direction they take.

VIII. Sustainable Development Topics related to the AFS

The comparison between the AFS and the other free trade agreements does raise the interesting question of potential alternative solutions in a world where the AFS was never passed. A plurilateral free trade agreement or a regional trade agreement like the CPTPP presents one possibility, as explored in the previous section. One scholar has suggested that if the AFS would not have gone through, a member may have sought to unilaterally prohibit

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includes the same contracting parties with the TPP with the exception of the United States, which withdrew from TPP negotiations in Jan. 20, 2017"; see Hanuel Jung and Nu Ri Jung, *Enforcing Purely Environmental Obligations through International Trade Law: A Case of the CPTPP's Fisheries Subsidies*, 53 J. WORLD TRADE fn. 15 (2019).

[2034] CPTPP Art. 20.16.5

[2035] Art. 20.16.7.

[2036] *Ibid.*

[2037] The United States-Mexico-Canada Agreement, Art. 24.20 July 1, 2020 [hereinafter USMCA] https://ustr.gov/sites/default/files/IssueAreas/Environment/USMCA_Environment_Chapter_24.pdf.

[2038] The United Kingdom-New Zealand Free Trade Agreement, Art. 22.9 February 28, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1057671/uk-new-zealand-free-trade-agreement-chapter-22-environment.pdf.

harmful fisheries subsidies through the GATT Art. XX(g) exception.[2039] This exception allows for a member to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[2040] The member would have to ensure that the unilateral measure they seek does not arbitrarily and unjustifiably discriminate between other members of the WTO or that it is not a disguised restriction on international trade. To fail either of those would contravene the Article XX Chapeau. Yet the history of negotiations for fisheries subsidies may have helped the potential success of a unilateral measure. Following the example of the WTO's Appellate Body's admission of a "good faith effort" argument in the *US-Shrimp* case, a member could potentially have argued that the WTO member countries have made a "good faith effort" to reach a multilateral agreement by going through so many rounds of negotiations.[2041]

Yet even if a member's unilateral effort may have proved too daunting of a task, member countries did push hard for certain sustainable development provisions to be included in the draft language. One remarkable example that has ramifications in development beyond subsidies was the U.S. effort to include forced labor provisions in the AFS. The U.S. argued in negotiation for the inclusion of forced labor provisions which recognize that disciplining fisheries subsidies may contribute towards eliminating the forced labor on fishing vessels, especially those that refuel at sea.[2042] It also proposed a corresponding notification and transparency obligation.[2043] Ultimately, the provisions did not make it into the final language, as other countries argued that forced labor was not part of the original mandate for the negotiations, and that provisions against forced labor exist in other international labor treaties.[2044] The U.S. countered (unsuccessfully) that the forced labor does fit within the sustainability framework of the mandate.[2045] Although the U.S. effort did not prevail, its willingness to expand the scope of inclusive and sustainable development provisions in a multilateral WTO instrument that facially seems very narrow in subject matter is an example to follow.

With the passage of the AFS, scholars are reimagining the potential to integrate other areas of law within the sphere of fisheries subsidies. One group of scholars take a human rights lens to the AFS, particularly in the context of integrating human rights in order to effect transformative change in preventing biodiversity loss. The group first notes that fisheries subsidies may have negative impacts on the right to a healthy environment, the right to adequate food, and the right to take part in cultural life. They also situate subsidies within the more specific context of the human rights of small-scale fishers. Their ultimate contention is that the AFS missed an opportunity to give special considerations to small-scale fishers in the S&DT provisions, which could have protected their rights from the negative impacts of fisheries subsidies. Despite this missed opportunity, the researchers see potential in reinvesting the funds saved by eliminating harmful fisheries into efforts that protect rights. Although these

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[2039] Kindlon, *Can Fish Save the WTO* at 313–17.

[2040] General Agreement on Tariffs and Trade art. XX(b),(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[2041] Kindlon, *Can Fish Save the WTO* at 313–17.

[2042] Office of the United States Trade Representative, *The Use of Forced Labor on Fishing Vessels*, Submission of the United States, May 26, 2021, https://ustr.gov/sites/default/files/IssueAreas/Trade%20Organizations/WTO/US.Proposal.Forced.Labor.26May2021.final%5B2%5D.pdf.

[2043] *Ibid.*

[2044] SDG Knowledge Hub, International Institute for Sustainable Development, *WTO Fisheries Subsidies Talks Consider Forced Labor, S&DT*, SDG.IISD.ORG June 21, 2021, https://sdg.iisd.org/news/fisheries-subsidies-talks-consider-forced-labor-sdt/.

[2045] *Ibid.*

proposals are more hopeful than real at this point, it is an encouraging sign that scholars and policymakers see potential with the passing of the AFS to make development more inclusive. The debate on special and differential treatment goes beyond developing country status and goes beyond blanket exemptions. There are opportunities to facilitate development in personal ways that can reach small communities, even through a multilateral trade instrument like the Agreement.

IX. Conclusion: What the WTO Agreement May Mean for the WTO's Future

The Agreement stands at a pivotal juncture of the WTO's history. It is too early to determine whether the Agreement on Fisheries Subsidies will be the only new multilateral agreement adopted by the WTO in the foreseeable future. The decades of negotiations, the impetus provided by the adoption of the SDGs, and the mandate from the previous Ministerial Conference all culminated in this historic agreement. Yet, even with the adoption of this Agreement, which seems narrow in scope, there are rare and exciting opportunities for inclusive and sustainable development. As the negotiators seek to reach agreement on subsidies related to overcapacity fisheries, there is room to discuss what special and differential treatment should look like. There is room to compare language with the other free trade agreements. There is room to incorporate forced labor provisions and room to reinvest funds saved from prohibited subsidies to help ensure artisan and small-scale fishers are protected in their right to a healthy environment. As the WTO and the trade law community looks ahead to the future, the Agreement represents both the hard work of those who toiled to get it adopted and a hopeful future.

PART III

ENVIRONMENTAL PROTECTION

PART III

ENVIRONMENTAL PROTECTION

Part III of the book focuses on the link between environmental sustainability and trade, which is increasingly integrated into trade rules and appears throughout Regional Trade Agreements (RTAs) and, to a lesser extent, WTO law. The papers in this part cover issues related to climate change, environmental protection, multilateral environmental agreements (MEAs), green investment, and protection of genetic resources and traditional knowledge. These issues would fall under a number of the Sustainable Development Goals (SDGs), including SDG 1 (No Poverty), SDG 10 (Reduced Inequalities), SDG 12 (Responsible Consumption and Production), SDG 13 (Climate Action), SDG 14 (Life Below Water), SDG 15 (Life on Land), and SDG 17 (Partnership for the Goals), among others.

The first sub-section of Part III focuses on climate change. Chapter 23, "Weathering the Storms: Recommendations for Preparing Regional Trade Agreements for Climate Change," addresses how to incorporate climate change readiness into RTAs in an inclusive, equitable way and recommends that negotiators address climate emergencies, promote technology transfer, lower technical barriers to trade, and put in place hard infrastructure. Chapter 24, "Designing an Equitable and Development-Friendly Carbon Border Adjustment Mechanism," proposes applying equity principles through special differential treatment to carbon border adjustment mechanisms (CBAMs) in order to address the needs of developing countries. Chapter 25, "Climate Change, Competition, and Conflict Along the River Nile: The Grand Ethiopian Renaissance Dam and Shifting International Water Law" argues that the Grand Renaissance Dam conflict between Egypt and Ethiopia could contribute to shaping customary international water law if it resolves the legal principles that direct transboundary waterways-related competitions.

The second sub-section of Part III includes papers on a range of emerging issues related to environmental sustainability, many of which recognize that addressing environmental issues has both economic and social implications. Two chapters in this sub-section explore an issue that has not yet been a significant focus in international investment agreements (IIAs) and RTAs, namely the facilitation of green finance and investment to reduce greenhouse gas (GHG) emissions to ensure a just and fair transition. Chapter 26, "Utilizing Investment Agreements to Spur Green Investment," identifies public and private barriers that hinder the flow of sustainable finance and presents recommendations on how future investment chapters or protocols can incorporate provisions to enable green and sustainable capital flows. Chapter 27, "Incentivizing Sustainable Climate Development and Sustainable Debt Through Novel Approaches to Trade and Investment Agreements," also supports the incorporation of sustainability provisions into trade and investment agreements, including concessional financing for climate mitigation and adaptation projects and incentives for bilateral lenders within the framework agreement.

Finally, this sub-section of Part III explores trade and environmental protection through the lenses of different MEAs: the United Nations Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the United Nations Convention on Climate Change (UNFCCC) and the Paris Agreement. Within the context of the first two of these MEAs, Chapter 28, "An Uninvited Commodity: Synergizing International Trade and Environmental Agreements to Combat the Spread of Invasive Alien Species," seeks to address the lack of a multilateral trade agreement

that regulates the intentional and accidental spread of "invasive alien species" by proposing a harmonization of different concepts included in international trade agreements and MEAs. Chapter 29, "Promoting Environmental Equity: CBDR as an International Standard in the WTO TBT Agreement," presents an initial approach for facilitating the recognition of the Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) principle as an international standard under the WTO Technical Barriers to Trade (TBT) Agreement and suggests the use of S&DT to provide flexibilities for developing economies.

PART III

ENVIRONMENTAL PROTECTION:

Climate Change

CHAPTER 23: WEATHERING THE STORMS: RECOMMENDATIONS FOR PREPARING REGIONAL TRADE AGREEMENTS FOR CLIMATE CHANGE

SAMANTHA LEAH CRISTOL*

Abstract

Climate change poses a threat to the wellbeing of the international community, especially in regard to international trade. Foreseeable impacts to trade are identifiable in both the production and transportation segments of global value chains, and preparation will require international cooperation. Regional trade agreements offer nations an opportunity to prepare for the impacts of climate change, both by allowing for the diversification of trading partners and products, and by reaching beyond borders to align preparation plans.

To incorporate climate change readiness into trade agreements in an inclusive, equitable, and meaningful way, negotiators should seek to directly address climate emergencies, promote technology transfer, lower technical barriers to trade, and harden regional infrastructure. This paper proposes suggestions for addressing these topics, and presents an evaluative framework to help negotiators understand and identify climate change preparation gaps while drafting or revising trade agreements.

Introduction

Climate change poses a threat to global value chains, and impacts are already being felt worldwide. As a foreseeable crisis, the international community has a rare opportunity to address anticipated climate change impacts in trade agreements before conditions worsen. This paper will address how nations can incorporate climate change readiness into trade agreements in an inclusive, equitable, and meaningful way.

Section I will discuss anticipated impacts to trade by climate change, and Section II will discuss how nations can prepare. With preparation in mind, Section III will suggest how trade negotiators can draft or modify Regional Trade Agreements to be more resilient in the face of climate disasters. Finally, Section IV will propose a framework to help negotiators determine the climate-change readiness of a trade agreement.

I. Climate Change Poses Foreseeable Threats to International Trade.

Climate change is one of the largest challenges facing present and future generations. The increase in global temperatures has in turn increased the frequency and magnitude of extreme weather events.[2046] Natural disasters including fires, storms, and extreme temperature conditions occur three times more often today than fifty years ago.[2047] The increased frequency of extreme phenomena is poised to impact all aspects of global value chains, especially in regard to production and transportation.[2048]

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[2046] *See What is Climate Change?*, UNITED NATIONS, https://www.un.org/en/climatechange/what-is-climate-change (last visited May 15, 2023).

[2047] *See Natural disasters occurring three times more often than 50 years ago: new FAO report*, UNITED NATIONS (Mar. 18, 2021), https://news.un.org/en/story/2021/03/1087702.

[2048] Adnan Seric & Yee Siong Tong, *What are global value chains and why do they matter?*, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (August 2019), https://iap.unido.org/articles/what-are-global-value-chains-and-why-do-they-matter (defining a global value chain as "the full range of activities (design, production, marketing,

A. *Production*

Agriculture and manufacturing will face some of the most significant impacts from climate change.[2049] Flooding impacts food supply by endangering livestock and limiting planting ability, which leads to decreased yields.[2050] Extreme temperatures also threaten agriculture and are not suitable for growth of many commodity crops.[2051] Although worldwide aggregate agriculture production is not projected to decline until 2050, it is anticipated that "suitable production zones will shift, annual yields will become more variable, and price volatility of agricultural commodities will increase."[2052] South Asia and Sub-Saharan Africa are expected to be at the forefront of negative crop yields in coming years.[2053]

Manufacturing is threatened by anticipated strains on labor and infrastructure that may limit the supply of raw goods to manufacturing centers. Labor shortages will impact productivity across all sectors.[2054] The Columbia Climate School estimates that climate change will result in a loss of two billion labor hours per year by 2090.[2055] Climate migration is also expected to impact the labor force, and in 2022, there were an estimated thirty-two point six million displaced persons due to climate disasters like floods and landslides.[2056] The availability of laborers is also likely to be impacted by increased waterborne and foodborne illnesses.[2057] Infrastructure supporting energy supply, water resources, and communication are also at risk worldwide, posing threats to laborers and straining labor conditions.[2058]

As the world changes, consumer needs and demand will also shift, which will also impact production. The redistribution of suitable environments for agriculture and manufacturing needs may make consumers more reliant on imported versions of products that were previously produced domestically. In response to the energy transition and energy demands, consumer demand for climate-friendly technology is also expected to rise.[2059]

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distribution, and support to the final consumer, etc.) that are divided among multiple firms and workers across geographic spaces to bring a product from its conception to its end use and beyond").

[2049] *See* Ankai Xu & José-Antonio Monteiro, *International trade in the time of climate crisis*, CENTRE FOR ECONOMIC POLICY RESEARCH (Dec. 12, 2022), https://cepr.org/voxeu/columns/international-trade-time-climate-crisis (warming of one degree celsius in global temperature is expected to decrease agricultural and light manufacturing exports); *see also* WTO Secretariat, *Climate Change Adaptation and Trade*, Policy Brief, at 5 (2022), https://www.wto.org/english/news_e/news22_e/dgo_ted_climate_change_sept22.pdf.

[2050] Renee Cho, *How Climate Change Impacts the Economy*, COLUMBIA CLIMATE SCHOOL (June 20, 2019), https://news.climate.columbia.edu/2019/06/20/climate-change-economy-impacts/.

[2051] *Id.*

[2052] EUROPEAN ENVIRONMENT AGENCY, *Global climate change impacts and the supply of agricultural commodities to Europe* (Feb. 11, 2021), https://www.eea.europa.eu/publications/global-climate-change-impacts-and.

[2053] Xu & Monteiro, *supra* note 4.

[2054] *How are trade and environmental sustainability compatible?*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, https://www.oecd.org/trade/topics/trade-and-the-environment/ (last visited May 15, 2023).

[2055] Cho, *supra* note 5.

[2056] Gabrielle Tétrault-Farber, *Number of internally displaced people hits record due to war, climate change*, Reuters (May 11, 2023, 6:69 AM), https://www.reuters.com/world/number-internally-displaced-people-hits-record-due-war-climate-change-2023-05-11/#:~:text=GENEVA%2C%20May%2011%20(Reuters),to%20data%20published%20on%20Thursday.

[2057] *See* Cho, *supra* note 5; *see also* EUROPEAN ENVIRONMENT AGENCY, *supra* note 7.

[2058] Cho, *supra* note 5.

[2059] Xu & Monteiro, *supra* note 4.

B. Transportation

Transportation of products will also be impacted as infrastructure choke points, namely roads, maritime ports, and airports, are increasingly exposed to climate change impacts.[2060] Maritime shipping accounts for eight percent of global trade by volume, and port closures caused by extreme events are both anticipated and worrisome.[2061] The mid-2021 logjams of container vessels at the Long Beach and Los Angeles Ports serve as a warning sign for future congestion, as an increase in import demand combined with limited labor and structural capacity at major maritime ports led to a global shipping container shortage, an oil spill, and negative impacts on exports.[2062] Road infrastructure faces risks from flooding and extreme heat, and from risks to fuel access and power supply stability.[2063] Airline transport is similarly at risk from flooding, extreme heat, and risks to fuel supply access, and airplane payload capacity will decrease as temperatures rise.[2064]

II. Nations can prepare for climate change impacts to trade by increasing and diversifying imports and exports, seeking out and increasing the use of resilient agriculture technologies and "green" or "clean" technologies, and improving resiliency of major infrastructure systems.

A. Production

To combat threats to supply and production, system redundancies are crucial. Nations will need to be able to import necessary products to replace any internal production failures, while also avoiding getting hit hard by the inability to export during a crisis. By expanding both the types of imports and the nations imported from, diversifying trade may help to address supply shortages in the case of far-reaching or simultaneous crises.[2065] Diversifying trade by product and trading partners will also lend itself to benefits beyond climate change preparation, like incentivizing innovation and offering economies of scale benefits.[2066]

Internal product diversification may also be helpful, especially in agricultural areas that are facing shifting weather patterns. Diversifying crops to include plants that can withstand varying ranges of temperature extremes and rain conditions can be revolutionary for a nation that is anticipating shifting agricultural viability. Similarly, manufacturing areas would benefit from either shifting to renewable electric power or backup generators that are not dependent on oil and gas. For manufacturing sectors that rely on specific hard-to-access raw materials, like heavy metals, research and development surrounding potential replacements or alternate sources may be helpful.

[2060] *See* Xu & Monteiro, *supra* note 4; *see also* KENYA PRIVATE SECTOR ALLIANCE, CLIMATE CHANGE AND TRADE, April 2014, https://cdkn.org/sites/default/files/files/Climate-Change-and-Trade.pdf.

[2061] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 9; *see also* KENYA PRIVATE SECTOR ALLIANCE, *supra* note 15.

[2062] *Case Study 1: Ports of Los Angeles and Long Beach, United States*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://resilientmaritimelogistics.unctad.org/guidebook/case-study-1-ports-los-angeles-and-long-beach-united-states#:~:text=Since%20the%20onset%20of%20the,given%20time%20(figure%2040) (last visited May 15, 2023).

[2063] KENYA PRIVATE SECTOR ALLIANCE, *supra* note 15.

[2064] *See* Diandong Ren et al, *Impacts of Climate Warming on maximum aviation payloads*, 52 Climate Dynamics 1711, 1718 (2018), https://link.springer.com/article/10.1007/s00382-018-4399-5.

[2065] EUROPEAN ENVIRONMENT AGENCY, *supra* note 7.

[2066] Xu & Monteiro, *supra* note 4.

B. Transportation

Infrastructure maintenance and resiliency measures will help to guard against transportation sector weaknesses.[2067] While it is most important to target areas that are critical to total system success, secondary routes should be improved and maintained in case of a widespread emergency. To be successful, infrastructure hardening must go beyond just the main thoroughfares, and address the entire system that it takes to get an exported product from producer to the point of exit, and an imported product from its point of entry to consumers.

Increasing access to climate friendly technology is also important, especially in the areas of energy supply and transportation. Clean technology like electric vehicles and solar panels can allow nations to transition to self-sufficient transit systems that are not reliant on imported fossil fuels like gasoline or coal.

III. Regional trade agreements are a valuable tool nations can leverage to prepare trade for climate change.

Regional trade agreements (RTAs) offer a unique opportunity for nations to address climate change preparedness in relation to trade. Beyond the on-the-face benefits of allowing nations to diversify trading partners and products, regional trade agreements offer signatories the flexibility to "go beyond what was possible multilaterally."[2068] Deep RTAs can reach behind-the-border issues, through mechanisms like the harmonization of national regulations.[2069] To prepare trade agreements for climate change, negotiators should leverage RTAs to directly address climate emergencies, promote technology transfer, lower technical barriers to trade, and harden infrastructure.

A. Climate Emergency Protocols

As of 2022, only eighteen percent of Regional Trade Agreements registered with the World Trade Organization explicitly addressed climate change.[2070] Of these agreements, the majority use "best endeavor" language or merely acknowledge the importance of mitigation and adaptation.[2071] If applicable, implementation is often in the form of institutional arrangements, like the formation of committees.[2072] Alternatively, ninety-seven percent of in-force RTAs have at least one environmental provision, which is most typically preambular language acknowledging the environment or a general exceptions clause for environmentally related trade considerations.[2073] Trade negotiators should update environmental and climate change provisions by adding emergency protocols that go beyond a general exceptions clause.

The first step for effectuating an emergency protocol is for an agreement to establish when an emergency is occurring. While some agreements, like the agreement establishing the African

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[2067] *See generally* Michael Mullar et al, *Climate-resilient Infrastructure*, OECD Environment Policy Paper No. 14, https://www.oecd.org/environment/cc/policy-perspectives-climate-resilient-infrastructure.pdf; *see also* EUROPEAN ENVIRONMENT AGENCY, *supra* note 7.

[2068] *Regionalism: friends or rivals?*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm (last visited May 15, 2023).

[2069] Heng Wang, *How to Assess Regional Trade Agreements? Deep FTAs v. China's Trade Agreements*, 54 THE INTERNATIONAL LAWYER, at 2 (2021) (forthcoming).

[2070] *Trade and Climate Change*, WTO Information Brief No. 2, at 6 (2022), https://www.wto.org/english/news_e/news21_e/clim_03nov21-2_e.pdf.

[2071] *Id.* at 4.

[2072] *Id.* at 9.

[2073] *Id.* at 4.

Continental Free Trade Area (AfCFTA), allow for Parties to apply to waive obligations in times of crisis, the application process itself is a barrier for a nation experiencing an emergency.[2074] By instead defining emergencies, negotiators can be assured that Parties have immediate access to the benefits of emergency protocols. Even if an agreement decides to keep committee oversight involved in the grant of emergency status, a definition will expedite rulings and help reduce a committee's confusion over whether or not an event qualifies, especially in regions that have varying topography.

To keep emergency protocols as accessible as possible, the threshold that triggers an emergency situation should be defined broadly. Emergencies may look different, based on the geographic location and topographic features of a nation. Coastal areas may be more prone to flooding, while desert areas may be more prone to drought. To acknowledge and simplify potential types of disasters, trigger clauses should instead look to a more general standard. In agricultural areas, the size of the land area affected may be an appropriate standard to judge the scale of a disaster, but in manufacturing-heavy areas, the amount of people displaced may be a better indicator. As parties to an agreement may be of radically different sizes and production capacities, thresholds should be determined per capita, or by land percentage impacted. As agreements may be between parties that include large amounts of differing types of industry, both of these indicator types should be included, and any others that are relevant. Emergency provisions should be triggered by the lessor of any of the established thresholds. Although the higher threshold may be better economically, triggering an emergency at the lower threshold is a more equitable action.

Emergency provisions themselves, when triggered, should seek to provide recovery support to the nation experiencing the emergency. Similar to the application of special and differential treatment, parties that have triggered the emergency threshold should be allowed extra time to meet agreement obligations.[2075] In the event that a party cannot meet an obligation at all, specifically because of the climate emergency at hand, an agreement should provide that no sanctions should be levied. As agriculture is particularly vulnerable to climate disasters, negotiators may want to consider segregating and separately addressing trade obligations or considerations related to agriculture.

As many RTAs are between countries that are geographically close, climate emergency protocols should address two different types of scenarios: those in which only one or some of the parties to an agreement are impacted by a disaster, and those in which all parties to an agreement are impacted by a common disaster, or simultaneous disasters. If a RTA does not otherwise lower technical barriers to trade in a meaningful way between the parties to the agreement, an emergency provision is a middle-ground area where negotiators should seek to lower technical trading boundaries.[2076] If only one, or some, parties to an agreement are impacted by a climate disaster, the special provisions to lower technical barriers to trade can extend just to the nation in need. If all parties are impacted, negotiators should consider implementing a temporary free trade zone between parties. To do so, parties to the agreement can temporarily agree to drop all tariffs, and to adopt international standards, instead of

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[2074] Agreement Establishing the African Continental Free Trade Area art. 15, Mar. 21, 2018, 58 I. L.M. 1028 [hereinafter AfCFTA].

[2075] *Special and differential treatment provisions*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited May 15, 2023).

[2076] UNCTAD Economists, *How regional trade agreements can improve access to medical products during crises*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (Mar. 10, 2021), https://unctad.org/news/how-regional-trade-agreements-can-improve-access-medical-products-during-crises.

national standards, during the time of mutual crisis.[2077] This temporary free trade zone after a common disaster can be limited to an arbitrary time period, or until at least one nation has recovered to the point that it no longer qualifies as experiencing an emergency.

B. Technology Transfer Provisions

By encouraging, promoting, and easing technology transfer, negotiators can help support the climate resiliency of both production and transportation. A recent study by Martinez-Zarzoso and Chelala analyzed the impacts of technology transfer provisions on exports, both in volume and in technology content.[2078] Following the results of this study, negotiators should encourage technology related RTA provisions to encourage a higher number of technology related exports. Deep RTAs were found to be more successful than shallow RTAs, with variable impacts based on development level of parties.[2079] Martinez-Zarzoso and Chelala noted that effects of such provisions are very pronounced in South-South agreements, less so in North-North agreements, and variable in North-South Agreements. To compensate for the negative impact technology provisions sometimes have in North-South agreements, the study found that intellectual property provisions resulted in a positive impact on trade volume, even in shallow agreements.[2080]

To best prepare for climate change, technology transfer in the areas of seeds, fertilizer, and clean technology are vital. Negotiators should seek to draft technology-specific provisions that encourage and ease technology transfer in these fields specifically. Because of the intellectual property and patent concerns that may inhibit the flow of high-technology in both of these areas, intellectual property provisions should be included. Although intellectual property provisions were shown to increase exports in the Martinez-Zarzoso and Chelala study, Warrad's study of Jordan's TRIPS-Plus agreements did not show positive impacts on trade exports from any of its provisions, and instead found a detrimental impact on the cost of medicines for local citizens.[2081] To avoid burdening locals more than spurring innovation, negotiators should avoid provisions that restrain compulsory licensing. Instead, negotiators should consider provisions that allow inventors to extend patent terms, or allow for expedited or "fast tracked" patent programs for parties to the treaty or patents related to climate and environmental technology.[2082]

C. Reducing Technical Barriers to Trade

Regional trade agreements that lower technical barriers to trade will allow parties to diversify imports and exports, which will be advantageous for nations preparing for supply and production shortages. A recent working paper by Gnutzmann-Mkrtchyan and Henn for the International Monetary Fund suggests that complete non-discriminatory tariff elimination

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[2077] *Id.*

[2078] IMMACULADA MARTÍNEZ-ZARZOSO & SANTIAGO CHELALA, TRADE AGREEMENTS AND INTERNATIONAL TECHNOLOGY TRANSFER, 157 Review of World Economics 631 (2021), https://link.springer.com/article/10.1007/s10290-021-00420-7.

[2079] *Id.* at 651.

[2080] *Id.*

[2081] *Id.*; TALEB AWAD WARRAD, THE ECONOMIC IMPACT OF THE TRIPS-PLUS PROVISION IN THE JORDAN-US FREE TRADE AGREEMENT, WIPO-WTO Colloquium Papers 2013 45, 51 https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2013/chapter_6_2013_e.pdf.

[2082] *See* Warrad, *supra* note 36 (patent extensions introduced as a TRIPS-plus measure in Jordan); *Expedite your patent application*, GOVERNMENT OF CANADA, https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/patents/expedite-your-patent-application (last visited May 15, 2023) (fast tracking in Canada available to trading partners).

can result in "considerable trade expansion."[2083] The paper links tariff elimination to reduction in overall costs to traders, as a result of lowering the frequency of customs inspections.[2084]

Negotiators should also aim to harmonize regulatory standards, either by aligning national regulations or by mutually respecting national regulatory agencies. Elimination of additional border testing, customs inspections, and duplicate-standard review will lower trading costs for exporters.[2085] These actions will help to diversify and expedite the trade of goods, while also encouraging producers to enter into cross-border trade. Lowering regulatory requirements and tariffs will make trade more accessible to micro-, small-, and medium-sized enterprises, which will also diversify the exports and expand the quantity of trade.[2086]

D. Provisions to Harden Infrastructure

Hardening infrastructure is arguably one of the most important aspects of climate change readiness. Looking to existing examples, infrastructure development and trade often go hand-in-hand, but not officially. China's Belt and Road Initiative has undertaken infrastructure projects across Asia, which are often accompanied by free trade agreements or "border development zones" in the areas projects have been funded.[2087] In the other direction, the AfCFTA has spurred infrastructure investment by the African Development Bank.[2088] Negotiators should look beyond the incidental impacts of RTAs, and instead include infrastructure hardening initiatives within RTAs.

To harden regional infrastructure, negotiators should consider adding in a infrastructure provision to RTAs. Acknowledgement of infrastructure dependencies on a regional scale may also be helpful for future interpreters to understand intent and priority of the drafters. Shallow language, like commitments to maintain national infrastructure and establish emergency plans, does not utilize the full power that a RTA can offer. Negotiators should instead consider including deeper-reaching provisions that rely on the cooperative and mutually beneficial nature of RTAs.

An example of a deep reaching provision is one that creates a regional infrastructure committee, with members from all parties to the agreement, that will be charged with identifying and mapping the critical regional transportation system. Mapping of this nature would include transit paths from production centers to points of exit and paths from points of entry to consumers. As infrastructure is interdependent, the committee would also be responsible for compiling a list of critical infrastructure needs and points. [2089] This would

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[2083] IMF, *Peeling Away the Layers: Impacts of Durable Tariff Elimination*, WP/18/109, at 37 (May 2018).

[2084] *Id.*

[2085] *See Reducing Technical Barriers to Trade*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE ARCHIVE, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/reducing-technical-barriers-trade (last visited May 15, 2023).

[2086] *See generally* GLOBAL ALLIANCE FOR TRADE FACILITATION, THE TRADE FACILITATION AGREEMENT THROUGH AN MSME LENS (2021), https://www.tradefacilitation.org/content/uploads/2021/05/tfa-through-msme-lens-toolkit-final.pdf.

[2087] *See* Chris Devonshire-Ellis, *China's Free Trade Agreements Along the Belt & Road Initiative*, SILK ROAD BRIEFING (Feb. 26, 2021), https://www.silkroadbriefing.com/news/2021/02/26/chinas-free-trade-agreements-along-the-belt-road-initiative/.

[2088] *See African Development Bank and AfCFTA Secretariat partner to stimulate industry*, African Development Bank Group (Oct. 30, 2021), https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-and-afcfta-secretariat-partner-stimulate-industry-46499.

[2089] *See* Robert Reid, *How to make infrastructure more resilient against climate change*, AMERICAN SOCIETY OF CIVIL ENGINEERS: CIVIL ENGINEERING SOURCE (JAN. 3, 2022), https://www.asce.org/publications-and-news/civil-engineering-source/civil-engineering-magazine/issues/magazine-issue/article/2022/01/how-to-make-infrastructure-more-resilient-against-climate-change.

include non-transportation infrastructure like water and sanitation facilities, power plants, transmission stations, and telecommunication facilities.[2090] The committee would then also be charged with identifying and ranking the weakest points of the system. To make the committee more powerful, the infrastructure provision could also establish a joint-fund that the committee must spend to improve and harden regional infrastructure. The committee should focus efforts based on the weakest identified points, and oversee the completion of infrastructure projects.

While an alternative, and obvious, deep reaching provision would be to harmonize national infrastructure resilience regulations by setting minimum standards, negotiators should be wary of choosing this option. Standards would need to vary by geography and topography of specific locations, and reaching an agreement on regulations may hinder the formation of a RTA, which would be detrimental to climate change preparation overall. Enforcement would be practically impossible, and any sanctions designed to enforce minimum standard meeting would impair trade and be detrimental to climate disaster preparedness.

If an infrastructure provision does create or enhance power to harden regional infrastructure, principles of equity and inclusion should not be overlooked. Infrastructure projects should be undertaken in a manner that is respectful to the area in which they are occurring, with the participation of the local labor force, with health and safety standards for both laborers and project neighbors. Minimum safety and labor rights standards should be incorporated and implemented, to either an agreed-upon international standard or the strictest standards of any party of the agreement. Benefits of hardened systems should be extended to all local citizens, not just trade-related industries, and the managers of infrastructure projects should take care to hire medium and small enterprises, and women-owned enterprises, when possible.

IV. Negotiators can use a framework to analyze the climate change readiness of regional trade agreements.

Created from the recommendations presented in the previous section, the following framework will allow for interested parties to better understand how climate-change ready a regional trade agreement may be. By looking closely at emergency protocols, technology transfer, technical barriers to trade, and infrastructure resiliency provisions, the framework will help identify preparation gaps, with the goal of addressing gaps in an equitable and meaningful manner.

A. Framework Proposal and Methodology

This framework (Table 1) is intended to be used to evaluate a single regional trade agreement at a time. The framework works like a rubric, and uses a criterion-reference method to generate a score.[2091] Subcategories and criterion were based off of the recommendations identified in Section III. To use the framework, a user should first refer to the series of questions on the far left. The second column lists possible answers, and corresponding points to be awarded based on the answer chosen. The matrix to the right shows the distribution of the potential points. After a user fills out the table, they should sum the total points across and down each column and row. These subtotals can then be plugged into the scoring matrix

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[2090] *Id.*

[2091] *See generally Grading Methods*, CENTRAL MICHIGAN UNIVERSITY, https://www.cmich.edu/offices-departments/curriculum-instructional-support/explore-teaching-and-learning/design-an-effective-course/assessment-and-evaluation/grading-methods (last visited May 23, 2023).

(Table 2) to determine subsection and total scores. By examining weak subsection scores and questions where an agreement did not earn points, users of the framework will be able to better understand where additional, or different, language may be beneficial to equitable climate change preparedness.[2092]

Table 1: Framework to analyze the climate change readiness of a regional trade agreement

Questions	Possible Answers & Points	Emergency Preparation	Technology Transfer	TBTs	Infrastructure	Equity and Inclusion	General	Total Possible Points Per Question
Are there more than two parties to the agreement?	No (0) Yes (1)						1	1
GENERAL								
Does the preamble address climate change or the environment?	Neither (0) One (1) Both (2)						2	2
Does the preamble address infrastructure?	No (0) Yes (1)				1			1
Is there an environmental provision?	None (0) One or more (1)						1	1
Are any of the environmental provisions considered "deep"?	No (0) Yes (1)						1	1
Is there a climate change provision?	None (0) One or more (1)						1	1
Are any of the climate change provisions considered "deep"?	No (0) Yes (1)						1	1
EMERGENCY PREPARATION								
Is there an emergency provision?	No (0) Yes (1)	1						1
Does the emergency provision specifically address climate emergencies?	No (0) Yes (1)	1						1
Are emergencies defined? If so, in a broad manner or a narrow manner?	No (0) Yes, Narrow (1 EP) Yes, Broad (1 EP, 1 EI)	1				1		2
	No (0)	1						1

[2092] The current version of this framework does not weigh subsections by importance, which may be a useful addition in the future.

Questions	Possible Answers & Points	Emergency Preparation	Technology Transfer	TBTs	Infrastructure	Equity and Inclusion	General	Total Possible Points Per Question
Do emergency protocols extend time to meet obligations?	Yes (1)							
Do emergency protocols negate sanctions?	No (0) Yes (1)	1						1
Are there separate carve-outs for agricultural protocols in the case of an emergency?	None (0) One or more (1)	1						1
TECHNICAL BARRIERS TO TRADE								
Does the agreement address TBTs?	No (0) Yes (1)			1				1
Does the agreement incorporate the WTO TBT Agreement?	No (0) Yes (1)			1				1
Does the agreement reduce or significantly limit tariffs?	No (0) Yes but discriminatorily (1) Yes, non-discriminatorily (2)			2				2
Does the agreement get rid of tariffs?	No (0) Yes but discriminatorily (1) Yes, non-discriminatorily (2)			2				2
Does the agreement specifically address MSMEs in regard to TBTs?	No (0) Yes (1)					1		1
Are TBTs reduced only in emergencies, or always?	Never (0) Emergencies (1 EP) Always (1 EP, 1 TBT)	1		1				2
Does the agreement harmonize product regulations?	No (0) Yes (1)			1				1
TECHNOLOGY TRANSFER								
Is there a technology transfer provision?	None (0) One or more (1)		1					1
Does the agreement emphasize seed and	No (0)		1					1

Questions	Possible Answers & Points	Emergency Preparation	Technology Transfer	TBTs	Infrastructure	Equity and Inclusion	General	Total Possible Points Per Question
fertilizer technology transfer?	Yes (1)							
Does the agreement emphasize clean tech technology transfer?	No (0) Yes (1)		1					1
Does the agreement include TRIPS+ provisions?	No (0) Yes (1)		1					1
Does the agreement restrict compulsory licensing?	No (1) Yes (-1)					-1, 1		1
Does the agreement promote technology-related information sharing and transparency between parties?	No (0) Yes (1)		1					
Does the agreement create a way to fast track patents?	No (0) Yes (1)		1					1
INFRASTRUCTURE								
Do any provisions cover infrastructure reinforcement?	None (0) One or more (1)				1			1
If so, are any infrastructure provisions "deep"?	No (0) Yes (1)				1			1
Does the agreement provide infrastructure hardening opportunities to MSMEs and/or woman owned businesses?	No (0) Yes (1)					1		1
Does the agreement harmonize labor standards to the safest guidelines?	No (0) Yes (1)					1		1
OVERALL TOTAL POSSIBLE POINTS		7	6	8	3	5	7	36

Table 2: Scoring Rubric Based on Framework

Category	Points Scored (User to input)	Total Points Possible	Score (Divide points scored column by points possible and multiply by 100)
Emergency Preparation		7	%
Technology Transfer		6	%
TBTs		8	%
Infrastructure		3	%
Equity and Inclusion		5	%
General		7	N/A – "general" is not a subcategory, and is instead used to sum uncategorized questions so that they factor into the overall score.
TOTAL		36	Total scores should be interpreted on a grade-scale, as follows: A: 90 – 100% B: 80 – 89% C: 70 – 79% D: 60 – 69% F: 0 – 59%

B. Applying the Framework

Low-scoring sections can help negotiators identify gaps, that if filled, would help the operation of a trade agreement, and thus trade itself, be more resilient in the face of a climate emergency. This section of the paper discusses the findings from the application of the framework to the U.S. – Mexico – Canada Agreement (USMCA) and the African Continental Free Trade Area agreement (AfCFTA).[2093]

1. USMCA

The USMCA scored a 60%, or a D-, using the proposed framework. (Appendix A). While the agreement does return strong results for technology transfer, equity and inclusion, and technical barriers to trade subcategories, it was weak in infrastructure and emergency preparation. To better prepare the USMCA for climate change, negotiators should consider amending the USMCA to include emergency provisions that extend beyond force majeure allowances to restrict agricultural trade, acknowledging climate change, and instituting regional infrastructure hardening measures that go beyond telecommunication system cooperation.

2. AfCFTA

[2093] United States- Mexico-Canada Agreement, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA]; AfCFTA, *supra* note 29.

The AfCFTA scored a 47%, or an F, using the proposed framework. (Appendix B). It scored very strongly in the technical barriers to trade subcategory, but its overall score was significantly weakened by its failure to deal with technology transfer, intellectual property provisions, and infrastructure. The emergency preparation score was moderate, mainly due to articles fifteen, twenty-six, and twenty-seven, but the agreement fails to define an emergency, and potentially creates a cumbersome process for disaster-stricken parties to apply for a waiver of obligations.[2094] To better prepare the AfCFTA for climate change, appropriate amendments may include incorporating intellectual property and technology transfer provisions, specifically in the fields of agriculture and clean technology, and incorporating language to increase the resiliency of regional infrastructure. To promote equity and inclusion, negotiators should provide opportunities for medium and small enterprises in infrastructure work, include a provision regarding labor and safety standards, define qualifying emergencies in a broad manner, and incorporate compulsory licensing provisions, either through TRIPS or through a stand-alone intellectual property agreement.

Conclusion

There is no silver-bullet solution that will prepare a regional trade agreement for the impacts of climate change. Although current predictions of climate change impacts point toward disruptions in the production and transportation segments of global value chains, stakeholders must stay vigilant and adapt to challenges as they come. Even still, negotiators can get ahead of the game by adding or amending provisions to agreements that set up emergency protocols, encourage technology transfer, lower technical barriers to trade, and harden regional infrastructure. By using the proposed framework, negotiators can quickly identify both where there may be gaps, and where there may be opportunities to make agreements more equitable and inclusive.

[2094] AfCFTA, *supra* note 29, art. 15, 26, and 27.

Appendix A: Application of Proposed Framework to the USMCA

Category	Points Scored	Total Points Possible	Score
Emergency Preparation	2	7	29%
Technology Transfer	5	6	83%
TBTs	6	8	75%
Infrastructure	1	3	33%
Equity and Inclusion	4	5	80%
General	3.5	7	N/A
TOTAL % SCORE	21.5	36	60%
SCORE			**D**

Appendix B: Application of Proposed Framework to the AfCFTA

Category	Points Scored	Total Points Possible	Score
Emergency Preparation	5	7	71%
Technology Transfer	0	6	0%
TBTs	8	8	100%
Infrastructure	1	3	33%
Equity and Inclusion	1	5	20%
General	2	7	N/A
TOTAL % SCORE	17	36	47%
SCORE			**F**

CHAPTER 24: DESIGNING AN EQUITABLE AND DEVELOPMENT-FRIENDLY CARBON BORDER ADJUSTMENT MECHANISM

JESSE VALENTE*

Abstract

A carbon border adjustment mechanism (CBAM) levies a tariff on imported goods to make them subject to the same carbon pricing as domestic goods. The aim is to reduce emissions and prevent carbon leakage. However, current CBAM designs do not adequately address developing countries' unique needs and capacities. CBAMs should incorporate equity principles through differential treatment to ensure global climate action without hindering development.

Three international law concepts can be utilized to apply differential treatment to developing countries under a CBAM. They are Common but Differentiated Responsibilities and Respective Capabilities, Special and Differential Treatment, and Sustainable Development. Differential treatment will ensure that equity is pursued across three dimensions: intra-generational, inter-generational, and procedural.

Equity can be pursued, and differential treatment applied through eight potential CBAM design options. These design options are explained, and their equitable implications are analyzed. Suggested language for incorporating each option into a CBAM or agreement addressing CBAMs is given.

I. Introduction

A carbon border adjustment mechanism (CBAM) makes imported goods subject to the same carbon pricing as domestic goods. It levies a tariff on imported goods based on their carbon content. The tariff would equal the carbon tax on domestic goods.

As currently designed, CBAMs inadequately consider the needs of developing countries.[2095] CBAMs could limit export markets, restrict development, and increase poverty in countries whose historical contribution to the climate crisis is minimal.

A "uniform" CBAM would "unilaterally impose the implementing country's carbon policy on developing countries' exporters and thus equalize emission reduction commitments worldwide."[2096] An equitable CBAM would instead carve out exceptions to meet countries' unique needs and capacities. CBAMs can utilize the principles of Special and Differential Treatment (S&DT), Common but Differentiated Responsibilities (CBDR-RC), and Sustainable Development to apply differential treatment to developing countries. In doing so,

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[2095] *See Whitehouse and Colleagues Introduce Clean Competition Act to Boost Domestic Manufacturers and Tackle Climate Change* (June 8, 2022), perma.cc/VY66-NB62; Clean Competition Act, S. 4355, 117th Cong. (2021-2022), perma.cc/8BUJ-E2QN; Oral Evidence: Carbon Border Adjustment Mechanism, H.C. 737, Environmental Audit Committee (2021), perma.cc/8SPU-RWKX; Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism - Updated Legislative Financial Statement, No. 5993/23 (Feb. 2, 2023), perma.cc/7JZ7-SEXH; Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism - Explanatory Memorandum (July 14, 2021), perma.cc/RA8T-UTAS.

[2096] Ivan Ozai, *Implementing a Differential Carbon Border Adjustment Mechanism: How to Design a CBAM Compliant with International Law*, KLUWER INTERNATIONAL TAX BLOG (Jun. 6, 2022), perma.cc/DWR4-GB2E.

they can promote intra-generational, inter-generational, and procedural equity in CBAM design.

II. International Law Standards Allowing for Differential Treatment

Three international law principles can be utilized to apply differential treatment to developing countries under a CBAM. They are Common but Differentiated Responsibilities and Respective Capabilities, Special and Differential Treatment, and Sustainable Development.

A. Common but Differentiated Responsibilities and Respective Capabilities

Under CBDR-RC, countries have varying duties in responding to climate change based on their contributions and capacities.[2097] The United Nations Framework Convention on Climate Change and Paris Agreement emphasize CBDR-RC, with developed nations assisting developing ones in climate adaptation and mitigation.[2098] As developed countries historically emit more greenhouse gases, they should contribute more to combating climate change.[2099] Less developed nations should contribute less.[2100] CBDR-RC's essence is that equity should guide global climate action.

B. Special and Differential Treatment

S&DT in international trade acknowledges that equal treatment may impact countries differently.[2101] Accordingly, it allows for benefits to developing countries not extended to developed ones, such as tariff exclusions.[2102] Although S&DT conflicts with WTO non-discrimination rules and the Most-Favored-Nation principle in the General Agreement on Tariffs and Trade (GATT), it promotes development and is widely accepted.[2103] However, its permanence and the definition of developing countries are contentious. The GATT's Enabling Clause suggests case-by-case differential treatment to respond to each developing country's needs, but many S&DT provisions do not follow this approach.[2104] Despite some controversy, S&DT is embedded in international trade law, and parties apply it through temporary waivers, exemptions, extended timelines, technical assistance, and financing.[2105] It can promote equitable outcomes through differentiation.

[2097] *See Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC)*, CLIMATE NEXUS, perma.cc/XTQ8-NB5U (last visited Apr. 25, 2023).

[2098] *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, perma.cc/K2NC-MTMW; Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, perma.cc/6D3W-8HFC.

[2099] *See* Yuli Chen, *Reconciling common but differentiated responsibilities principle and no more favourable treatment principle in regulating greenhouse gas emissions from international shipping*, 123 MARINE POLICY 1, 2 (Jan. 2021), perma.cc/QVK3-SFYQ.

[2100] *See id.*

[2101] *See* Ingo Venzke & Geraldo Vidigal, *Are Trade Measures to Tackle the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)*, NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 1, 27 (Sep. 15, 2022), perma.cc/2FHS-3N87.

[2102] *See id.*

[2103] *See* General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, perma.cc/4L6D-Z4QG.

[2104] *See* World Trade Organization, *Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries*, WTO Doc No L/4903 (Nov. 28, 1979), perma.cc/PX8T-J45V; Venzke, *supra* note 7.

[2105] *See Differential and More Favourable Treatment: Reciprocity and Fuller Participation of Developing Countries*, *supra* note 10; Venzke, *supra* note 7.

C. Sustainable Development

Sustainable development aims to meet current needs without jeopardizing future generations' ability to meet theirs.[2106] This principle underpins "the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs)," which emphasize balancing "social, economic, and environmental sustainability."[2107] The SDGs prioritize progress for countries furthest behind and acknowledge that "creativity, know-how, technology, and financial resources" from all sectors are vital for success.[2108] Sustainable development and the SDGs support actions to enhance international equity across various dimensions.

III. Equity Standards to Pursue

The three international law principles discussed prior can be used to justify differential treatment of developing countries under a CBAM. This differential treatment can be used to pursue equity across three dimensions: intra-generational, inter-generational, and procedural.

A. Intra-generational Equity

Intra-generational equity is fairness among those in the same generation. It emphasizes the needs and situations of developing countries, particularly the least developed and environmentally vulnerable ones.[2109] It states that international actions must address the "interests and needs of all countries."[2110] Intra-generational equity is closely related to CBDR-RC and S&DT. CBDR-RC and S&DT advocate for differential treatment for specific developing states to promote, among other things, intra-generational equity. These principles provide a legal foundation for advancing intra-generational equity.

B. Inter-generational Equity

Inter-generational equity is a foundational principle in international law that calls for fairness between generations in using, caring for, and conserving the Earth.[2111] In the climate context, it justifies carbon restrictions like CBAMs to preserve resources and the environment for future generations.[2112] However, it also acknowledges the right of current generations to

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[2106] *See Sustainable Development*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, perma.cc/4E84-BU34 (last visited Apr. 25, 2023).
[2107] *Id.; The SDGs in Action*, UNITED NATIONS DEVELOPMENT PROGRAM, perma.cc/6P7B-GSMC (last visited Apr. 25, 2023).
[2108] *The SDGs in Action*, *supra* note 13.
[2109] *See* DANIEL BODANSKY, JUTTA BRUNNÉE & ELLEN HEY, OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1-26 (2008), perma.cc/5CZE-TFHC; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992), perma.cc/BYB8-FRK9.
[2110] U.N. Conference on Environment and Development, *supra* note 15.
[2111] *See* Edith Brown Weiss, *Climate Change, Inter-generational Equity, and International Law*, 9 VERMONT JOURNAL OF ENVIRONMENTAL LAW 616 (2008), perma.cc/CM87-77DB.
[2112] *See* TREVOR M. LETCHER, MANAGING GLOBAL WARMING 711 (2019), perma.cc/NT79-CLZS.

utilize resources without unnecessary constraints.[2113] Not allowing developing countries to use current resources to alleviate poverty and meet basic needs is inequitable.[2114]

Paul Collier's "pragmatic environmentalism" emphasizes shared resource access across generations, balancing sustainability and economic progress.[2115] Sustainable development is intertwined with inter-generational equity in that both aim to foster development now while preserving resources for the future. Sustainable development promotes the rights of future generations and the responsible use of resources by present generations, providing a legal foundation for inter-generational equity.

C. Procedural Equity

Procedural equity deals with "communities having a voice in decision-making processes."[2116] Planning and implementation should be done through "diverse and inclusive engagement processes."[2117] One rationale for greater procedural equity is the "utilitarian notion that procedural equity allows for diverse interests and values to be represented and defended."[2118] Another is that "participants should feel they've been consulted, allowed a voice, and had the freedom to contribute."[2119]

Procedural equity is crucial because it ensures that everyone has a voice in decision-making processes. Furthermore, it supports the principles of CBDR-RC, S&DT, and sustainable development by fostering diverse interests and values. This diversity leads to improved decision-making and promotion of development, sustainability, and equity. Consequently, procedural equity is vital for achieving these goals.

IV. Design Options for an Equitable CBAM

The following are eight potential design options for an equitable CBAM. First, the design option is explained, and its equitable implications are analyzed. Then, suggested language is given for incorporating each option into a CBAM or agreement addressing CBAMs. The language is not intended to be comprehensive but instead offer some ideas for how these design options can be implemented. Each design option can be adopted alone or combined with other options.

A. Full Exemptions for Least Developed Countries

One option is to exempt all goods from Least Developed Countries (LDCs) from a CBAM.[2120] The United Nations defines LDCs using criteria like human assets, economic vulnerability, and income per capita.[2121] LDCs, with a population of 1.1 billion, contribute

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[2113] *See Edith Brown Weiss on the Principle of Inter-generational Equity*, UNITED NATIONS MEDIA (June 12, 2008), perma.cc/NU8S-Z9X5.
[2114] *See id.*
[2115] Matilda Lee, *Paul Collier: saying 'nature has to be preserved' condemns the poor to poverty*, THE ECOLOGIST (May 14, 2010), perma.cc/HH28-8MTE.
[2116] *Equitable Adaptation Legal & Policy Toolkit*, GEORGETOWN CLIMATE CENTER, perma.cc/SD32-ZMPC (last visited Apr. 25, 2023).
[2117] *Id.*
[2118] Rachel S. Friedman et al., *Analyzing procedural equity in government-led community-based forest management*, 25 ECOLOGY & SOCIETY (2020), perma.cc/PR28-CWNW.
[2119] *Id.*
[2120] *See* Sam Lowe, *The EU's carbon border adjustment mechanism: How to make it work for developing countries*, CENTRE FOR EUROPEAN REFORM 1, 2 (Apr. 2021), perma.cc/3FPT-26WG.
[2121] *See Least Developed Countries*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, perma.cc/QR3B-MK8R (last visited Apr. 25, 2023).

minimally to CO2 emissions, accounting for about 1.1% of emissions in 2019.[2122] LDCs mainly export primary natural resources and are often poorly integrated into regional markets.[2123] This makes them vulnerable to the environmental policies of major trading partners.[2124] Additionally, the administrative burden and compliance costs for CBAMs would likely be higher in LDCs.[2125]

Exempting LDCs would complement the EU's "Everything but Arms" scheme, which "offers duty and quota-free access to all goods imported from LDCs other than weapons."[2126] It also would better align with CBDR-RC, S&DT, and sustainable development principles. However, NGOs warn that a complete waiver might hinder LDCs' transition to low-carbon production methods and leave them vulnerable as other countries implement CBAMs.[2127]

Intra-generationally, full LDC exemptions would protect them from CBAM impacts. However, concerns remain about the fair treatment of lower-middle-income countries. Inter-generationally, sweeping exemptions could perpetuate environmental issues CBAMs aim to address, potentially causing inter-generational inequity. Procedurally, this approach limits developing countries' input.

Suggested Language

1. Parties to this Agreement shall grant full exemptions from CBAMs for all goods imported from LDCs, as listed in Annex A, except weapons, in alignment with the "Everything but Arms" scheme.
2. The exemptions provided under this Article shall be reviewed every three years, in conjunction with the United Nations Committee for Development's review of the LDC list, to determine the eligibility of countries for continued exemptions based on their graduation from the LDC category.
3. The Parties shall review the implementation of the exemptions and special provisions for LDCs every five years, considering the development needs and the progress made by LDCs in transitioning to low-carbon economies. The provisions may be adjusted as deemed necessary by the Parties to this Agreement to ensure that LDCs are not stranded with carbon-intensive production methods and can adapt to the evolving global trade landscape.

B. Partial Exemptions for Least Developed Countries

Another option would be to adopt more limited exemptions for LDCs. For many LDCs, industries targeted by CBAMs are significant to the economy. This is especially true in Africa. For instance, the EU CBAM would cause Mozambique to lose 1% of its GDP.[2128] Researchers have recommended that CBAMs adopt partial exemptions for African LDCs.[2129] There is "inherent inequity" in taxing countries with "minimal carbon footprint."[2130] But, "a full

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[2122] *See The Least Developed Countries Report 2022*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2022), perma.cc/DY9B-3L9P.
[2123] *See id.*
[2124] *See id.*
[2125] *See id.* at 5; *Joint NGO Statement on the Carbon Border Adjustment Mechanism*, CARBON MARKET WATCH 1, 6 (2021), perma.cc/LF2E-C5EE.
[2126] *The Least Developed Countries Report* 2022, *supra* note 28; *Joint NGO Statement*, *supra* note 31.
[2127] *See The Least Developed Countries Report* 2022, *supra* note 28, at 5; *Joint NGO Statement*, *supra* note 31.
[2128] *See* Samuel Pleeck, Fatima Denton & Ian Mitchell, *An EU Tax on African Carbon – Assessing the Impact and Ways Forward*, CENTER FOR GLOBAL DEVELOPMENT (Feb. 10, 2022), perma.cc/MLX4-GLVK.
[2129] *See id.*
[2130] *Id.*

exemption could be difficult to remove once established."[2131] Moreover, "carbon-intensive industries could relocate to exempted countries."[2132] Delayed implementation for lower-income countries would provide more time to adjust. This would help to get around some of the significant issues with a full exemption. For one, a total exemption would be difficult to remove once established.[2133] Delayed implementation would already have a mechanism for removal. There would also be less risk of carbon-intensive industries relocating to exempted countries.[2134] One could imagine a company moving to an exempted country to avoid ever paying a CBAM. But, it is unlikely that a company would move only to delay payment of a CBAM.

Intra-generationally, partial exemptions may not sufficiently address developing countries' need for fair treatment. Inter-generationally, like full exemptions, partial exemptions will limit emissions reductions, harming future generations. Procedurally, this approach does not allow for developing countries' input.

Suggested Language

1. LDCs shall be eligible for a temporary, partial exemption from CBAMs imposed by Parties to this Agreement in accordance with the following provisions:

    a. LDCs shall receive a five-year grace period from the date of entry into force of this Agreement, during which they will be exempted from 100% of the applicable CBAM rate imposed by the Parties.

    b. Following the five-year grace period, LDCs shall receive an additional five-year adjustment period, during which the CBAM rate exemption shall be reduced to 50%.

C. Sliding Scale for Developing Nations

Despite not being LDCs, some developing countries, like India, Indonesia, and Nigeria, may still be unfairly impacted by CBAMs. But, exemptions are problematic due to their high emissions. A sliding scale approach, similar to the EU's Generalised System of Preferences (GSP), could be used for such countries, allowing CBAM exemptions until they make up a significant share of imports.[2135] Exemptions expire if they adopt "an equivalent domestic carbon price" or produce goods with "greater carbon efficiency than [domestic] equivalents."[2136] These exemptions could also be temporary, expiring once the countries become developed.

Procedural equity implications are minimal, but intra-generational equity could improve with greater capacity for differential treatment between countries. However, inter-generational equity might be hindered. Wide-ranging exemptions for large carbon-emitting developing countries could undermine CBAMs' climate goals and impact future generations.

Suggested Language

1. Acknowledging that certain developing countries, which do not qualify as Least Developed Countries (LDCs) but still face challenges in their transition to low-carbon

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[2131] *Id.*
[2132] *Id.*
[2133] *See id.*
[2134] *See id.*
[2135] *See id.*
[2136] *Id.*

economies, may be disproportionately impacted by Carbon Border Adjustment Mechanisms (CBAMs), Parties to this Agreement agree to provide graduated treatment for such high-emitting developing countries, as identified in Annex Z of this Agreement.

2. The graduated treatment shall be based on a sliding scale approach, considering the following criteria:
    a. The level of economic development, as determined by the World Bank classification of income groups;
    b. The carbon intensity of the economy, measured as CO2 emissions divided by GDP;
    c. The share of imports from the high-emitting developing country in the total imports of the Party imposing the CBAM.

D. Country-by-Country Approach

Rather than exempting certain countries, a CBAM could take a country-by-country approach. There could be greater consultation and "dialogue with developing countries."[2137] Countries can suggest "technical, financial and capacity support measures."[2138] They can also suggest ways to "help decarbonise their economies."[2139] This would lead to greater specificity in how the CBAM treats developing countries. The administrability of such an approach is questionable, however. Taking a country-by-country approach rather than using a blanket exemption may be costly and inefficient.

This approach offers procedural strength by allowing more input from developing countries on CBAM implementation. Intra-generationally, better differentiation helps provide tailored support for equitable outcomes. Inter-generationally, this approach addresses issues caused by blanket exemptions, as it can be adjusted based on a country's unique situation. This promotes current development without causing carbon leakage harmful to future generations.

Suggested Language

1. Parties to this Agreement shall engage in consultations and dialogue with developing countries, with the aim of:
    a. Identifying the specific challenges and needs of each developing country in transitioning to a low-carbon economy;
    b. Assessing the potential impact of CBAMs on the economic and social development of each developing country;
    c. Collaborating on the development and implementation of technical, financial, and capacity support measures tailored to the needs of each developing country;
    d. Exploring opportunities to support developing countries in decarbonizing their economies and promoting sustainable development.
2. Based on the outcomes of the consultations and dialogue, Parties to this Agreement shall design and implement CBAMs in a manner that:
    a. Takes into account the specific circumstances and needs of each developing country;

[2137] *See Joint NGO Statement*, *supra* note 31.
[2138] *Id.*
[2139] *Id.*

b. Provides tailored exemptions or special provisions, as appropriate, to minimize any adverse effects on the economic and social development of developing countries;
c. Encourages and supports developing countries in transitioning to low-carbon economies and adopting cleaner production methods.

E. Individual Adjustment Mechanism

Another option is to create an "individual adjustment mechanism" (IAM). An IAM focuses on specific producers rather than specific countries. There is an administrative burden in calculating the carbon intensity of imports.[2140] When combined with the lack of data, CBAMs will likely use default values.[2141] CBAMs may rely on sector carbon intensity rather than individual carbon intensity.[2142] An IAM would allow producers to show that their carbon intensity is below the default value.[2143] Many other proposals for special treatment falter by having a country-wide application. An IAM may help to solve many of those problems.

Problems would persist for producers that are above the default level. Producers may also have administrative difficulties in proving they are below the default. This harm to intra-generational equity may be mitigated through technology and knowledge transfer. Also, for intra-generational equity, greater differentiation between producers allows more focused support. Compared to the sliding scale approach, an IAM ensures accountability for high-emitting producers in developing countries. This limits carbon emissions, benefitting future generations and inter-generational equity. An IAM could enhance procedural equity by facilitating feedback from those affected by a CBAM.

Suggested Language

1. To promote fairness and accuracy in applying Carbon Border Adjustment Mechanisms (CBAMs), Parties to this Agreement agree to establish an Individual Adjustment Mechanism (IAM) that focuses on the carbon intensity of specific producers rather than entire countries.
2. The IAM shall provide producers the opportunity to demonstrate that their carbon intensity is below the default value used for calculating the applicable CBAM rate based on the following provisions:
    a. Producers seeking to benefit from the IAM must submit verifiable data on their carbon emissions, production processes, and energy sources per the guidelines established by the Parties to this Agreement.
    b. The submitted data shall be subject to review and verification by an independent third-party auditor, as approved by the Parties to this Agreement.
    c. Upon successful verification, producers whose carbon intensity is demonstrated to be below the default value shall be subject to a reduced CBAM rate proportional to their verified carbon intensity.
3. Parties to this Agreement shall collaborate to:
    a. Develop and maintain guidelines and standards for the submission and verification of producer-specific data;

[2140] *See* Michael A. Mehling & Robert A. Ritz, *Going Beyond Default Intensities in an EU Carbon Border Adjustment Mechanism*, MIT CEEPR (Oct. 2020), perma.cc/B9KX-JSWN.
[2141] *See id.*
[2142] *See id.*
[2143] *See id.*

b. Establish a list of approved independent third-party auditors for the verification of producer data;
c. Provide technical assistance and capacity-building support to producers, particularly those in developing countries, to help them comply with the IAM requirements and lower their carbon intensity.

F. Investment of Funds

The European Commission wants to use all EU CBAM revenue for internal debt.[2144] But another option is to invest CBAM funds back into developing countries.[2145] Investments could focus on sustainability. Some have argued that this would make CBAMs more in line with CBDR-RC.[2146] Various NGOs have also suggested investing CBAM revenues in global climate action.[2147] The focus would be on developing countries. Putting funds toward climate finance would multiply the climate-friendly effects of a CBAM.[2148] It would also ease tensions and show support to trading partners.[2149]

The Task Force on Climate, Development, and the International Monetary Fund (IMF) devised a concrete plan for achieving this.[2150] An "Equitable Decarbonization Fund" (EDF) would help developing countries in their energy transitions.[2151] EDF funds would be used for "de-risking facilities and other blended finance instruments."[2152] It would also "crowd fund private capital for green and low carbon investments in developing economies."[2153] Particular focus would be on "those most vulnerable to the CBAM."[2154] The EDF could invest directly in "green and low-carbon technologies" as well.[2155]

Developing countries may struggle to analyze the CBAM's impact on their economies.[2156] The IMF could provide developing countries with policy advice to help avoid the economic harms of a CBAM.[2157] This includes advice on growth, fiscal sustainability, and financial stability.[2158] This is essential to ensuring that the CBAM does not worsen existing inequities.[2159] Increased inequity harms "the capacity of some low-income countries to decarbonize their economies."[2160] Thus, greater inequity would also be counterproductive to the CBAM's climate goals.

[2144] *See A European Union Carbon Border Adjustment Mechanism: Implications for developing countries*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 1, 24 (July 14, 2021), perma.cc/GR7W-4CCW.
[2145] *See id.*
[2146] *See* Rim Berahab, *Is the EU's Carbon Border Adjustment Mechanism a Threat for Developing Countries?*, POLICY CENTER FOR THE NEW SOUTH (Jan. 13, 2022), perma.cc/U9HV-RZZX.
[2147] *See Joint NGO Statement*, *supra* note 31.
[2148] *See id.*
[2149] *See id.*
[2150] *See* He Xiaobei, Zhai Fan & Ma Jun, *The Global Impact of a Carbon Border Adjustment Mechanism: A Quantitative Assessment*, TASK FORCE ON CLIMATE, DEVELOPMENT AND THE INTERNATIONAL MONETARY FUND (Mar. 2022), perma.cc/D8PV-NZKD.
[2151] *Id.*
[2152] *Id.* at 14.
[2153] *Id.*
[2154] *Id.*
[2155] *Id.*
[2156] *See id.* at 1-20.
[2157] *See id.*
[2158] *See id.*
[2159] *See id.*
[2160] *Id.* at 13.

CBAMs risk pushing developing countries into extractive industries supplying green technology raw materials like nickel, lithium, and cobalt.[2161] Often located in the Global South, these mines pose hazards for workers, involve child labor, and contribute to environmental issues like desertification and groundwater pollution.[2162] To avoid climate colonialism, CBAMs must address harmful extraction practices through investment and technology transfer, promoting renewable energy industries and minimizing mining's negative impacts. Developed countries must recognize their historical responsibility in the climate crisis and address the damage caused in developing nations.

Procedurally, investing CBAM funds in developing countries provides them more power to effectuate their energy transition. Inter-generationally, investment benefits current and future generations through new technologies, investments, and jobs in the present that will lead to a sustainable future. Intra-generationally, the adverse effects of developed countries keeping CBAM revenues are removed. If managed efficiently, CBAMs could even improve intra-generational equity by supporting growing industries.

Suggested Language

1. Parties to this Agreement agree to establish an "Equitable Decarbonization Fund" (EDF) financed by CBAM revenues. It shall be utilized for the following purposes:
    a. Supporting Least Developed Countries (LDCs) and other developing countries in transitioning to low-carbon and sustainable economies;
    b. Investing in green and low-carbon technologies with the potential to be applied in developing countries;
    c. Promoting sustainable extraction of raw materials required for green technologies while avoiding harmful environmental and social impacts;
    d. Facilitating technology transfer and capacity-building initiatives for developing countries in areas related to renewable energy, energy efficiency, and climate-resilient development;
    e. Providing de-risking facilities and blended finance instruments to attract private capital for green and low-carbon investments in developing economies, particularly those most vulnerable to the CBAM.
2. Parties to this Agreement shall collaborate with international organizations, such as the International Monetary Fund (IMF), to:
    a. Provide policy advice and analytical support to developing countries in assessing the effects of CBAMs on their economies and in designing appropriate policy responses;
    b. Develop and implement mechanisms to ensure transparency, accountability, and effectiveness in the management and disbursement of the EDF;
    c. Monitor and evaluate the impact of the EDF-supported initiatives on beneficiary countries' sustainable development and decarbonization efforts.

G. Green Technology Transfer

[2161] *See* Myriam Douo, *Climate Colonialism and the EU's Green Deal*, ALJAZEERA (June 23, 2021), perma.cc/U3MN-TYL3.

[2162] *See* Bárbara Jerez, Ingrid Garcés & Robinson Torres, *Lithium extractivism and water injustices in the Salar de Atacama, Chile: The colonial shadow of green electromobility*, 87 POLITICAL GEOGRAPHY (May 2021), perma.cc/TCH2-NVFU.

Supporting developing countries with green technology transfer can help them adjust to CBAMs.[2163] Green technology transfer, a vital aspect of sustainable development, has been applied in various fields, including ecological engineering and sustainable energy.[2164] The EU's CBAM encourages cooperation on R&D, product standardization, and carbon output calculation.[2165] However, the EU CBAM also requires verification of GHG emissions resulting from products.[2166] This can impose a technical and administrative burden on those who cannot calculate these emissions accurately.

While effective in theory, technology transfer has faced many difficulties in practice. Chief among them are lack of transfer experience, incompatible technology between the nations, and a lack of communication about incorporating transferred technologies into a country's long-term energy grid.[2167] To optimize technology transfer, countries should consider sharing technology and knowledge, enabling long-term replication and development.[2168] With significant decreases in solar and wind power costs and developed country knowledge transfer, developing countries can invest in these power sources relatively cheaply.[2169] An additional dialogue should be opened up about the long-term benefits of technology transfer. These include long-term reduction in electricity costs, job creation, pollution avoidance, and increased compliance with CBAMs.[2170]

Existing frameworks and partnerships could be utilized to accomplish this. For instance, the European Commission's Global Gateway initiative could be used. It exists to invest in infrastructure projects and establish economic partnerships to "boost smart, clean and secure links in digital, energy and transport sectors and to strengthen health, education and research systems across the world."[2171] Multilateral energy cooperation partnerships, like Mission Innovation and the International Solar Alliance, could also be utilized. The UN's Technology Needs Assessments, the Technology mechanism, and The Climate Technology Centre and Network could also play a part. These partnerships could help CBAMs accomplish green technology transfer to developing countries.

Intra-generationally, green technology transfer ensures equitable access to these technologies and cost-effective compliance with CBAM emissions calculations. Inter-generationally, it fosters innovation benefiting future generations. Procedurally, it gives developing countries more control over technology now and going forward.

Suggested Language

1. Parties to this Agreement shall collaborate to:
    a. Enhance cooperation on research and development, cross-boundary demonstration projects, standardization of products, testing and safety procedures, and standard methodologies for calculating carbon output;

[2163] *See* Sigit Perdana & Marc Vielle, *Making the EU Carbon Border Adjustment Mechanism acceptable and climate friendly for least developed countries*, 170 ENERGY POLICY (Sep. 19, 2022), perma.cc/4F8P-XVNB.
[2164] *See id.*
[2165] *See* Alex Clark, Susi Dennison & Mats Engström, *Climate of cooperation: How the EU can help deliver a green grand bargain*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Oct. 27, 2021), perma.cc/5D8H-4QUT.
[2166] *See id.*
[2167] *See* Hieu Thanh Nguyen et al., *Green technology transfer in a developing country: mainstream practitioner views*, 30 INTERNATIONAL JOURNAL OF ORGANIZATIONAL ANALYSIS 699 (Feb. 4, 2021), perma.cc/NX6L-LT6B.
[2168] *See id.*; *Methodological and Technological Issues in Technology Transfer*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2000), perma.cc/C9AH-95L6.
[2169] *See Methodological and Technological Issues in Technology Transfer*, *supra* note 74; Nguyen, *supra* note 73.
[2170] *See Methodological and Technological Issues in Technology Transfer*, *supra* note 74; Nguyen, *supra* note 73.
[2171] *Global Gateway*, EUROPEAN COMMISSION, perma.cc/24RJ-HK5E (last visited Apr. 24, 2023).

b. Support the verification of greenhouse gas (GHG) emissions resulting from products in developing countries by providing technical assistance and capacity-building measures;
c. Promote dialogue on the long-term economic and environmental benefits of transitioning to clean energy, including the reduction of electricity costs, job creation, pollution avoidance, and increased compliance with CBAMs;
d. Share policy advice and best practices regarding clean energy innovation and regulation, scaling up technologies, and green financial markets design.

2. To achieve effective green technology transfer, Parties to this Agreement shall:
   a. Encourage the transfer of both technology and knowledge related to green technologies, enabling receiving countries to replicate and develop their own technologies;
   b. Address challenges related to the lack of transfer experience, incompatible technology, and communication gaps by providing tailored support, training, and resources.
3. Parties to this Agreement shall utilize existing frameworks and partnerships to facilitate green technology transfer and capacity building, including but not limited to:
   a. The European Commission's Global Gateway initiative;
   b. Multilateral energy cooperation partnerships such as Mission Innovation and the International Solar Alliance;
   c. The United Nations Technology Needs Assessments, Technology Mechanism, and Climate Technology Centre and Network.

H. Climate Clubs

A climate club is "an agreement by participating countries to undertake harmonized emissions reductions."[2172] It leads to "ambition by fostering commitment to collective climate goals, accelerating action, facilitating financial and technology partnerships, managing concerns around carbon leakage and competitiveness, and aligning around common interests in guiding industrial transformations."[2173] Climate clubs can help achieve the goals of the Paris Agreement if designed and carried out well.[2174] Climate action needs to be collective and climate clubs inclusive.[2175] Climate clubs should go beyond trade defenses.[2176]

Climate clubs should focus on three key components. First, they should build partnerships focused on climate adaptation, mitigation, resilience, and biodiversity.[2177] Second, they should create finance partnerships to increase climate finance.[2178] Third, they should generate technology partnerships to increase cooperation there.[2179]

G7 countries first proposed climate clubs, but climate clubs should include developing countries. This will allow for greater equity, inclusivity, and agency for developing

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[2172] William Nordhaus, *Climate Clubs: Overcoming Free-riding in International Climate Policy*, 105 AMERICAN ECONOMIC REVIEW 1339, 1341 (Apr. 2015), perma.cc/4FGZ-3X78.
[2173] Nicholas Stern & Hans Peter Lankes, *Collaborating and Delivering on Climate Action through a Climate Club*, LONDON SCHOOL OF ECONOMICS (Oct. 2022), perma.cc/A5TE-LNR9.
[2174] *See id.*
[2175] *See id.*
[2176] *See id.*
[2177] *See id.*
[2178] *See id.*
[2179] *See id.*

countries.[2180] CBAMs may lead to carbon colonialism.[2181] Developing countries' involvement will limit the possibility of this.[2182]

There is significant debate about what a climate club would entail.[2183] One option is a normative club.[2184] Here, countries would make a normative commitment to particular climate objectives.[2185] Another option is a bargaining club.[2186] A bargaining club would allow for bargaining on targets, measures, and rules.[2187] A final option is a transformational club.[2188] A transformational club would provide membership rules, benefits, and sanctioning mechanisms.[2189] This would encourage group members to follow through on common goals.[2190]

Climate clubs, combined with other mechanisms, can enhance inter-generational and intra-generational equity. Crucially, involving developing countries in climate clubs improves procedural equity, giving them a voice in decision-making.

Suggested Language

1. Recognizing the importance of harmonized emissions reductions and collective climate action, Parties to this Agreement agree to establish Climate Clubs to foster commitment to shared climate goals, accelerate action, facilitate financial and technology partnerships, manage concerns around carbon leakage and competitiveness, and align common interests in guiding industrial transformations.
2. Climate Clubs shall focus on the following key components:
    a. Building partnerships focused on climate adaptation, mitigation, resilience, and biodiversity;
    b. Creating finance partnerships to increase climate finance;
    c. Establishing technology partnerships to enhance cooperation in green technology research, development, and deployment.
3. Climate Clubs shall be inclusive, promoting the participation of developing countries to ensure equity, inclusivity, and agency for all countries involved, thus minimizing the risk of climate colonialism.

V. Conclusion

CBDR-RC, S&DT, and Sustainable Development principles can be used to pursue intra-generational, inter-generational, and procedural equity through various CBAM design options. These design options can be mixed and matched based on perceived efficacy, cohesiveness, and feasibility. More research is still needed on the concrete effects of each design option on the twin aims of climate change mitigation and global development. Both are important goals, and designing an equitable CBAM requires striking a balance between them.

[2180] *See id.*
[2181] *See* Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 THE WINDSOR YEARBOOK OF ACCESS TO JUSTICE 129 (2016), perma.cc/H42C-UTWL.
[2182] *See id.*
[2183] *See* Robert Falkner, Naghmeh Nasiritousi & Gunilla Reischl, *Climate clubs: politically feasible and desirable?*, 22 CLIMATE POLICY 480 (Aug. 27, 2021), perma.cc/5CRW-4LP3.
[2184] *See id.*
[2185] *See id.*
[2186] *See id.*
[2187] *See id.*
[2188] *See id.*
[2189] *See id.*
[2190] *See id.*

CHAPTER 25: CLIMATE CHANGE, COMPETITION, AND CONFLICT ALONG THE RIVER NILE: THE GRAND ETHIOPIAN RENAISSANCE DAM AND SHIFTING INTERNATIONAL WATER LAW

SALMA H. SHITIA*

Abstract

Decade-long negotiations between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia surround the decision to build the hydroelectric power plant along the River Nile. For much of Ethiopia, the Grand Ethiopian Renaissance Dam represents a beacon of prosperity. For countless Egyptians, the structure embodies a potential catastrophe. Grounded in threats of displacement for Egyptian agricultural communities, some have compared the Grand Ethiopian Renaissance Dam crisis to disasters culminating in mass migration.

This battle for natural resource access has intensified as climate change exacerbates the region's dire conditions. Specifically, exhaustible resource allocation amid climate change indicates that regional development, competition, and associated conflict will increase. While development opportunities along the Nile may in fact facilitate expansive economic transformation for the region, the Grand Ethiopian Renaissance Dam conflict illustrates heightening conflict between two key African states, leaving potential regional success in jeopardy and military combat a growing reality. International water law remains at the conflict's forefront as governments, scholars, and international organizations grapple with vital legal questions. The way international water law is applied to the Grand Ethiopian Renaissance Dam crisis will be influential and create powerful international legal precedent for global transboundary waterways. For this reason, international and regional bodies must acknowledge the foreseeable future where upstream and downstream confrontations for exhaustible resource-based development opportunities are common.

Introduction

Along the Blue Nile in Ethiopia's Benishangul-Gumuz region and approximately 40 kilometers east of Sudan, Ethiopia's new Grand Renaissance Dam ("GERD") seeks to generate power through two power stations, three spillways, and a saddle dam.[2191] Estimated to reach a height of 145 meters with a length of 1800 meters, the GERD is projected to store an estimated 63 billion cubic million meters of water.[2192] The hydropower plant would provide

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[2191] *See* Aktas & Erdem, *Ethiopia begins filling controversial Nile Dam*, ANADOLU AGENCY (July 16, 2020), https://www.aa.com.tr/en/africa/ethiopia- begins-filling-controversial-nile-dam/1912030; Ker Than, *Egypt Moves Forward with Massive Nile Dam Project*, NAT'L GEOGRAPHIC NEWS (July 14, 2011), https://www.nationalgeographic.com/news/2011/7/ethiopia-south-sudan-nile-dam- river-water/ (The Grand Ethiopian Renaissance Dam, formerly referred to as the Millennium Dam and the Hidase Dam, is also referred to as the Great Renaissance Dam.).

[2192] MWANGI S. KIMENYI & JOHN M. MBAKU, GOVERNING THE NILE RIVER BASIN, 107 (2015).

electricity to 60% of Ethiopians at a grand cost of 4.5 billion USD.[2193] As Africa's largest dam, the GERD spans the Blue Nile tributary where Egypt and Ethiopia receive most of their water resources. Preliminary plans for constructing the GERD became public in March 2011, approximately one month after the Egyptian Mubarak regime's collapse and just a month before construction commenced.[2194] Since the beginning of its construction, Egyptian leaders consistently challenged Ethiopia's legal authority to construct and fill the GERD. In response, Ethiopian leaders cited opposing legal authority to justify their government's unwavering persistence to build and fill the GERD. The GERD is projected to become fully operative between 2020 and 2022.[2195] As of May 2020, the GERD's total construction had reached approximately 73%.[2196]

Both Egypt and Ethiopia have exhibited tremendous reluctance to reach a compromise with respect to GERD-related issues. Ethiopia's timetable for filling the GERD's reservoir and the GERD's general management during droughts posed particularly tremendous challenges during negotiations.[2197] While officials in Addis Ababa argue that the GERD would not significantly affect the Nile's water flow and instead name potential benefits to drought migration and water salinity, Egypt rejects such arguments and fears substantial disruption to Nile water access, especially for its commercial water supply.[2198] Egypt has repeatedly called upon the international community to stop Ethiopia's filling of the GERD.[2199] Powers like the United States have cut foreign aid from Ethiopia, which comes at little surprise given the strong U.S.-Egyptian alliance and robust Chinese support for the GERD.[2200]

As Ethiopia began filling the GERD, Egypt appealed to the United Nations Security Council in May 2020, arguing that Ethiopian intentions to fill the GERD violate Ethiopia's obligation to respect international law.[2201] Egypt's letter calls upon the international community to urge Ethiopian compliance with its obligations pursuant to a 2015 Declaration of Principles that compelled Egypt, Ethiopia, and Sudan to negotiate a comprehensive solution for the GERD's filling and operation.[2202] The Declaration came shortly after the Ethiopian irrigation minister announced Ethiopia's intention to commence the first stage of filling the GERD without having shared the plan's details with either Egypt or Sudan.[2203]

[2193] Meron Moges-Gerbi, *Tensions over Nile River dam project as heavy rain sows confusions*, CNN (Aug. 13, 2020), https://www.cnn.com/2020/07/21/africa/ethiopia-nile-river-dam-afr-intl/index.html.

[2194] Al Jazeera English, *What's behind the Egypt-Ethiopia Nile Dispute?,* YOUTUBE (Jan. 26, 2020), https://www.youtube.com/watch?v=JdizU0arrJ0&vl=en.

[2195] *See* Aaron Maasho, *Ethiopia expected Nile dam to be ready to start operation in late 2020*, REUTERS (Jan. 3, 2019), https://www.reuters.com/article/us- ethiopa-dam/ethiopia-expects-nile-dam-to-be-ready-to-start-operation-in-late-2020- idUSKCN1OX0T4.

[2196] Ayah Aman, *Nile dam talks stall again amidst Egyptian-Ethiopian dispute*, MIDDLE EAST MONITOR (May 22, 2020), https://www.al- monitor.com/pulse/originals/2020/05/egypt-letter-un-security-council-etihiopia- nile-dam-sudan.html.

[2197] *See* John M. Mbaku, *The controversy over the Grand Ethiopian Renaissance Dam*, BROOKINGS (Aug. 5, 2020), https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopia n-renaissance-dam/.

[2198] *Id.*

[2199] *Id.*

[2200] *Id.*

[2201] *Egypt sent letter about GERD crisis to UN Security Council - Foreign Minister*, AHRAM ONLINE (May 7, 2020), http://english.ahram.org.eg/NewsContentP/1/368823/Egypt/Egypt-sent-letter- about-GERD-crisis-to-UN-Security.aspx.

[2202] *Id.*

[2203] *See id.*

The GERD serves as a timely reminder that exhaustible natural resource disputes enable regional conflict between neighbors. The GERD conflict further elucidates the Nile's role within Africa as a base of historical reliance for Egypt and beacon of hope for Ethiopia. However, the conflict does not merely implicate Egypt and Ethiopia; other nations, particularly riparian nations along the Nile, hold high stakes in the conflict's outcome, especially Sudan, which also receives a significant portion of its water from the Blue Nile tributary to supply and power its nation. This Note argues that the GERD conflict could very well establish international legal precedent for transboundary waterways. As GERD-related negotiations and tensions rise along a transboundary riverway where climate change and poverty alleviation are central concerns, the likelihood for shifting the historical international water law framework along the Nile, and consequently other transboundary riverways, also increases.

The Introduction of this Note has briefly summarized the recent Grand Ethiopian Renaissance Dam crisis and its relationship with international water law. Part I discusses the River Nile's historical and cultural significance to Egypt and Ethiopia to contextualize what led to the crisis. Part II highlights main instruments that are frequently applied to the crisis and universal ideas within the international legal framework. Part III outlines and analyzes the respective legal arguments both parties have used to justify their positions towards the Grand Ethiopian Renaissance Dam's construction and filling. Part IV concludes by arguing that the case of the Grand Ethiopian Renaissance Dam could shape customary international water law by settling the legal principles that dictate water competition along transboundary riverways.

I. The River Nile's Role In Egypt & Ethiopia

The GERD conflict highlights the undeniably essential role the Nile plays for many African countries. As the longest river in the world, the Nile flows south to north, with its drainage basin reaching 11 countries.[2204] Beginning from Lake Victoria's Nile Basin, the Nile flows over 4100 miles until its final destination off of Egypt's coast into the Mediterranean Sea.[2205] The Nile contains two main streams: the White Nile flowing in Uganda from Lake Victoria composing 30% of the Nile's waters, and the Blue Nile flowing from Ethiopia's Lake Tana composing about 60% of the Nile.[2206] Both streams meet near the Sudanese capital of Khartoum. From there, the Nile converges and flows downstream to Egypt.

The Nile Basin Area includes Tanzania, Rwanda, the Democratic Republic of Congo, Kenya, Uganda, South Sudan, Sudan, Eritrea, Egypt, Ethiopia, and portions of Burundi.[2207] Each Nile Basin country maintains its own interest in developing hydroelectric projects along the waterway for natural resource and energy access.

As Egypt and Ethiopia assert their social, political, economic, and legal arguments for and against the GERD's construction, each nation's respective value for the Nile has become apparent. For Egypt, the country's relationship with the Nile stretches back to its deep colonial roots and historical reliance upon the Nile for agriculture, commerce, and electricity.[2208]

[2204] Salam Abdulrahman, *The River Nile and Ethiopia's Grand Renaissance Dam: challenges to Egypt's Security Approach*, 76 INT'L J. OF ENVTL. STUD. 136, 139 (Sept. 3, 2018).

[2205] *See id.*

[2206] Kevin G. Wheeler et. al, *Cooperative filling approaches for the Grand Ethiopian Renaissance Dam*, 41 WATER INT'L 611, 613-614 (May 11, 2016).

[2207] *See Major Subbasins,* NILE BASIN INITIATIVE, https://nilebasin.org/media-center/maps.

[2208] *See* Mwangi S. Kimenyi & John Mukum Mbaku, *The limits of the new "Nile agreement",* BROOKINGS (April 28, 2015), https://www.brookings.edu/blog/africa-in-focus/2015/04/28/the-limits-of-the-new- nile-agreement/.

Meanwhile, Ethiopian desire for the GERD's construction stems from the Nile's role in connecting Ethiopians to the nation's electric grid, addressing widespread poverty, and elevating Ethiopia's geopolitical position in Africa.[2209] To grasp the origin of each party's arguments fully, one must explore the underlying histories that brand the Nile as Egypt's historic gift and Ethiopia's beacon of prosperity.

A. Egypt's Gift of the Nile

For thousands of years, the Nile has provided Egypt with its main source of freshwater. Modern towns and villages in Egypt are situated along the Nile's banks and its delta.[2210] Because Egypt's annual rainfall and groundwater are extremely low, Egypt faces an alarming water crisis.[2211] With a population of approximately 370 million, the Nile Basin's population includes 160 million whose livelihood relies upon the watercourse.[2212] Coupled with its water crisis and dry climate, Egypt's population has grown from 23 million in 1955 to over 99 million today.[2213] By 2050, the population is projected to reach 153 million as the Nile supports approximately 95% of the country's population – all of whom live within twelve miles of the Nile or its Delta.[2214]

The Nile's flow across Egypt is principally controlled through the Aswan High Dam located in Upper Egypt where the Nile arrives to Egyptian territories. The Aswan High Dam provides the Egyptian agricultural sector with the ability to cultivate its land by taming the Nile's unpredictable irrigation patterns and flooding while providing many Egyptian villages with electricity.[2215]

Historically, Egypt's legal and political control over the Nile extends back to the nation's historical colonial period in which it remained under British control beginning in 1882.[2216] By allocating waters between Egypt and the Sudan without regard for other riparian nations' potential access to the Nile's waters, the British essentially granted the two nations a veto power over any upstream development projects. Using this as its legal and diplomatic basis for control over the waterway, Egypt built significant natural resource reliance upon the waters it was gifted by its former colonizers. Over the century to come, this reliance would become extremely dangerous and emerge as a recurring theme during numerous rounds of GERD conflict negotiations.

Since 2011, the Egyptian and Ethiopian governments have criticized each other's stances on the GERD's construction. Egypt's foreign policy towards the GERD has illustrated the notion that "with projected climate change and anticipated water shortages in such areas as the

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[2209] *Id.*

[2210] Richard Conniff, *The Vanishing Nile: A Great River Faces a Multitude of Threats*, YALE SCHOOL OF FORESTRY & ENVTL. STUD. (April 6, 2017), https://e360.yale.edu/features/vanishing-nile-a-great-river-faces-a-multitude-of-threats-egypt-dam.

[2211] Randa Bedawy, *Water resources management: alarming crisis for Egypt*, 4 J. OF MGMT. AND SUSTAINABILITY 108, 115 (Aug. 29, 2014).

[2212] *See* Kimenyi, *supra* note 18.

[2213] Abdulrahman, *supra* note 14, at 136-37.

[2214] Salam Abdulrahman, *The River Nile and Ethiopia's Grand Renaissance Dam: challenges to Egypt's Security Approach*, 76 INT'L J. OF ENV. STUD. 136, 136-137 (Sept. 2018); Daniel Abebe, "Egypt, Ethiopia, and the Nile: The Economics of International Water Law, University of Chicago Public Law & Legal Theory Working Paper No. 484, (2014); Declan Walsh & Somini Sengupta, *For Thousands of Years, Egypt Controlled the Nile. A New Dam Threatens That,* THE N.Y. TIMES (Feb. 9, 2020), https://www.nytimes.com/interactive/2020/02/09/world/africa/nile-river-dam.html.

[2215] *See* M.A. Abu-Zeid & F. Z. El-Shibini, *Egypt's High Aswan Dam*, 13 INT'L J. OF WATER RESOURCES DEV. 209, 209-10 (July 21, 2010).

[2216] *See* David J. Mentiply, *The British Invasion of Egypt, 1882,* E-INT'L RELATIONS (Mar. 23, 2009), https://www.e-ir.info/2009/03/23/the-british-invasion- of-egypt-1882/.

Middle East, northern and eastern Africa, South Asia, among others, water is increasingly viewed within the lens of national security."[2217] As early as 1979, President Anwar Sadat said, "the only matter that could take Egypt to war again is water."[2218] In 2014, former President Mohamed Morsi indicated "all options are open" in response to the impending water supply threat posed by the GERD, stating that "if [the Nile] diminishes by one drop then blood is the other alternative" alluding to potential military action.[2219] Egyptian President Abdelfattah al-Sisi recently framed the GERD as a matter of life and death for Egyptians, stating that "the Nile is a question of life, a matter of existence to Egypt."[2220]

For the Egyptian government, the GERD threatens a reliance built upon the Nile for millennia. Egyptian government studies estimate that for each decrease "of 1 billion cubic meters of water, 200,000 acres of farmland would be lost" while affecting the livelihoods of 1 million and reducing the Aswan High Dam's power generation by a third.[2221] Perceived as a potential catastrophe for Egyptians, the GERD would cut Egypt's water supply, depending on the speed at which Ethiopia chooses to fill the GERD's reservoir and the GERD's management during extreme weather events.

B. Ethiopia's Beacon of Prosperity

Ethiopia's use of the Nile has been limited by Egypt's historic control over the Nile as a downstream nation. Ethiopia's population now exceeds more than 100 million and as its population continues to rise, Ethiopia's demand for water also increases. While Ethiopia receives considerable amounts of precipitation measured at an average of 815.8 millimeters annually, climate change has disrupted precipitation patterns across Africa, and consequently, destabilized the Nile's flow.[2222]

For many Ethiopians, the Nile provides hope for a nation to escape poverty by providing electricity to approximately two-thirds of Ethiopians who lack access.[2223] By building one of the largest hydroelectric power plants in the world along its border with Sudan, the GERD, as its name suggests, symbolizes a form of rebirth for approximately 75 million people.[2224] The GERD would also generate 6,000 megawatts, which is approximately 2,000 megawatts more than Ethiopia's current generating capacity, enabling Ethiopia to sell and export electricity.[2225]

The Ethiopian government expressed its intention to fill the GERD's reservoir between the next 5 to 6 years, noting the immediate benefits of power generation.[2226] This would reduce

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[2217] Edith B. Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INTL. L. 1, 18 (2011).

[2218] *See Next on Egypt's to-do: Ethiopia and the Nile*, AL-JAZEERA (Dec. 9, 2013), https://www.aljazeera.com/features/2013/12/9/next-on-egypts-to-do- ethiopia-and-the-nile.

[2219] *Egyptian warning over Ethiopia Nile dam*, BBC AFRICA (June 10, 2013), https://www.bbc.com/news/world-africa-22850124.

[2220] *Sisi says Nile water issue a matter of life and death for Egypt, wants Sudan removed from terror list,* AL-AHRAM ONLINE (Sept. 24, 2019), http://english.ahram.org.eg/NewsContent/1/64/351461/Egypt/Politics-/Sisi-says- Nile-water-issue-a-matter-of-life-and-de.aspx; Declan Walsh & Somini Sengupta, *For Thousands of Years, Egypt Controlled the Nile. A New Dam Threatens That*, THE N.Y. TIMES (Feb. 9, 2020), https://www.nytimes.com/interactive/2020/02/09/world/africa/nile-river-dam.html.

[2221] *Death of the Nile: Egypt fears Ethiopian dam will cut into its water supply*, THE TELEGRAPH (Oct. 2, 2017), https://www.telegraph.co.uk/news/2017/10/02/death-nile-egypt-fearsethiopian- dam-will-cut-water-supply/.

[2222] Climate Change Knowledge Portal, *Ethiopia - Country Context,* WORLD BANK GROUP, https://climateknowledgeportal.worldbank.org/country/ethiopia.

[2223] Al Jazeera English, *supra* note 4.

[2224] *Id.*

[2225] *Id.*

[2226] *See* Mbaku, *supra* note 7.

the Nile's flow by an estimated 25%, severely impacting the Egyptian economy.[2227] Instead, Egypt requests that the GERD be filled over a 12 to 18-year timeframe citing Egypt's need to adapt to a "huge water share deficit, causing the end of agricultural expansion" as well as "a possible reduction of the currently cultivated area, an increase of salinity in the northern part of the Delta, damage to potable water stations, the collapse of canals and drains, and environmental destabilization."[2228]

The Nile's significance to the Egyptian and Ethiopian governments differs. While Egyptians view the Nile as a staple of historic civilization and modern sustenance, Ethiopians envision a new future with the GERD as its latest technological contribution to the livelihood of its people. Egypt's and Ethiopia's battle for control over the Nile has only incited greater political, military, and diplomatic escalation.

II. A Modern International Water Law

Humans struggle to delineate the legal boundaries that govern bodies of water. As an ambient resource, water does not abide by the boundaries drawn by the humans who seek its access. The world contains many examples of nations that struggle to find mutually beneficial terms to water supply access while at the same time maintaining cordial relations.[2229] In fact, the 246 largest rivers in the world flow through basins that are shared with another nation.[2230] This is also true in regions like Egypt and Ethiopia, which harbor arid and semi-arid lands.[2231] Despite its recent evolution and growth, international water law remains highly decentralized and institutionally underdeveloped.[2232]

Riparian nations tend to rely on highly debated legal concepts within international agreements to argue for river access, including territorial sovereignty and absolute integrity of the river.[2233] Upstream riparian nations, such as Ethiopia, often argue that absolute territorial sovereignty provides the legal right to access and use a river's water regardless of its effect on other riparian nations.[2234] Meanwhile, downstream riparian nations like Egypt typically rely on claims that invoke the absolute integrity of the river, arguing that upstream riparian nations cannot perform actions that affect the quantity, quality, or flow of the watercourse.[2235] Of the many important international water law principles, two vital legal concepts that fuel GERD negotiations are principles of (1) reasonable and equitable utilization ("equitable utilization") and (2) the duty not to cause significant harm ("no-harm rule"). Both principles are codified

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[2227] Foreign Staff, *Death of the Nile: Egypt fears Ethiopian dam will cut into its water supply,* TELEGRAPH (Oct. 2, 2017), https://www.telegraph.co.uk/news/2017/10/02/death-nile-egypt-fearsethiopian- dam-will-cut-water-supply/.

[2228] *See* Randa Bedawy, *supra* note 66.

[2229] Joseph W. Dellapenna, *The Berlin rules on water resources: the new paradigm for international water law, World Environmental and Water Resource Congress,* ASCE LIBR. 2 (2012), https://ascelibrary.org/doi/10.1061/40856%28200%29250.

[2230] *Id.*

[2231] *Basin Climate Zones,* NILE BASIN INITIATIVE (last updated 2016-2017), https://atlas.nilebasin.org/treatise/nile-basin-climate-zones/.

[2232] *See* Mark Zeitoun, *The relevance of international water law to later- developing upstream states*, 40 WATER INT'L 968, 972 (2015).

[2233] *User's Guide Factsheet Series: Number 10 - Theories of Resource Allocation,* UN WATERCOURSES CONVENTION 1, 1 (2006), https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-10- Theories-of-Resource-Allocation.pdf [hereinafter *User's Guide Factsheet No. 10*].

[2234] *See id.*

[2235] *Article 5.1.1 Theories of Allocation,* UN WATERCOURSES CONVENTION, https://www.unwatercoursesconvention.org/the-convention/part-ii-general- principles/article-5-equitable-and-reasonable-utilisation-and-participation/5-1-1- theories-of-allocation/.

in the General Assembly's *United Nations Convention on the Non-Navigational Uses of International Water Courses.*[2236]

The international community coined the principle of equitable utilization to balance the tension between absolute territorial sovereignty and absolute integrity of the river.[2237] Equitable utilization provides that all co-riparian nations with a stake in an international watercourse may use its resources in a manner that does not disrupt another co-riparian nation's interest, calling for development and use along the river "but in a fair and reasonable manner."[2238] Employing a theory of limited territorial sovereignty, equitable utilization recognizes all riparian nations' right to use water from a common source with an obligation to ensure that their use does not unreasonably interfere with that of another riparian nation.[2239] Alternatively, lower riparian states rely on the no-harm rule, which requires that States take all appropriate measures to prevent significant harm to other watercourse States through their use of the water source.[2240] The no- harm rule has been defined as a widely recognized principle of customary international law where a State maintains an obligation to prevent, reduce, and control the risk of environmental harm and other significant harm to other watercourse States.[2241] Upstream riparian States generally oppose the no-harm rule out of fear that it could curb development opportunities. On the other hand, downstream States generally oppose equitable utilization for fear that it permits harm generated by upstream development that will inevitably impact downstream states. While customary international law embraces the no-harm rule, countries continue to debate the standard for equitable utilization often pitting the clear standard for no-harm at odds with the unclear standard for equitable utilization.[2242]

Although international law outlines parameters for transboundary riverways like the Nile, tensions between the legal concepts of no-harm and equitable utilization persist, demonstrating a chief constraint to resolving the GERD conflict. With the longest river in the world at its focal point, the GERD conflict's underlying legal rationale retains enough influence to shift international water law's historical preference from the no-harm rule to equitable utilization, or instead consolidate the no-harm rule as the dominant legal principle guiding international water law.

International water law is largely defined in three main legal instruments: *the Helsinki Rules on the Uses of the Waters of International Rivers* ("Helsinki Rules"), *the United Nations Convention on the Non-Navigational Uses of International Water Courses* ("UN Watercourse Convention"), and the *Berlin Rules on Water Resources* ("Berlin Rules"). *The Helsinki Rules*, *UN Watercourse Convention*, and *Berlin Rules* recognize the challenges posed by an application of equitable utilization and attempt to clarify the factors relevant for determining the use of an international watercourse in an equitable and reasonable manner. Adopted by the International Law Association in 2004,

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[2236] *See Report of Sixth Committee,* U.N. GAOR 6th Comm., 49th Sess., 3d pen. mtg. at 12, 15, U.N. Doc. A/48/738 art. 5-7 (1994).

[2237] *See User's Guide Factsheet No. 10, supra* note 43.

[2238] Albert E. Utton, *Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm*, 36 NAT. RESOURCES J. 635, 637 (1996).

[2239] *See id.*

[2240] *User's Guide Factsheet Series: Number 5 - No Significant Harm Rule,* UN WATERCOURSES CONVENTION 1, 1 (2006), https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No- Significant-Harm-Rule.pdf [hereinafter *User's Guide Factsheet No. 5*].

[2241] *See* Int'l Law Ass'n [ILA], Rep. of the Fifty-Second Conference, Helsinki, The Helsinki Rules on the Uses of the Waters of International Rivers, (Aug. 14-20, 1966) [Helsinki Rules].

[2242] *See* Attila M. Tanzi, *The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law*, 20 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 619, 619 (2020), https://link.springer.com/article/10.1007/s10784-020-09502-7.

the Berlin Rules superseded *the Helsinki Rules* and summarize modern international customary water law for domestic freshwater resources and those that cross international borders. Authors of *the Berlin Rules* noted that the guidelines "express rules of law as they presently stand and, to a small extent, rules not yet binding legal obligation," but those that are budding into customary international law.[2243] Like equitable utilization, the no-harm rule was also incorporated in *the Helsinki Rules* and later reiterated in *the UN Watercourse Convention* and *the Berlin Rules*. By outlining non-exhaustive, relevant factors and circumstances that weigh in favor or against a nation's utilization, these legal instruments all identify the following factors in common: geography, hydrology, climate, existing/past utilization, social and economic needs of riparian nations; populations dependent on the watercourse; and availability of alternative resources or uses.[2244]

A. Helsinki Rules on the Uses of the Waters of International Rivers

Adopted by the International Law Association in August 1966, *The Helsinki Rules* serve as the foundational modern legal document regulating rivers crossing national boundaries.[2245] As one of the initial international legal documents to identify a need for equitable utilization, Article IV of *the Helsinki Rules* rejects a nation's unlimited sovereignty to maintain "the unqualified right to utilize and disposeof the waters of an international river flowing through its territories."[2246] Instead, *the Helsinki Rules* recognize that a State must consider economic and social needs of co-basin States, which could result in one basin State receiving more water than its neighbors.[2247] To determine reasonable and equitable shares of co-basin States, Article V outlines a list of factors to consider, such as the basin's geography, hydrology, climate, past and existing utilization, and dependent population.[2248] Other factors include each basin State's economic and social needs, alternatives to satisfy those economic and social needs, additional resource availability, and the degree to which a State's needs may be met without causing substantial injury to a co-basin State.[2249]

While *the Helsinki Rules* acknowledge ideas of cooperation, appropriate compensation, and equitable distribution of waters, they lack an enforcement mechanism.[2250] The incredibly vague set of factors weighed in totality without a dispute resolution mechanism other than the joint agency procedure outlined in Chapter 6 of *the Helsinki Rules* creates a major dilemma for international water law: the two simultaneously applicable legal doctrines, equitable utilization and no- harm, can be weaponized by multiple parties and result in a conflict based on riparian States' inconsistent interests. Without objectively institutionalizing equitable utilization, dispute resolution institutions engineered by *the Helsinki Rules* are bound to face numerous obstacles. At the time of its adoption by the International Law Association, *the Helsinki Rules* were not considered binding international law. Nevertheless, *the Helsinki Rules* forged the

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[2243] *See Berlin Rules on Water Resources*, ILA (Aug. 21, 2004) (preface).

[2244] *See* Helsinki Rules, *supra* note 51; *Report of Sixth Committee,* U.N. GAOR 6th Comm., 49th Sess., 3d pen. mtg. at 12, 15, U.N. Doc. A/48/738 (1994); ILA, Berlin Rules on Water Resources art. 13, Aug. 21, 2004 [hereinafter Berlin Rules].

[2245] *See* Helsinki Rules art. 4, *supra* note 51.

[2246] *See id.*

[2247] *See id.*

[2248] *Id.* art. 5.

[2249] *See id.* (The *Helsinki Rules* also incorporate chapters about pollution, navigation, timber floating, and procedures to prevent and settle disputes.); *see also* Berlin Rules, *supra* note 53, at 4.

[2250] *See* Alan Nicol, The Nile: Moving Beyond Cooperation, UNESCO, 23 (2003), https://unesdoc.unesco.org/ark:/48223/pf0000133301.

beginnings of a growing body of law, leading to *the UN Watercourse Convention and the Berlin Rules,* respectively.[2251]

Since the International Law Association's adoption of *the Helsinki Rules*, equitable utilization has become a principal tenet of customary international water law. Despite being outlined in both *the UN Watercourse Convention* and *the Berlin Rules*, equitable utilization remains notorious for its ambiguity.[2252] Applying equitable utilization in no-harm situations generates debate and tension among proponents of each respective legal principle.

B. United Nations Convention on the Non-Navigational Uses of International Water Courses

Rather than endorsing *the Helsinki Rules*, the United Nations requested a set of draft articles on non-navigational uses of international watercourses from the International Law Commission, which would be reworked into the General Assembly's *UN Watercourse Convention*.[2253] Approved by a vote of 103 to 3 with 27 abstentions, *the UN Watercourse Convention* incorporates principal values of international water law to curb potential conflicts, but has yet to be ratified by a single Nile riparian State.[2254] The law also has not evolved at the same speed as pressures surrounding natural resource access, particularly with climate strains in dry regions.

The UN Watercourse Convention has been criticized for its failure to integrate environmental and ecological concerns as well as pertinent human rights into its body of international water law.[2255] The main drafting debate at *the UN Watercourse Convention* was the tension between equitable utilization and the no-harm rule, both of which the General Assembly approved.[2256] *The UN Watercourse Convention* codified the rule of equitable utilization and participation in Article 5, requiring that watercourse states utilize an international watercourse in "an equitable and reasonable manner" with the purpose of "attaining optimal and sustainable utilization thereof and benefits therefrom."[2257] Under Article 5, equitable utilization must account for downstream nation interests and "adequate protection of the watercourse."[2258] Article 5 also provides that riparian States "participate in the use, development and protection of [the] international watercourse in an equitable and reasonable manner," stipulating that participation includes a right to use the watercourse and duty to cooperate in protection and development.[2259]

The UN Watercourse Convention also observes the no-harm rule in Article 7, stating that riparian nations maintain a legal obligation not to cause significant harm to other riparian nations by taking "all appropriate measures" including the elimination or mitigation of such harm as well as potential compensation where appropriate.[2260] While crafted to be read with Articles 5 and 6, Article 7 creates a clearer, more easily applicable legal basis for downstream

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[2251] Salman M.A. Salman, *The World Bank Policy for Projects on International Waterways: An Historical and Legal Analysis. Justice and Development Series.*, 171-72 (2009).
[2252] *See e.g.,* Tanzi, *supra* note 52.
[2253] *See* Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, 32 WATER INT'L 1, 4 (2007).
[2254] *See* Alan Nicol, The Nile: Moving Beyond Cooperation, UNESCO 1, 23 (2003), https://unesdoc.unesco.org/ark:/48223/pf0000133301; Salman, *supra* note 63, at 4.
[2255] *See Berlin Rules on Water Resources, supra* note 53.
[2256] *Id.* at 5.
[2257] *See Report of Sixth Committee,* art. 5*, supra* note 46.
[2258] *Id.*
[2259] *Id.*
[2260] *Id.* art. 7.

nations who can prove that greater use or development along a watercourse by other riparian nations could cause significant harm to water use. Based on the *UN Watercourse Convention*, watercourse states must "take all appropriate measures to prevent the causing of significant harm to other watercourse states."[2261] According to the United Nations, the obligation to 'take all appropriate measures' is an obligation of due diligence "proportioned to the magnitude of the subject and to the dignity and strength of the power which is exercising it."[2262] The no-harm rule thereby does not create an absolute ban on transboundary harm. Article 7(2) attempts to clarify the relationship between both principles, maintaining that any State causing harm to another must "take all appropriate measures, having due regard to the provisions of Article 5 and 6 to eliminate or mitigate such harm" where Article 5 provides that States use their waters in an equitable and reasonable manner and Article 6 outlines the non-exhaustive list of factors that should be considered when determining equitable utilization.[2263]

The UN Watercourse Convention's 37 articles highlight co- riparian obligations to share common resources, consult one another, protect the environment, and resolve disagreements.[2264] While the articles on environmental protection certainly extend beyond analogous provisions within *the Helsinki Rules*, *the UN Watercourse Convention's* articles are limited in scope to transboundary water issues, refuse to include interdependent groundwater concerns, and fail to elucidate the relationship between the rules of equitable utilization and no-harm for co-riparian States in conflict.

C. Berlin Rules on Water Resources

The Berlin Rules serve as a progressive attempt by the International Law Association to reformulate *the Helsinki Rules* to integrate international environmental law and international human rights law. By focusing on domestic and international participatory water management, conjunctive management, integrated management, sustainability, and environmental harm,[2265] *the Berlin Rules* advance concepts crafted for the international and transboundary customary water law context: cooperation, equitable utilization, and no-harm.[2266]

Outlined in Article 11 of *the Berlin Rules*, the principle of cooperation ensures that basin States cooperate in good faith while managing waters for the mutual benefit of participating states.[2267] This principle is immediately followed by equitable utilization in Article 12, which reiterates *the UN Watercourse Convention's* definition of equitable utilization while incorporating the obligation to avoid causing significant harm to other basin States.[2268] Additionally, *the Berlin Rules* complement other factors that are considered for equitable utilization determinations, including sustainability of proposed or existing water uses and the minimization of environmental harm.[2269]

The Berlin Rules define the no-harm rule to ensure basin States refrain from acts that cause significant harm to other basin States while respecting each basin States right to equitable utilization of waters.[2270] While *the UN Watercourse Convention's* expression of the no-harm rule

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[2261] *Id.* art. 7 (1).
[2262] *Id.*
[2263] *Id.* art. 7(2).
[2264] *See id.*
[2265] *See Berlin Rules on Water Resources*, art. 9, *supra* note 53 (These principles were not reflected in the Helsinki Rules and were only "developed in rudimentary form" in the UN Watercourse Convention.).
[2266] See *id.* arts. 11-16.
[2267] *Id.* art. 11.
[2268] *Id.* art. 12.
[2269] *Id.* art. 13.
[2270] *Id.* art. 16.

references equitable utilization as a simultaneous obligation for States, *the Berlin Rules* departs from merely referencing equitable utilization by explicitly stating that basin States must "refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters."[2271] *The Berlin Rules* illustrate a strong commitment to no-harm and equitable utilization obligations complementing one another; however, the gap between *the Berlin Rules*, which allow both legal concepts to coexist, and the actual practice of these obligations by basin States is arguably the leading challenge in negotiations during the GERD conflict.

III. Equitable Utilization and the No-Harm Rule: A Battle for the River Nile

Conceptualizing the battle for the Nile demands adequate historical, legal, and political analyses. Holistic outlooks in the region have dictated the waterway's allocation and use for centuries and are currently advanced by riparian States with interests in the river. Clashes often arise when international water law is applied to transboundary watercourses because the interrelationship between equitable utilization and no-harm remains unclear. This tension further contributes to the GERD conflict as the international community struggles to attribute a clear legal rationale behind the GERD's construction.

The GERD conflict illustrates the complex challenge that national, regional, and international bodies face when attempting to facilitate and negotiate a solution over water control. Egypt and Ethiopia both lay claim to the Nile on the basis of international water law; however, international law remains unsettled as to which claim is more valid than the other, if any. If constructed, filled, and operated successfully, the GERD provides the international legal community with international water law precedent that can shift international water law along the Nile and other transboundary waterways as climate change alters national demands for water. While Egyptian arguments appeal to the no-harm rule, prior use, and colonial and post- colonial legal agreements, Ethiopian arguments instead advance equitable utilization and natural resource property ownership through absolute territorial sovereignty.

A. Egyptian Arguments to Preserve River Nile Control

Like many modern struggles for natural resource access and control, political influence has contributed to notable power imbalances. Egypt has historically justified its control over the Nile through legal agreements made with its former colonizer, Britain. Those legal agreements not only exclusively allocated the Nile's waters to Egypt and Sudan, but also granted Egypt with authority over any upstream development projects; however, Ethiopia was not even party to these agreements, calling into question the validity of the legal authority Egypt has consistently relied upon. Egypt subsequently invoked its prior use of the Nile through the appropriation doctrine to advance its opposition to the GERD, which has largely been subordinated to equitable utilization. Egypt's strongest argument to oppose Ethiopia's full sovereignty to build and control the GERD remains through the no-harm rule, a widely accepted and codified principle of customary international water law. Egyptian strategy in GERD negotiations has recently shifted from a focus on Egyptian natural and historical rights to an emphasis on the no-harm rule in an attempt to justify circumstantial Egyptian management of the GERD.

1. The No-Harm Rule & Water Scarcity

[2271] *Id.*

Egypt's strongest argument to sustain partial control over the GERD stems from the no-harm rule. Within customary international law, the no-harm rule requires that a State maintain its duty to prevent, reduce, or control environmental harm to other States.[2272] Codified in *the Helsinki Rules*, *the UN Watercourse Convention*, and *the Berlin Rules*, the no-harm rule ensures that Egypt's downstream status along the Nile affords it a form of protection from upstream construction that could potentially harm Egypt's access to water resources.

Climate change's effects on the already dry, desert nation serve as a great impetus for Egypt's arguments against GERD construction and Ethiopia's exclusive GERD management. While Ethiopian Prime Minister Abiy Ahmed has told the United Nations General Assembly that Ethiopia has "no intention" of using the GERD to harm Sudan and Egypt, GERD negotiations have halted and remain at a bitter standstill. Currently, Egypt and Sudan demand that any deal be legally binding over decisions to establish a dispute resolution mechanism for GERD- related issues, and to designate GERD management and control during periods of drought and reduced rainfall.[2273] However, before a resolution among Ethiopia, Egypt, and Sudan was reached, Ethiopia unilaterally began filling the GERD at approximately 5 billion cubic meters of water in June 2020.[2274]

Based on Egypt's increasing demand for water and economic activities, rapid population growth, and attempts to tackle the impacts of climate change, Egypt maintains a compelling argument for invoking the no-harm rule. With a population of 100 million, Egypt's population mostly lives along the Nile Valley, which is merely 6% of Egypt's total area surrounded by desert on both sides. Based on the World Bank's classification of water scarcity, Egypt meets the definition with a government reported figure at 550 cubic meters of freshwater per person annually.[2275]

However, consequential questions arise about what the no- harm rule in practice should look like: should it be a binding legal arrangement between Egypt and Ethiopia that guarantees a *quid pro quo* arrangement for all parties? Would Ethiopia continue its exclusive authority over the GERD's filling or would situations arise that warrant other parties to restrict sole Ethiopian control? Because no institutional framework exists to ensure the Nile Basin region is governed fairly, equitably, efficiently, and sustainably, failure to craft a legal arrangement that addresses the interplay between equitable utilization and no-harm could contribute to a prolonged diplomatic standstill.

In a radical shift from his predecessors, Egyptian President Abdel Fattah al-Sisi recently addressed the United Nations announcing, "The Nile River must not be monopolized by one state. For Egypt the Nile Water is an existential matter. This, however, does not mean that we want to undermine the rights of our brothers and sisters, sharing with us the Nile basin."[2276] Egypt's present negotiation strategy is to pursue an agreement that permits Ethiopia to generate hydropower from the GERD while minimizing the GERD's potential harm to downstream Egypt and Sudan.

[2272] *See* Utton, *supra* note 48, at 636.

[2273] Michelle Nichols, *Ethiopia Tells UN No Intention of Using Dam to Harm Egypt, Sudan*, REUTERS (Sept. 25, 2020), https://www.reuters.com/article/un-assembly-ethiopia-int/ethiopia-tells-u-n-no- intention-of-using-dam-to-harm-egypt-sudan-idUSKCN26G33.

[2274] Mohamed S. Helal, *Ethiopia's Power Play on the Nile Has Left the Region in a Deadlock*, FOREIGN POL'Y (Sept. 28, 2020), https://foreignpolicy.com/2020/09/28/renaissance-dam-ethiopia-egypt- negotiations/.

[2275] Magdi Abdelhadi, *Nile dam row: Egypt fumes as Ethiopia celebrates*, BBC (July 29, 2020), https://www.bbc.com/news/world-africa-53573154/ (The World Bank classifies a nation as water scarce when there is less than 1000 cubic meters of freshwater per person annually.).

[2276] *See* Nichols, *supra* note 83.

2. The Doctrine of Prior Appropriation

Egypt has long relied on the doctrine of prior appropriation ("appropriation doctrine") to develop an argument that captures its historical past reliance upon the Nile. The appropriation doctrine provides that water rights are determined by priority of beneficial use.[2277] In other words, a person, group, or State who first diverted the Nile for a beneficial use or purpose may acquire individual rights to the water, vesting the first appropriator with a recognized property right.

The appropriation doctrine was first developed in California during the Colorado Silver Boom in the mid-1800s.[2278] Gold miners arriving in the United States were unable to proclaim riparian rights to water because they did not own any land.[2279] Consequently, the miners applied a rule that the first miner to use water productively would automatically maintain the right to continue using the water and to exclude others from its use.[2280] This property right vests for the remainder of the individual's life allowing for continued use of the resource.[2281] However, what this principle of prior appropriation failed to recognize was a right of pre-emption upon unappropriated water supplies.[2282] While the first appropriator could lay claim to the water used, she could not lay claim to waters that "had not yet been reduced to possession."[2283]

The appropriation doctrine has since evolved into the rule of natural flow. Based on the rule of natural flow, riparian owners are given "the right to have water flow past the land undiminished in quantity or quality" where the idea of "first in time, first in right" applies.[2284] As a result, land ownership does not affect or influence water rights. The modern appropriation doctrine as a basis for Egyptian control over the GERD fails to garner robust legitimacy. As a rigid principle rooted in absolute claims of right, the appropriation doctrine has become subordinate to equitable utilization through Article 6 of *the UN Watercourse Convention*. Thus, prior appropriation is just one of many factors considered when assessing equitable utilization and is a frail justification for Egypt to secure GERD management control.

3. Natural & Historical Rights: The Nile Water Agreements

Historically, Egypt has controlled the Nile drawing legal rights from a series of agreements with Britain called *the Nile Water Agreements*. *The Nile Water Agreements* are composed of two treaties: the *1929 Anglo-Egyptian Treaty* and the *1959 Bilateral Agreement between Egypt and Sudan*. When negotiations were conducted for the *1929 Anglo-Egyptian Treaty*, Ethiopia was not a British colony. Ethiopia, or the Abyssinian Empire, was instead an independent sovereign polity by the time the *1929 Anglo-Egyptian Treaty* was concluded. Because Ethiopia was neither a signatory nor a participant in the negotiations that directly led to the initial *Nile Water*

[2277] Jeffrey D. Azarva, *Conflict on the Nile: International Water Law and the Elusive Effort to Create a Transboundary Water Regime in a Nile Basin*, 25 TEMP. INT'L & COMP. L.J. 457, 470 (2012).

[2278] David A. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32-1 ECOLOGY L.Q. 3, 3 (2005).

[2279] *Id.*

[2280] *See* Kimenyi, *supra* note 2, at 70.

[2281] *Id.*

[2282] *See* Azarva, *supra* note 87.

[2283] *Id.*

[2284] Maeve Flaherty, *The Test on the Nile: Ethiopia and Egypt's Conflicting Claims to the Nile River Waters*, COLUM. POL. REV. (Nov. 12, 2020), http://www.cpreview.org/blog/2020/11/the-test-on-the-nile-ethiopia-and-egypts-conflicting-claims-to-the-nile-river-waters.

Agreement, Ethiopian government officials have steadily declined to recognize the validity of *the Nile Water Agreements* and Egypt's claim for natural and historical rights over Nile waters.[2285]

Moreover, British interests in Egyptian monopolization over the River Nile at the commencement of *the Nile Water Agreements* remains undeniable and central to the tale of equitable natural resource distribution. The British's agricultural interest in Egypt's Nile Delta peaked during the United States Civil War.[2286] Most of Britain's cotton supply had been produced in the United States South, which was in the middle of war with the United States North. As a result, the United States cotton famine increased British reliance upon Egyptian cotton. To minimize any potential disruption of its cotton supply, the British bolstered its foreign policy within the region to secure its economic dominance through *the Nile Water Agreements*, negatively impacting upstream regions.[2287] Britain's unrivaled bargaining power put upstream riparian nations, many of which were British colonies, at a severe disadvantage to gain Nile access. This also resulted in Egypt's loss in economic self-sufficiency with its agricultural industry transforming into a one-crop cotton industry, wholly dependent upon the Nile River's waters.[2288]

The 1929 Anglo-Egyptian Treaty

The 1929 Anglo-Egyptian Treaty is a series of agreements exchanged between the British, representing various Nile River Basin countries, and Egypt & Sudan that allocated the Nile's waters to these two countries.[2289] The agreement includes a letter from Egypt's government to the British government and the Nile Commission's 1925 report. Within these letters, both parties recognize Sudan's need for Nile water, yet the Egyptian government qualifies Sudan's right by declaring Egyptian natural and historical rights. One letter specifically states that granting Sudan additional waters would be acceptable so long as it "does not infringe Egypt's natural and historical rights in the waters of the Nile."[2290] The agreement also constrains upstream riparian abilities to build along the Nile if such construction would "entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level."[2291] Ultimately, the series of agreements denied upstream nations, like Ethiopia, access to the Nile for actions that could negatively affect the Nile's flow to downstream Egypt, including construction and irrigation.[2292] At the time, Egypt encompassed the Sudan "for the purpose of sharing Nile water."[2293] Egypt argues that the *1929 Anglo- Egyptian Treaty* provides the nation with "exclusive proprietary rights to the Nile

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[2285] *See* Kimenyi, *supra* note 2, at 39.
[2286] *See* Patrick L.O. Lumumba, *The Interpretation of the 1929 Treaty and its Legal Relevance and Implications for the Stability of the Region*, 11 AFRICAN SOCIOLOGICAL REV. 10, 12 (2007).
[2287] *See id.*
[2288] *See How the American Civil War Built Egypt's Vaunted Cotton Industry and Changed the Country Forever*, SMITHSONIAN (2016), https://www.smithsonianmag.com/history/how-american-civil-war-built-egypts- vaunted-cotton-industry-and-changed-country-forever-180959967/.
[2289] Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of Waters of the Nile River for Irrigation Purposes (with Seven Diagrams), Cairo, May 7, 1929, L.N.T.S. 2103 (1929) [hereinafter 1929 Anglo-Egyptian Treaty]; MWANGI S. KIMENYI & JOHN M. MBAKU, GOVERNING THE NILE RIVER BASIN, 37.
[2290] *See* 1929 Anglo-Egyptian Treaty, para. 2, *supra* note 99.
[2291] *See id.* para. 4, subsec. (i).
[2292] M. K. Mahlakeng, *China and the Nile River Basin: The Changing Hydropolitical Status Quo*, 10 INSIGHT ON AFR. 73, 76-77 (Dec. 21, 2017).
[2293] *Id.*

water without obligation, consent or even voluntary transfer of property rights from Egypt to other riparian countries."[2294]

The 1959 Bilateral Agreement between Egypt and Sudan

The 1959 Bilateral Agreement between Egypt and Sudan effectively replaced *the 1929 Anglo-Egyptian Treaty* by exclusively allocating "the entire flow of the Nile water at Aswan to Egypt and Sudan" and reinforcing the 1929 treaty.[2295] *The 1929* and *1959 Nile Water Agreements* do not differ greatly. *The 1959 Bilateral Agreement* simply accounts for vast political changes in the region and agricultural demands. According to *the 1959 Bilateral Agreement*, the Nile's average flow was 84 billion cubic meters per year. Of these 84 billion cubic meters, evaporation and seepage accounted for 10 billion cubic meters per year, and the remaining 74 billion cubic meters per year would be divided between Egypt and Sudan where Egypt would receive 48 billion cubic meters per year and 7.5 billion cubic meters per year in benefits. Sudan would acquire 4 billion cubic meters per year and 14.5 billion cubic meters per year in benefits.[2296] This essentially disqualified other upstream, riparian States from attaining water rights to the River Nile by only allocating 10% of the River Nile to upstream States.[2297] With downstream nations Sudan and Egypt obtaining water rights over the longest transboundary waterway in the world, Egypt continues to exercise its power by strategically citing the no-harm rule as an important source of customary international law to protect itself from any upstream hydroelectric construction thatwould affect own developments. In contrast, Ethiopia has been unable to assert authority over the Nile river.

As early as 1997 and 1998, Ethiopia's Minister of Water Resources and foreign minister announced, respectively:

> As a source and major contribution of the Nile waters, Ethiopia has the right to have an equitable share of the Nile waters and reserves its rights to make use of its waters. There is no earthly force that can stop Ethiopia from benefiting from the Nile.[2298]

Today's the GERD debate hinges on the question of whether *the Nile Water Agreements* are binding legal agreements upon upstream riparian nations. If Egypt relies on the natural and historical rights asserted through *the Nile Water Agreements*, it is unlikely to make a compelling argument for controlling upstream development, given that the agreements were made and concluded without the participation of many upstream riparian nations.

B. Ethiopian Arguments to Gain River Nile Access

To justify its authority to build the GERD, Ethiopia repeatedly asserts its absolute, upstream authority to develop along the Nile, despite objections by its downstream neighbors Sudan and Egypt. Home to the White Nile's origin, Ethiopia houses the majority of the White Nile's waters within its highlands. Consequently, the upstream nation invokes a property right argument to the Nile's waters to justify the GERD's construction and Ethiopia's exclusive management over the GERD. However, this claim raises entitlement questions based on the contentious principle of absolute sovereignty along an international waterway, garnering objections from diplomatic and legal circles. Like Egypt, Ethiopia's most powerful claim stems

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[2294] *Id.* at 77.
[2295] *Id.*
[2296] *Id.*
[2297] *Id.*
[2298] *Id.*

from codified customary international water law through equitable utilization with an emphasis on Ethiopia's scarce energy access.

1. River Nile Ownership & The Ethiopian Highlands

Ethiopia's highlands supply about 86% of the water that the River Nile uses.[2299] Because the highlands flow into the Nile, Ethiopian government officials claim, to an extent, ownership over the Nile and oppose Egyptian arguments that attempt to regulate Ethiopia's GERD construction and filling. Ethiopia's property right argument invokes a national sovereignty approach towards the GERD.

Ethiopia's argument raises many questions, particularly as it relates to which country may possess more or less of a transboundary waterway. When contemplating the property right of a transboundary waterway, is the property right attached to the land from which the water originates or the land that provides most of the water used? Similarly, does a property right originate from the land where most of the water flows or the land where most of the water is used? Ironically, by asserting an ownership right over a transboundary waterway to justify the GERD's construction and exclusive control over that structure, the Ethiopian government mirrors the same flawed national sovereignty argument invoked by Egypt. Ethiopia would have a stronger argument by acknowledging an irrefutable co-riparian reliance.

2. Equitable Utilization & Poverty Alleviation

Ethiopia's use of equitable utilization to justify the GERD's construction and exclusive management of the Dam is the nation's strongest argument. It is no secret that Ethiopia has grappled with widespread poverty, particularly through food insecurity and malnutrition.[2300] However, the GERD's potential to provide energy access for a considerable number of Ethiopians who remain off the nation's power grid would enhance Ethiopia's standard of living.[2301] The GERD is an attempt to develop Ethiopia's hydroelectric capacity. While Ethiopia's highlands provide Ethiopians with an important water source, only about 3% of Ethiopia's hydropower potential had been reached as of 2001.[2302] Historically, Ethiopians have relied on other alternative forms of energy that have been more harmful to the environment, including biofuel mass.[2303]

Ethiopian circumstances certainly warrant invoking equitable utilization. Reaching Ethiopia's untapped energy potential would also make a difference in local communities for millions of Ethiopians.[2304] For instance, some Ethiopians are relying on their government's promise that the GERD will generate electricity to power their businesses. As a result, individuals have poured their resources into business investments, anticipating the GERD's positive benefits.[2305] For them, the GERD's failure would be a disaster to their livelihoods.

Ethiopia also contends that the GERD's construction could create benefits for the entire region, promoting equity. Through the GERD, Ethiopia expects to produce enough electricity for the entire nation with surplus amounts of energy, much of which could be exported and

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[2299] Ashok Swain, *Challenges for water sharing in the Nile basin: changing geo-politics and changing climate*, 56 HYDROL. SCI. J. 687, 688 (2011).

[2300] *2020 Global Report on Food Crisis 2020,* FOOD SECURITY INFORMATION NETWORK [FSIN] (2020), https://www.fsinplatform.org/sites/default/files/resources/files/GRFC_2020_ONLI NE_200420.pdf.

[2301] *See* Kimenyi, *supra* note 18.

[2302] *See* Kimenyi, *supra* note 2, at 106.

[2303] *Id.*

[2304] *See* Al Jazeera English, *supra* note 4.

[2305] *Id.*

sold for affordable prices to neighboring countries that do not have substantial energy access.[2306] Energy sales could reach as far as China and Western Europe, particularly given the non-African support and financing of the GERD.[2307] Another benefit that Ethiopia cites is environmental. Although it cannot be said with complete certainty, simulations reveal that despite risks to Egyptian water supplies, the filling period of the reservoir could benefit Ethiopia and Sudan without significantly hindering Egyptian water users.[2308] However, subsequent multi-year droughts would need to be managed with careful coordination to avoid harmful impacts.[2309]

Under equitable utilization, Ethiopia is entitled to greater Nile access than through the anachronistic *Nile Water Agreements*. At the same time, Ethiopia's current efforts to account for potential downstream harm within Egyptian borders are feeble and do not sincerely incorporate the no-harm rule. If Ethiopia were to successfully construct and fill its reservoir under the legal justification of equitable utilization, without restrictions upon Ethiopian management, new legal precedent could very well be established where international water law's principle of equitable utilization no longer considers the no-harm rule essential.

Conclusion

The GERD crisis has pushed legal proponents and opposition to the Dam to explore diverse legal justifications. For each party in the conflict, the strongest legal justifications stem from codified international water law: equitable utilization and no-harm. With a focus on the effects of climate change upon Egypt, the desert nation could certainly invoke the no-harm rule to insist upon a *quid pro quo* solution. At the same time, Ethiopia's economic and social circumstances warrant invocation of equitable utilization to increase its Nile access. Nevertheless, the legal community struggles to explain the interplay between no-harm and equitable utilization in practice.

The concrete response to the GERD conflict could very well set the stage for new legal precedent that applies international water law to transboundary waterways. For instance, if the filling results in a disaster for Egypt, regional and international responses could call for greater emphasis upon the no-harm rule in the future. On the other hand, if the filling results in technological innovation and economic prosperity that overshadows Egyptian water use strife, equitable utilization could very well become completely divorced from the no- harm rule. As circumstances evolve and climate change exacerbates environmental and economic situations along transboundary riverways, the legal community must confront a crucial legal question: how the two competing principles should interplay. Either way, the GERD's filling and operation will help to answer that question and solidify customary international water law.

[2306] *See* Kimenyi*, supra* note 18.
[2307] *See* Kimenyi, *supra* note 2, at 106.
[2308] Kevin G. Wheeler et. al, *Understanding and managing new risks on the Nile with the Grand Ethiopian Renaissance Dam,* 11 NATURE COMM. 1, 4 (Oct. 16, 2020), https://www.nature.com/articles/s41467-020-19089-x/.
[2309] *Id.*

PART III

ENVIRONMENTAL PROTECTION

Emerging Issues

CHAPTER 26: UTILIZING INVESTMENT AGREEMENTS TO SPUR GREEN INVESTMENT

JOHN BABCOCK*

Abstract

This paper discusses the role international investment agreements (IIAs) and regional trade agreements (RTAs) must play in facilitating green finance to reduce global greenhouse gas emissions in line with the Paris Agreement's goals. This paper contributes to investment law scholarship by identifying public and private barriers that are hindering the flow of sustainable finance in the global economy; surveying how IIAs and RTAs currently address, or fail to address, the need for greater levels of green finance; and puts forward a model framework for how future investment chapters or protocols can create the right investment environment to enable greater capital flows.

Ultimately, future agreements must incorporate sustainable finance considerations throughout the agreement. Specifically, these agreements should reaffirm the Parties' commitments to the Paris Agreement, distinguish between high and low-emission investments, safeguard the ability of states to advance their energy transition through climate regulation, place greater obligations on investors to advance the emissions transition, and strengthen the mechanisms for regional coordination on climate action. Only then will the provisions be designed not just avoid impeding, but rather, to affirmatively catalyze, the necessary investments towards a more sustainable future.

I. Introduction

Climate change has caused substantial and "increasingly irreversible" damage to ecosystems, infrastructure, and human communities.[2310] Yet, "the pace and scale of what has been done so far and current plans are insufficient to tackle climate change."[2311] Therefore, immediate actions are needed to mitigate the unsustainable use of natural resources, most notably carbon, in order to avoid missing the "brief and rapidly closing window to secure a livable and sustainable future."[2312]

Further, addressing climate change is integral to achieving the United Nation's 17 Sustainable Development Goals (SDGs).[2313] None of the 17 SDGS – whether it be ending poverty, providing affordable and clean energy, or building sustainable infrastructure – is possible if the international community does not reduce emissions and limit global temperature increases.[2314] There is a growing recognition that such actions will require massive

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2310 Climate Change 2022: Impacts, Adaptation, and Vulnerability, Sixth Assessment Report for the Intergovernmental Panel on Climate Change (Feb 22, 2022).

2311 Urgent Climate Action Can Secure a Livable Future for All, Intergovernmental Panel on Climate Change (March 20, 2023), https://www.ipcc.ch/2023/03/20/press-release-ar6-synthesis-report/.

2312 *See* Climate Change 2022, supra n.1, at SPM.D.5.3.

2313 *See 17 Goals*, United Nations Department of Economic and Social Affairs, https://sdgs.un.org/goals, (last accessed May 10, 2023).

2314 *See* Financing Credible Transitions: How to Ensure the Transition Label has Impact, Climate Bonds Initiative, White Paper, 8 (Sept. 2020).

investment in the global economy to facilitate the transition to a low-carbon, sustainable model.[2315]

Fortunately, the international community has acknowledged the need for action and committed to various collective measures through the Paris Agreement.[2316] In order to meet the over-arching goal to hold the increase in global average temperature at 2°C below pre-industrial levels,[2317] significant financing will be required, especially within less developed countries.[2318] As such, the Paris Agreement calls for making "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development,"[2319] and obligates all parties to enhance the capacity of developing nations to implement the agreement.[2320] The Paris Agreement recognizes that public commitments will not be enough to achieve its 2°C goal, envisioning an important role for private investment. [2321] With governments not providing sufficient quantities of public capital, the Paris Agreement seeks to create a robust market for private capital by calling on developed countries to mobilize necessary finances from a variety of sources.[2322]

The private green finance market has developed into an important source of financing for climate-friendly projects, yet further scale up is necessary to achieve the Paris Agreement's goals. In 2021, issuances designated for climate projects increased to over USD 540 billion globally, as compared to USD 5 billion in 2012.[2323] Despite this impressive growth, significant scale up will be required to meet the 2°C goal, as it is estimated that an additional USD 5-7 trillion of climate finance is needed per year.[2324]

A major challenge to the necessary growth in private capital is the fact that the legal regime that governs it is largely fragmented.[2325] There is no multilateral legal framework governing international investment, rather relations between international investors and host states have historically been governed by international investment agreements (IIAs), mainly in the form

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[2315] *Id.*

2316 Paris Agreement expressly commits to:

> (a) Holding the increase in the global average temperature to well below 2oC above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5oC above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;
>
> (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[2317] *See id.* at Art. 2.

[2318] *See* Climate Transition Finance Handbook, International Capital Market Association, 2 (Dec. 2020).

[2319] *See* Paris Agreement, *supra* 7, at Art. 2 section 1(c).

[2320] *See* Paris Agreement, *supra* 7, at Art. 11 section 3.

[2321] *See* Paris Agreement, *supra* 7, at Art. 9.

[2322] *See* Paris Agreement, *supra* 7, at Art. 9 section 3.

[2323] *See* Guarav Dogra, Reuters, *Global Green Finance Rises Over 100 Fold in the Past Decade* (March 31, 2022), https://www.reuters.com/business/sustainable-business/global-markets-greenfinance-graphics-2022-03-31/. *See also*, Climate Bonds Initiative, Interactive Data Platform, https://www.climatebonds.net/market/data/ (last accessed April 6, 2023).

[2324] *See* Financing Credible Transitions, *supra* 5, at 9. It is estimated USD 3 trillion is required for developing countries, alone, to meet the Paris Agreement's goals.

[2325] *See* Katrin Kuhlmann, UN Handbook on Provisions and Options for Trade and Sustainable Development, 157 (2023).

of bilateral investment treaties (BITs) between individual nations.[2326] Recently, investment chapters are increasingly being included in regional trade agreements (RTAs) entered into by several nations or blocs of nations, as governments prioritize the link between trade and investment.[2327]

The inclusion of investment provisions in RTAs, however, does offer a unique opportunity to craft the enabling environment necessary to spur green investment. RTAs often serve as "laboratories" in which new types of provisions are designed to address specific issues.[2328] For a variety of reasons, discussed later in this paper, the green finance market has been hindered such that capital has not been flowing sufficiently for the global community to reach the Paris Agreement goals. As such, RTAs can create the enabling environment for financial flows by protecting investments that meet ambitious climate goals consistent with the Paris Agreement while not limiting a state's ability to implement climate change measures, reducing risks associated with green investments, and increasing the flow of green investments towards developing countries and high-emitting industries.[2329] Ultimately, these reforms are critical to support the transition to Paris Agreement-aligned economies.[2330]

II. Existing Barriers to the Green Finance Market

As previously noted, the green finance market has developed significantly over the last decade into an important source of financing for climate-friendly projects, yet it continues to be underfinanced. Greater capital flows, particularly from private investors, will be critical to meet the Paris Agreement's goals. This Section identifies existing public and private barriers to bridging this green finance gap.

A. Public Barriers

As discussed above, international investment law is fragmented, with thousands of IIAs and RTAs prescribing different rights and obligations with respect to investment. On the whole, IIAs have not catalyzed the flow of green finance for three main reasons. First, IIAs and RTAs have historically been silent on climate change and green finance, failing to spur green finance because they do not address specific challenges associated with climate-friendly investments.[2331] Second, these agreements generally do not distinguish between desirable and non-desirable investments; rather they treat all investments, regardless of their environmental or social impact, as welcome and beneficial.[2332] Third, IIAs and RTAs can create chilling effects

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[2326] *Id.* There are currently more than 2,500 IIAs in effect around the world. *See* UNCTAD, "International Investment Agreement", (last accessed April 6, 2023), www.unctad.org/iia.

[2327] *See* UN Handbook, *supra* n.16, at 159 (citing OECD, "The Future of Investment Treaties", (last visited Nov. 17, 2022), https://www.oecd.org/investment/investment-policy/investment-treaties.htm#:~:text=Investment%20treaties%20are%20an%20important,investment%20provisions%20of%20trade%20agreements); WTO OMC, "Regional Trade Agreements Database" (last visited Nov. 17, 2022), https://rtais.wto.org/UI/PublicSearchByCrResult.aspx).

[2328] *See* World Trade Organization, Trade and Climate Change Information Brief, 6 (last accessed April 6, 2023), https://www.wto.org/english/news_e/news21_e/clim_03nov21-2_e.pdf.

[2329] *See* William Burke-White, Bloomberg Law, "A Green Investment Treaty Can Help Close the Climate Funding Gap" (Nov 22, 2022), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XF0VMAOK000000?bna_news_filter=us-law-week#jcite.

[2330] *See* UNCTAD, International Investment Treaty Regime and Climate Action (Sept. 2022), https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

[2331] Daniel Magraw et al., *Model Green Investment Treaty: International Investment and Climate Change*, 36 J. Int'l Arb. 95, 96 (2019).

[2332] Martin Dietrich Brauch et al, *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Aligning International Investment Law with the Urgent Need for Climate Change Action*, 36 J. Int'l Arb. 7, 18 (2019).

on participating state's policy space through limiting their "right to regulate" and maintaining the constant threat of investor-state arbitration.[2333] Ultimately, these characteristics have not led to the establishment of the enabling environment necessary to attract private capital for sustainable projects.

B. Private Barriers

A recent study by the Global Sustainability Institute examined climate-friendly investments and interviewed investors in the green finance market, ultimately producing a survey of reported private characteristics deterring green investment.[2334] The reported barriers can be grouped into three inter-related categories. First, the lack of an over-arching climate policy framework, including lack of consistent green taxonomy or industry-accepted standards, inhibits investment.[2335] Currently, there are no uniform criteria to identify which sectors or technologies are eligible to receive green financing, leaving investors hesitant to invest capital in "green" projects, as what constitutes "green" varies from country-to-country. Second, investors claimed that the lack of appropriate projects and investment opportunities deters investors from climate-related projects.[2336] Third, internal features of investment institutions, including slow uptake of environmental, social, and governance (ESG) strategies[2337] and a shortage of sustainability expertise,[2338] constrain investors.

III. IIAs and RTAs Treatment of Green Finance

While international investment law is governed by a fragmented set of IIAs and RTAs, the investment provisions contained in these agreements tend to be somewhat standardized. First, IIAs and investment chapters of RTAs define the scope of the agreement by defining key terms such as "investment," "investor," and "host-state."[2339] Traditionally, they focus on the promotion of all types of investment across economic sectors and, therefore, do not distinguish between low-carbon and high-carbon investments or between desirable or undesirable investments.[2340] Second, the agreements generally bind participating states to provide certain standards of non-discriminatory treatment to foreign investors from other contracting states, including National Treatment,[2341] Most-Favored Nation (MFN) treatment,[2342] Fair and Equitable Treatment (FET),[2343] and protection from expropriation.[2344]

[2333] *See* Fiona Marshall, International Institute for Sustainable Development, Climate Change and International Investment Agreements: Obstacles or Opportunities, 25 (2010), https://www.iisd.org/system/files/publications/bali_2_copenhagen_iias.pdf.

[2334] *See generally* Hafner et al, *Closing the Green Finance Gap – a Systems Perspective*, 34 Environmental Innovation and Societal Transitions 26-60 (2020).

[2335] *See id.* at 32.

[2336] *See id.*

[2337] *See id.* at 31 (Table 2).

[2338] *See* Acre Resources, "Finance Sector Skills Shortage Puts ESG in Focus" (May 6, 2021), https://www.acre.com/blog/2021/05/finance-sector-skills-shortage-puts-esg-in-focus?source=google.com.

[2339] *See* UN Handbook, *supra* n. 16, at 161.

[2340] *See* International Investment Treaty Regime, *supra* n. 21, at 1. *See also* Sustainable Investment Treaty, supra n. 23, at 18.

[2341] National treatment can be summarized as "an obligation to accord the foreign investor treatment no less favourable than it accords its own investors." *See* Climate Change and IIAs, supra n. 24, at 3.

[2342] MFN can be described as "an obligation to accord the foreign investor treatment n less favourable than it accords to investors from any other State." *Id.*

[2343] FET can be defined as "obligation to treat the investor fairly and equitably." *Id.*

[2344] Expropriation provisions generally provide "a commitment not to expropriate investments except for a public purpose and upon prompt and adequate compensation" *Id.*

Third, the agreements incorporate dispute-resolution mechanisms to resolve conflicts between host states and foreign investors, most commonly through investor-state dispute settlement (ISDS) under the rules of the International Centre or the Settlement of Investment Disputes (ICSID).[2345] Historically, these provisions have been relatively standardized, with the substance remaining consistent across agreements; however, some newer agreements significantly modify, or omit altogether, certain obligations such as expropriation or FET.[2346] This is a noteworthy shift in the investment law landscape to watch moving forward.

Since 2010, a growing share of international agreements contain general environmental and sustainability provisions or dedicated chapters.[2347] Recently, RTAs have started incorporating a broad range of environmental and social provisions into the agreements. The most common types of environmental provisions contained in newer RTAs include: clauses in preambles related to environmental protection; substantive provisions related to environmental protection; carve-outs for environmental protection from standards of treatment to safeguard state's policy space; compliance and implementation procedures for environmental protection; and environmental protection as a general exception.[2348] These provisions in RTAs are designed to minimize state-to-state disputes by granting Parties greater policy space to protect the environment.[2349] Similarly, recent IIAs have included sustainability provisions, although in a more limited sense,[2350] mostly through aspirational provisions in the preamble and public policy exception clauses.[2351] As IIAs govern investor-state relations, these provisions are ultimately intended to balance the rights of investors with the ability of states to regulate and protect the environment.[2352]

While the inclusion of environmental provisions is becoming more common, it is far less common for these agreements to include specific provisions related to climate change or green finance.[2353] Certain newer RTAs include preambular clauses that explicitly mention climate change and climate action.[2354] Further, some agreements have included substantive provisions on climate action, including provisions calling for cooperation on climate mitigation and adaption, safeguarding Parties' right to regulate the environment and address climate change, reaffirmations of Parties' commitment to multilateral environmental agreements (MEAs),

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[2345] *See* Megan Wells Sheffer, Bilateral Investment Treaties: A Friend or Foe to Human Rights, 39 Denv. J. Int'l L. & Pol'y 483 (2011), https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1189&hx0026;context=djilp].

[2346] *See, e.g.,* CETA, Article 8.10, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:22017A0114(01); Brazil's Cooperation and Facilitation Investment Agreements, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

[2347] *See* International Investment Treaty Regime, *supra* n. 21, at 1.

[2348] *Id.* at 4.

[2349] *See* UN Handbook, *supra* n.16, at 168.

[2350] Typically, IIAs do not include all of the types of provisions that RTAs include, as described above.

[2351] *See* UN Handbook, *supra* n.16, at 178. *See, e.g.,* Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, Zero Draft, Preamble, November 2021, https://www.tralac.org/documents/resources/cfta/4613-protocol-on-investmentto-the-agreement-establishing-the-afcfta-zero-draft-november-2021/file.html.

[2352] *Id.*

[2353] *Id.*

[2354] *Id.* at 9. *See also,* Turkey-United Kingdom FTA (2020), Preamble, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963851/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf ("Recognising the importance of sustainable development, including urgent action to protect the environment and combat climate change and its impacts . . . .").

non-abrogation from environmental standards to attract investment, and cooperation to facilitate investment in climate-friendly technologies.[2355]

IV. Model Agreement to Promote Green Investment

The inclusion of environmental provisions, described above, into RTAs, and, to a lesser extent, IIAs, is an important development in the shift towards a focus on sustainable development. However, to mobilize the necessary capital flow into climate-friendly investments to achieve the Paris Agreement's goals, international investment policies must be reformed to create the requisite enabling environment.[2356] International instruments must not just be consistent with, but rather must proactively advance, climate commitments under the Paris Agreement and UNFCC.[2357] Specifically, future agreements should reaffirm the commitments to the Paris Agreement, distinguish between high and low-emission investments, safeguard the ability of states to advance their energy transition through climate regulation, place greater obligations on investors to advance the emissions transition, and strengthen the mechanisms for regional coordination on climate action.[2358]

This section puts forward a framework ("Model Agreement"), incorporating emerging approaches from around the world, for how facilitate the flow of green finance in future international instruments. The commitments outlined in this section could be included in an RTA with an investment chapter or a stand-alone investment protocol, such as the Zero Draft of the AfCFTA Protocol on Investment.[2359] These international instruments have greater flexibility than traditional IIAs to incorporate environmental and climate change considerations into their provisions.[2360] Ultimately, the Model Agreement takes a whole-of-agreement approach, incorporating these ideals throughout the preamble, definitions, and general provisions.[2361]

A. Preamble

Though non-binding, the Preamble to international agreements is important to outline the Parties' goals for negotiating the international agreement and, under Article 31(1) of the Vienna Convention on the Law of Treaties, should be used to guide the interpretation of provisions in the agreement.[2362] Some agreements have begun incorporating environmental or sustainable development principles into the Preamble.[2363] This is critical to facilitating sustainable investment, because if the Preamble is silent on these considerations, then tribunals

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[2355] *See* International Investment Treaty Regime, supra n. 21, at 9.

[2356] *See* UNCTAD, International Investment Agreements and Climate Action Policy Brief, 1, https://unctad.org/system/files/non-official-document/IIED_UNCTAD_IIAs_climate_action.pdf.

[2357] *Id.*

[2358] *Id.*

[2359] *See generally* AfCFTA, *supra* n. 42.

[2360] *See* Trade and Climate Change Information Brief, *supra* n. 19, at 6.

[2361] This framework is not exhaustive; rather it merely illustrates *some* ways future agreements could be designed to promote sustainable investments.

[2362] *See* Climate Change and International Investment Agreements, supra n.24, at 61. *See Also*, Vienna Convention on the Law of Treaties, Art. 31(1), https://www.iisd.org/system/files/publications/bali_2_copenhagen_iias.pdf.

[2363] *See* International Institute for Sustainable Development (IISD), Sustainability Toolkit for Trade Negotiators (last accessed April 6, 2023), https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/1-why-is-sustainable-development-important-for-trade-and-investment-agreements/#jump. *See, e.g.,* AfCFTA, *supra* n. 42, at Preamble; Trans-Pacific Partnership Agreement (TPP), Preamble, https://www.dfat.gov.au/sites/default/files/preamble.pdf; Morocco-Nigeria BIT, Preamble, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download.

will focus exclusively on the typical stated objectives, including the promotion of investment, despite this running counter to a state's desire to promote only sustainable investments.[2364] A Model Agreement can fully reflect the Parties' commitment to facilitating green finance by (i) strengthening preambular language related to investment and sustainable development and (ii) expressly incorporating the Paris Agreement into the article.[2365]

First, the Preamble must recognize the important role that investment plays in sustainable development. For example, the recently-signed Morocco-Nigeria BIT states that the parties are "[seeking] to promote, encourage, and increase investment opportunities that enhance sustainable development within the territories of the state parties."[2366] The inclusion of similar provisions would ensure that the any agreement memorializes the importance of facilitating investment to advance sustainable development goals, not merely promoting all investment.

Additionally, the Preamble should highlight the Parties' intentions to preserve their right to regulate in order to protect the environment and fight climate change. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) incorporates and affirms the Preamble to the Trans-Pacific Partnership (TPP) which includes extensive references to such safeguarding of policy space:

> "The Parties to this agreement, resolving to:
> …RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals;
> …PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices;"[2367]

It is important to include such references to safeguarding policy space in the Preamble to make clear that the agreement calls for a balancing of the States' investment protection obligations with States' interests in taking the climate action necessary to meet the Paris Agreement's goals.[2368]

Second, the Preamble should explicitly reaffirm the Parties' commitments to the Paris Agreement. Certain agreements already in effect contain affirmations to specific international or human rights agreements in the Preamble.[2369] Doing so highlights the Parties' commitment

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[2364] *See* Climate Change and International Investment Agreements, *supra* n.24, at 61.

[2365] In the context of an investment chapter of a RTA, these considerations could be included in the Preamble to the RTA. Stand-alone investment protocols often include a separate Preamble to the agreement. *See* AfCFTA, *supra* n. 42, at Preamble.

[2366] *See* Morocco-Nigeria BIT, *supra* n. 49, at Preamble.

[2367] *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Preamble, https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf. *See also*, Trans-Pacific Partnership, Preamble, https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf.

[2368] *See* Climate Change and International Investment Agreements, *supra* n. 24 at 61.

[2369] *See, e.g.*, Energy Charter Treaty, Preamble, Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects"); Economic Partnership Agreement between the European Union and Japan, Preamble ("REAFFIRMING their commitment to the Charter of the United Nations and having regard to the principles articulated in the Universal Declaration of Human Rights"); and Turkey-United Kingdom Free Trade Agreement (2020), Preamble (""RECOGNISING the importance of sustainable development,

to upholding such international obligations and underscores that the Parties intend the agreement to support each States' sustainable development.[2370] As such, a Model Agreement should include specific reference to the Paris Agreement to similarly highlight the importance of the Parties' obligations to create Paris Agreement-aligned economies and clarify that all subsequent provisions in the agreement must be interpreted in the light of those commitments.

B. Definitions

A Model Agreement can further integrate environmental concerns and the emphasis on green investments through its Definitions Section. The Definitions Section outlines the scope of the agreement.[2371] In the investment context, whether an investment is afforded any legal rights or obligations (e.g., subject to dispute settlement) is determined by whether it is a covered investment under the definitions set forth in the agreement.[2372] As discussed above, IIAs and RTAs do not distinguish between desirable and undesirable investments; rather, they seek to liberalize the flow of all investments. As a result, investments in unsustainable assets, such as a fossil fuel plants, are afforded the same priority and legal protection as those in renewable energy. In order to transition to a Paris Agreement-aligned economy, a Model Agreement should provide only "climate-friendly" investments legal protections.[2373]

A Model Agreement could facilitate the flow of green finance by distinguishing between sustainable and unsustainable investments. First, the Model Agreement should incorporate sustainability into the basic definition of "investment," by including under the definition only those investments that "contribute to the sustainable development of the Party."[2374] This creates a baseline that all the investments covered under the agreement are positively contributing towards the three pillars of sustainable development.

A Model Agreement can further distinguish between climate-friendly and climate-harmful investments by creating a separate definition for "green investments." Such green investments could be defined specifically through characteristics of sustainability (e.g., carbon neutrality, investments that only use clean technologies, etc.)[2375] or through exhaustive schedules or annexes of covered investments, such as those in renewable energy sectors.[2376] Alternatively, the green investments could be defined through certification/classification mechanisms that give the Parties discretion over whether a specific investment qualifies as "green" or not.[2377] This would enable Parties to certify only those investments that contribute to achieving the

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including urgent action to protect the environment and combat climate change and its impacts, and the role of trade in pursuing these objectives, consistent with rules and principles under multilateral environmental agreements to which they are party, including the United Nations Framework Convention on Climate Change (UNFCCC)").

[2370] *See* Climate Change and International Investment Agreements, *supra* n. 24 at 61.

[2371] *See* IISD Toolkit, *supra* n. 49.

[2372] *Id.*

[2373] *See* Climate Change and International Investment Agreements, *supra* n. 24 at 74.

[2374] *See* Morocco-Nigeria BIT, *supra* n. 49, at Art. 1 (defining "investment" as "an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration."

[2375] *See* Climate Change and International Investment Agreements, *supra* n. 24, at 32.

[2376] *See* International Investment Treaty Regime, *supra* n. 21 at 16; *see also*, Sustainable Investment Treaty, *supra* n. 23, at 10-11.

[2377] *See* International Investment Treaty Regime, *supra* 2, at 16. *See also*, Paula Henin et al, *Innovating International Investment Agreements: A Proposed Green Investment Protocol for Climate Change Mitigation and Adaptation*, 36 J. Int'l Arb. 37, 46-48 (2019).

Paris Agreement taking into account their transition trajectory.[2378] However investment is defined,[2379] the Model Agreement could provide investment protections, or a greater level of protection, only to those investments that qualify as a "green investment," or, alternatively, could provide certain incentives for the establishment and maintenance of these investments.[2380]

Including sustainability considerations into the definitions of "investment" and "green investments," combined with the preambular reaffirmation of the Parties' commitments under Art. 2.1 of the Paris Agreement, would help ensure that the definition and any substantive obligations would be interpreted in light of the Parties' obligation to mobilize necessary finance to transition to a Paris Agreement-aligned economy.[2381]

C. General Provisions

Investment Chapters included in RTAs and investment protocols outline the substantive rights and obligations towards investment. As such, it is critical that the Model Agreement be intentionally drafted to create an environment that facilitates the flow of green finance. This section discusses how the negotiators can draft the Objectives, Host State Obligations and Flexibilities, and Investor Obligations provisions to support the flow of sustainable finance.

1. Objectives

Similar to the Preamble, the Objectives Article outlines the goals of the Parties in crafting the agreement and will serve to guide the interpretation of the agreement.[2382] Therefore, the Objectives Article must reaffirm the Parties' commitment to encouraging and facilitating investments that are consistent with the transition to a lower-emission economy in-line with the goals of the Paris Agreement.[2383] The recent Economic Partnership Agreement (EPA) between the EU and Japan is an example of an RTA that incorporates similar language. The agreement states:

> "4. The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as "UNFCCC"), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement.
>
> 5. Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is party, provided that such measures are not applied in a manner that would constitute a means of

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[2378] *See* International Investment Treaty Regime, *supra* n. 21, at 16.
[2379] This Paper does not advocate for one approach over another, as all approaches advance the transition towards a more sustainable economy by distinguishing between climate-friendly and climate-harmful investments.
[2380] *See* Climate Change and International Investment Agreements, *supra* n. 24 at 76.
[2381] *See* Henin et al, *supra* n. 61, at 48.
[2382] *See* Climate Change and International Investment Agreements, *supra* n. 24, at 61.
[2383] *See* Henin et al, *supra* n. 61, at 41 n. 22.

arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade."[2384]

The Model Agreement should follow the EU/Japan's lead in incorporating language that expressly cross-referencing the Paris Agreement's obligations. Though not binding the Parties to the Paris Agreement's goals, this would ensure the agreement will be interpreted in light of these international environmental principles,[2385] such that if there is a conflict between the investment and the Paris Agreement, the Paris Agreement's obligation to mobilize capital flows will take precedent.[2386]

2. Host State Obligations and Flexibilities

The transition towards a Paris Agreement-aligned economy can further be supported by obligations on the host state to ensure adequate measures are in place to promote and facilitate the flow of sustainable investments. As a baseline, a Model Agreement should follow newer agreements by including provisions that prevent the Parties from lowering their environmental standards to attract new investment.[2387] Typically, these non-abrogation provisions only refer to "environmental" laws, so the Model Agreement could strengthen the obligation by including reference to "climate-related" laws or regulations.[2388]

Further, a Model Agreement should commit the Parties to cooperating to promote and facilitate investment in climate change mitigation and emission transition projects.[2389] Some RTAs establish institutional mechanisms, including Joint Committees and various sub-committees to implement the agreement and ensure coordination between the Parties.[2390] A Model Agreement should establish a sub-committee dedicated to monitoring the implementation of sustainability and green investment-related provisions. Specifically, the sub-committee's responsibilities could include cooperating to identify and promote low-carbon technologies and emissions transition projects,[2391] reviewing EIAs and certifying green investments, interacting with civil society to promote the flow of green finance,[2392] sharing information on regulatory conditions and opportunities for investment.[2393] Though these provisions would unlikely be binding on the Parties, they would serve as important bases of cooperation to encourage and facilitate the flow of capital towards green investment projects within the Parties' territories.[2394]

[2384] *See* Economic Partnership Agreement between the European Union and Japan (2018), Art. 16.4, https://eur-lex.europa.eu/resource.html?uri=cellar:cf1c4c42-4321-11e8-a9f4-01aa75ed71a1.0001.02/DOC_2&format=PDF#page=186.

[2385] *Id.*

[2386] *See* Magraw et al, *supra* n. 22, at 104.

[2387] *See* Climate Change and International Investment Agreements, *supra* n.24 at 63. *See also* EU-CARIFORUM Economic Partnership Agreement (2008), Art. 73, http://publications.europa.eu/resource/cellar/f5c1c99f-9d19-452b-b0b0-ed690a53dd5f.0006.05/DOC_1.

[2388] *Id.*

[2389] *See, e.g.,* EU-Japan EPA, Art. 16.3 ("shall strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement"); Morocco-Nigeria BIT, Art. 6(1).

[2390] *See* International Investment Treaty Regime, *supra* n. 21 at 7. *See also*, EU-Japan EPA, Art. 22.1-22.3 (establishing a Joint Committee to implement the EPA and ten subcommittees).

[2391] *See* EU-Japan EPA, Art. 16.12(h).

[2392] *See* Morocco-Nigeria BIT, Art. 4.

[2393] *Id.*

[2394] *See* Henin et al, *supra* n. 61 at 50.

Finally, a Model Agreement should contain a provision protecting the States' policy space to address environmental concerns, including the transition to a Paris Agreement-aligned economy. Currently, some treaties seek to protect States' policy space by incorporating or referencing Article XX of the General Agreement on Tariffs and Trade (GATT) that provides general exceptions to States' obligations, as long as certain conditions are met.[2395] However, this is not enough; rather, the Model Agreement should affirm the State's independent right to regulate in order to protect the environment.[2396] This way, the Model Agreement makes clear that the States' right to regulate is a pre-existing right, not an exception, in an effort to reconcile investment protection and environmental considerations.[2397]

3. Investor Obligations

Investors must take greater responsibility in advancing the transition to a low-carbon, Paris Agreement-aligned economy. Including investor obligations in IIAs and RTAs has been a controversial topic, because these agreements are negotiated and agreed upon by states and creating obligations on the private sector would involve non-state actors.[2398] However, there is precedent in international jurisprudence for such private sector obligations, as the Maritime Labor Convention imposes responsibilities on private ship owners,[2399] and newer investment agreements have increasingly created obligations on investors under standards of corporate social responsibility (CSR) and responsible business conduct.[2400] The AfCFTA Draft Zero is a notable example for the expansive obligations it places on investors related to human rights and labor standards,[2401] anti-corruption,[2402] and environmental protection.[2403] The breadth of these obligations is remarkable as they touch on subjects otherwise not covered in the AfCFTA's substantive provisions.[2404] However, these obligations, as currently drafted, are insufficient as they omit any obligations related to climate action or facilitating the transition to a Paris Agreement-aligned economy.

With this backdrop, a Model Agreement could ensure that investors take more responsibility towards meeting the Paris Agreement's goals through a number of potential provisions crafted to reflect business best practices and regulatory requirements.[2405] First, the agreement should require compliance with domestic law regarding environmental protection and climate action to qualify for the agreement's legal protections.[2406] Such a provision would

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[2395] *See* AfCFTA, *supra* n. 42, at 21 ("[i]n accordance with customary international law and other general principles of international law, each State Party has the right to regulate, including to take regulatory or other measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives"). *See also*, IISD Toolkit, *supra* n.49.

[2396] *See, e.g.*, EU-Canada CETA (2016), Chapter 8, Art. 8.9.

[2397] *See* IISD Toolkit, *supra* n.49.

[2398] *See* IISD Toolkit, *supra* n. 49.

[2399] *See* Maritime Labour Convention (2006), Title 4, Regulation 4.2, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C186.

[2400] *See* Canada-Mongolia BIT (2016), Art. 14, https://jusmundi.com/en/document/treaty/en-canada-mongolia-bit-2016-canada-mongolia-bit-2016-thursday-8th-september-2016; Morocco-Nigeria BIT (2016), Art. 4. *See also*, International Investment Treaty Regime, *supra* n. 21 at 11.

[2401] *See* AfCFTA, *supra* n. 42, at Art. 29.

[2402] *Id.* at Art 33.

[2403] *Id.* at Art. 30.

[2404] *See* UN Handbook, *supra* n. 16, at 179.

[2405] *See* Magraw et al, *supra* n. 22. at 100.

[2406] *See* Climate Change and International Investment Agreement, *supra* n.24, at 63. *See also* Netherlands-Costa Rica BIT (1999), Art. 10, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1049/costa-rica---netherlands-bit-1999-.

exclude non-conforming investments from the rights under the agreement, most notably dispute settlement, which could disincentivize further climate-harmful investments.[2407] However, this approach is only effective if the host state country has robust environmental and climate laws.[2408] Therefore, a more comprehensive approach would be to include specific obligations related to sustainable development and climate action.[2409] This would create a floor of environmental standards in case there are gaps in domestic law.[2410] Such obligations could include:

- Performing an environmental impact assessment of the investment prior to establishment,[2411] including climate-change associated risks, greenhouse gas (GHG) emissions projections, and contributions to an emissions-reduction transition pathway;[2412]
- Maintaining an environmental management and improvement system, consistent with international standards, for their investment;[2413] and
- Reporting, on an ongoing basis, the investment's environmental impact, including GHG emissions levels.

It is important that these obligations be mandatory (i.e., provisions should be drafted with "shall" rather than "may" language) to ensure that the appropriate steps are being taken. Non-compliance with such requirements should exclude such investments from protection under the agreement. Such private investor obligations are necessary to transition investments and business operations to align with the Paris Agreement.

V. Conclusion

The world will not meet the Paris Agreement's 2°C goal without the mobilization of massive amounts of capital to finance the transition to lower-emission economies. Despite growth in the market, climate finance remains severely underfinanced, which threatens meaningful progress in the fight against climate change. For sustainable investment to be appropriately scaled up and broadened, the international investment agreements that govern it must be redesigned. This paper puts forward a Model Agreement that highlights ways in which investment provisions could be designed not just to avoid impeding, but rather to affirmatively catalyze the necessary investments towards a more sustainable future.

[2407] *See* IISD Toolkit, *supra* n. 49.
[2408] *Id.*
[2409] *See* International Investment Treaty Regime, *supra* n. 21, at 16.
[2410] *See* IISD Toolkit, *supra* n. 49.
[2411] *See, e.g.*, AfCFTA, *supra* n. 42, at Art. 30; Morocco-Nigeria BIT, Art. 13. *See also*, South African Development Community (SADC) Model Bilateral Investment Treaty Template (2012), Art. 13, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.
[2412] *See* Magraw, *supra* n. 22, at 100.
[2413] *See, e.g.*, AfCFTA, *supra* n.42, at Art. 30; SADC Model BIT, *supra* n.89, at Art. 14.

CHAPTER 27: INCENTIVIZING SUSTAINABLE CLIMATE DEVELOPMENT AND SUSTAINABLE DEBT THROUGH NOVEL APPROACHES TO TRADE AND INVESTMENT AGREEMENTS

LUKE ROWE*

Abstract

Many developing countries suffer from multiple and simultaneous challenges which impact on their ability to hold debt sustainably while also needing to finance new adaptation development in response to climate change. These challenges will only escalate as the effects of climate change become more severe. A stark example of these compounding pressures is in the Pacific Islands, where already heavily indebted countries with difficult economic development contexts are facing a growing climate financing gap.

This paper explores novel approaches to sustainable development and the coverage of debt in trade and investment agreements, and explores whether the two areas of sustainable development and sustainable debt could be better integrated in such agreements. It argues that sustainable debt considerations could be integrated into trade and investment agreements through a mechanism for concessional financing for climate mitigation and adaptation projects, and proposes incentives for bilateral lenders within the agreement framework, including preferential products and services treatment associated with the climate projects, and recognition of commercial opportunities lost.

Introduction

The convergence of climate change adaptation needs and debt sustainability is becoming an increasingly significant issue for many of the countries most affected by climate change. As climates change, the viability of economies is threatened, putting extra pressures on national budgets. Meanwhile, countries must borrow to finance climate adaptation, creating a downward spiral of higher fiscal gaps from lower income and higher expenses. This has been described as a 'looming debt crisis' for the developing world,[2414] threatening sustainable development and the prospects of many countries achieving the 2030 Sustainable Development Goals.[2415]

The connection between trade, investment and debt can be fraught with difficulty in this context. In theory, trade and investment should help developing countries grow their economies and so grow out of the debt they incur as part of that process. Trade should be playing a role in access to goods such as food supplies, renewable energy and climate related goods and technologies.[2416] But this dynamic does not proceed smoothly for many countries.

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[2414] 'Debt Relief for a Green & Inclusive Recovery: Securing Private Sector Participation and Policy Space for Sustainable Development' (*Global Development Policy Center*, Jun. 28, 2021) <https://www.bu.edu/gdp/2021/06/28/debt-relief-for-a-green-inclusive-recovery-securing-private-sector-participation-and-policy-space-for-sustainable-development/> accessed May 12, 2023.

[2415] Ibid; 'Sustainable Development Goals' (United Nations Department of Economic and Social Affairs) <https://sdgs.un.org/goals> accessed May 15, 2023.

[2416] Carolyn Deere Birkbeck, 'Trade ministers must pull their weight on climate action' (*Chatham House*, Oct. 8, 2021) <https://www.chathamhouse.org/2021/10/trade-ministers-must-pull-their-weight-climate-action> accessed May 12, 2023.

Add in the challenges of climate and the debt increase during the COVID-19 pandemic, and many developing countries face a precarious situation. A stark example of this is in the Pacific Islands, where small, highly dispersed populations and limited domestic markets can make trade and development challenging,[2417] before even taking into account climate considerations. Despite the difficulty, various trade related approaches have been suggested to help address this convergence of issues. Some suggested approaches include domestic trade policy measures, trade-related financing mechanisms, and collaborative frameworks on trade in support of climate adaptation.[2418]

Yet, more needs to be done to address the connection between trade, investment and debt sustainability and its role in incentivizing climate mitigation and adaptation projects. Trade and investment have become increasingly intertwined in recent years through regional trade and investment agreements, with a push towards framing agreements for sustainable development. Debt has been the topic of numerous initiatives outside of trade and investment agreements. However, there has been relatively little to connect the two areas.

This paper explores the need for sustainable climate mitigation and adaptation projects in developing countries, the need for sustainable debt, and ways to connect the two. The paper will proceed in three sections. It explores first, the connection between climate change, trade pressures and debt sustainability through a brief case study on the Pacific Islands; second, novel approaches to sustainable development in trade and investment agreements and coverage of debt in trade and investment agreements; and third, how sustainable climate projects and sustainable debt can be connected. It proposes that a mechanism for concessional financing for climate mitigation and adaptation projects could be incorporated into trade and investment agreements to help debt taken on for climate project reasons remain sustainable. It also proposes incentives for bilateral lenders within the agreement framework, including preferential products and services treatment associated with the climate projects, and recognition of commercial opportunities lost. While incorporating such a mechanism in trade and investment agreements may be complicated, it provides an opportunity to incentivize the sustainable climate projects which countries cannot afford to sideline for fear of unsustainable debt.

I. When Climate Change, Trade Pressures and Debt Sustainability Converge – Pacific Islands Case Study

A. Climate change and trade in the Pacific

The Pacific Islands are stark example of where spiraling debt dynamics can play out as climate change impacts worsen. The climate threat to the Pacific is existential and immediate. The first paragraph of the Boe Declaration, a statement of the Pacific Island Forum, states

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[2417] Scott Roger, 'Debt Landscape and Fiscal Management Issues in Pacific Small Island Developing States' (*United Nations Economic and Social Commission for Asia and the Pacific*, Apr. 2022), <https://www.unescap.org/sites/default/d8files/event-documents/2022%20Debt%20Conference%20Background%20Paper_Scott%20Roger_4.4.22.pdf> accessed May 15, 2023, para 17.

[2418] Andreas Oeschger, 'More Than Just a Plan B: Climate Change Adaptation and Potential Role of Trade' (*International Institute for Sustainable Development*, Oct. 26, 2022) <https://sdg.iisd.org/commentary/policy-briefs/more-than-just-a-plan-b-climate-change-adaptation-and-potential-role-of-trade/> accessed May 12, 2023; Julie Dekens, Anne Hammill, David Hoffmann, Christophe Bellmann, 'Leveraging Trade to Support Climate Adaptation in Developing Countries' (*International Institute for Sustainable Development*, Oct. 2021), <https://www.iisd.org/system/files/2021-10/trade-support-climate-adaptation-developing-countries.pdf> accessed May 12, 2023; See 'The Pacific Resilience Facility' (*Pacific Islands Forum*) <https://www.forumsec.org/prf/> accessed May 15, 2023, as an example of financing facility.

that "climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific".[2419] Fiji, and other island nations, are already relocating settlements due to climate change and making systemic plans for long term relocation efforts.[2420] In November 2022, Vanuatu's Former Prime Minister declared:

> "we are no longer measuring this emergency only in tonnes of carbon emissions or the global warming by degrees of Celsius, but also in human rights violations and lives lost... Believe me when I say 'The Pacific is now out of time'."[2421]

Many approaches are being taken to combat climate change, such as the 2017 Pacific Resilience Partnership, the 2021 Pacific Islands Forum Leaders' Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, and even through trade, such as the Pacific Aid-for-Trade Strategy as part of the WTO-led Aid-for-Trade initiative,[2422] but the challenges are far reaching.

Climate change is also affecting the Pacific Islands' food security and ability to trade in produce. Much of the Pacific is dependent on fishing for domestic consumption, jobs and government revenue. For some Pacific countries, fishing is between 4 and 84% of all government revenue.[2423] Yet warming oceans are changing the distribution of tuna stocks,[2424] the main fishing product, which threatens to reduce income as fish stocks move into international waters, rather than remaining in exclusive economic zones where island nations can earn income from commercial fishing licenses.[2425] Catch reductions are estimated to be up to 20% in 10 Pacific Island nations, causing a collective loss of $140 million annually by 2050, and as much as 17% of annual government revenue for some nations or territories.[2426]

B. Debt sustainability challenges

Pacific Island nations face significant debt sustainability issues related to climate change and an associated increase in natural disasters.[2427] The International Monetary Fund (IMF) calculates that the impact of natural disasters alone for poorer Pacific Island nations is between

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[2419] 'Boe Declaration on Regional Security' (*Pacific Islands Forum*) <https://www.forumsec.org/2018/09/05/boe-declaration-on-regional-security/> accessed May 5, 2023.

[2420] Kate Lyons, 'How to move a country: Fiji's radical plan to escape rising sea levels' (*The Guardian*, Nov. 8, 2022) <https://www.theguardian.com/environment/2022/nov/08/how-to-move-a-country-fiji-radical-plan-escape-rising-seas-climate-crisis> accessed May 12, 2023; Anna Naupa, Murray Ackman and Patrick Tuimalealiifano, 'Boe Declaration: navigating an uncertain Pacific' (*Lowy Institute: The Interpreter*, Oct. 3, 2018) <https://www.lowyinstitute.org/the-interpreter/boe-declaration-navigating-uncertain-pacific> accessed May 12, 2023.

[2421] Former Prime Minister Bob Loughman Weibur, 'The Pacific is now out of time, Vanuatu's former PM' (*Pasifika Environews*, Nov. 17, 2022) <https://pasifika.news/2022/11/the-pacific-is-now-out-of-time-vanuatus-former-pm/> accessed May 12, 2023.

[2422] Oeschger (n 5); See also Frances Anggadi, 'Establishment, Notification, and Maintenance: The Package of State Practice at the Heart of the Pacific Islands Forum Declaration on Preserving Maritime Zones' (2022) (53)1 Ocean Development & International Law 19.

[2423] 'Sustaining Pacific Island Fisheries' (*Conservation International*) <https://www.conservation.org/projects/sustaining-pacific-island-fisheries> accessed May 15, 2023.

[2424] Ibid.

[2425] Kiley Price, 'Shifting tuna populations could trigger ;climate justice issue: study' (*Conservation International*, Jul. 29, 2021) <https://www.conservation.org/blog/shifting-tuna-populations-could-trigger-climate-justice-issue-study> accessed May 5, 2023.

[2426] Ibid.

[2427] Roger (n 4) para 17.

14 and 21 percent of GDP.[2428] Pacific Island countries also face a climate finance gap of almost $1 billion annually for the region ranging from 6.5 to 9 percent of GDP.[2429]

Pacific Island countries are vulnerable to issues of debt distress even without the addition of climate challenges and natural disasters, given their small size and unique development challenges.[2430] A 2022 report by the UN's Economic and Social Commission for Asia and the Pacific (ESCAP) for the Pacific Regional Debt Conference in April 2022 assessed only two Pacific Small Island Developing States as not at high risk of debt distress.[2431] But even they are still reliant on grant support,[2432] and remain vulnerable to external macroeconomic shocks and the effects of both future natural disasters and ongoing infrastructure needs from past natural disasters.[2433]

Many countries throughout the world, including in the Pacific Islands, are paying more in debt repayments than towards necessary social programs such as education and health, let alone financing more developments to adapt to climate change.[2434] While much funding for such development comes from multilateral development banks (MDBs), funding also comes bilaterally, ranging from concessional to market rates. In order to prevent debt sustainability issues from spiraling, developing nations in the Pacific and elsewhere need concessional financing, but may struggle to find MDB partners for infrastructure development to meet all their needs as MDBs have shifted away from infrastructure lending. They will likely need to supplement MDB lending with bilateral and less concessional lending.

C. Infrastructure projects in response to climate change

There are a wide variety of infrastructure projects required for the Pacific to adapt to climate change. While much of climate adaptation for the Pacific Islands will not necessarily involve infrastructure projects, for example different forms of coastal management, there will still likely be significant need for external financing of infrastructure projects. This might involve projects as simple as sea walls, to upgraded technologies in buildings, re-building

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[2428] Ibid, referring to Lee, Zhang, and Nguyen, 'The Economic Impact of Natural Disasters in Pacific Island Countries: Adaptation and Preparedness, IMF Working Paper 18/108' (*International Monetary Fund*, 2018), and Nishizawa, Roger, and Zhang, 'Fiscal Buffers for Natural Disasters in Pacific Island Countries, IMF Working Paper 19/152' (*International Monetary Fund*, 2019).

[2429] Manal Fouad, Natalija Novta, Gemma Preston, Todd Schneider, and Sureni Weerathunga, 'Unlocking Access to Climate Finance for Pacific Island Countries (DP/2021/020)' (*International Monetary Fund*, 2011) <https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2021/09/23/Unlocking-Access-to-Climate-Finance-for-Pacific-Islands-Countries-464709> accessed May 12, 2023 page 7; Manal Fouad et al., 'Unlocking Access to Climate Finance for Pacific Island Countries' (*IMF Public Financial Management Blog*, Sep. 30, 2021) <https://blog-pfm.imf.org/en/pfmblog/2021/09/unlocking-access-to-climate-finance-for-pacific-islands-countries> accessed May 12, 2023.

[2430] Roland Rajah, Alexandre Dayant and Jonathan Pryke, 'Ocean of debt? Belt and Road and debt diplomacy in the Pacific' (*Lowy Institute*, Oct 21., 2019) <https://www.lowyinstitute.org/publications/ocean-debt-belt-road-debt-diplomacy-pacific> accessed May 12, 2023.

[2431] Roger (n 43) para 16.

[2432] 'Debt Sustainability Analysis (Vanuatu)' (*Asian Development Bank*, Nov. 2020) <https://www.adb.org/sites/default/files/linked-documents/54179-001-sd-01.pdf> accessed May 5, 2023 paras 7-8.

[2433] For example: 'Vanuatu: Staff Report for the 2021 Article IV Consultation—Debt Sustainability Analysis' (*International Monetary Fund*, Sep. 14, 2021), https://www.elibrary.imf.org/view/journals/002/2021/208/article-A003-en.xml#A003tab01> accessed May 12, 2023, paras 13-14.

[2434] 'Protecting and Transforming Social Spending for Inclusive Recoveries – COVID-19 and the Looming Debt Crisis' (*UNICEF Office of Research*, Apr. 2021) <https://www.unicef-irc.org/publications/pdf/Social-spending-series_COVID-19-and-the-looming-debt-crisis.pdf> accessed May 12, 2023 – in the Pacific, for example, Papua New Guinea spends more on debt repayment than on aggregate social spending (see p 16).

towns, upgrading key infrastructure such as wharves and ports as sea levels rise, and power stations or other non-coastal key infrastructure as natural disasters become more frequent and severe.

An example might be in energy infrastructure. Many countries in the Pacific have favorable conditions for hydropower, and some have potential for solar or wind power development.[2435] Pacific Islands do not have a large emissions footprint, but importing fossil fuels for energy is, for the reasons mentioned above, an expensive proposition for small and dispersed populations. Renewable energy projects would therefore have a positive fiscal effect, requiring less foreign exchange to purchase fossil fuels and providing greater future energy security. Such projects have already begun. The Asian Development Bank (ADB) helped Samoa to build new hydropower plants and to restore hydropower plants severely damaged by Cyclone Evan in 2012,[2436] partnering with the European Union and New Zealand through the Clean Energy Fund, providing loans and grants for the projects.[2437]

II. Implementing and Incentivizing Sustainable Projects and Sustainable Debt Through Trade Agreements

Sustainability has always been a necessary feature of the global economic framework, and though it has often been pushed to the sidelines, it is becoming an increasingly prominent feature of novel approaches to trade and investment agreements. This section will consider how multilateral and regional frameworks are adopting novel approaches to address sustainable development on the one hand, and debt on the other, through regional and bilateral trade and investment agreements.

A. Sustainable development in trade

A widely accepted definition of sustainable development, from the Brundtland Report, is: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[2438] Three pillars of sustainable development have become widely accepted: economic, social and environmental.[2439] Clearly issues of climate mitigation, adaptation and debt touch on the environment and the economy, but they also are central to the social element of development. As the Bruntland definition alludes to, there is an intergenerational equity element to development.[2440] Future generations must not have their right to live and work compromised by the action or inaction of current generations. Further, current generations must not have their rights compromised by their governments having too

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[2435] 'The Pacific Islands: The Push for Renewable Energy' (*Asian Development Bank,* May 1, 2019) <https://www.adb.org/results/pacific-islands-push-renewable-energy> accessed May 10, 2023.

[2436] 'Expanding Hydropower in Samoa' (*Asian Development Bank*) <https://www.adb.org/multimedia/partnership-report2021/stories/expanding-hydropower-in-samoa/> accessed May 5, 2023.

[2437] Ibid.

[2438] Thabo Fiona Khumalo, 'Sustainable development and international economic law in Africa' (2020) 24 Law, Democracy and Development, Section 2; Bruntland et al., 'Report of the World Commission on Environment and Development: Our Common Future' (*United Nations*, Mar. 20, 1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed May 7 2023.

[2439] Khumalo (n 25) section 2; see also 'United Nations Conference on Environment & Development, Rio de Janerio, Agenda 21' (*United Nations Sustainable Development*, Jun. 1992) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed May 12, 2023.

[2440] See 'Intergenerational Equity' (*UN Department of Economic and Social Affairs*) <https://publicadministration.un.org/en/Intergovernmental-Support/Committee-of-Experts-on-Public-Administration/Governance-principles/Addressing-common-governance-challenges/Intergenerational-equity> accessed May 15, 2023.

little to spend on basic services because of financing needs and debt repayment. The economic aspect of sustainable development therefore has very strong connections to environmental and social development when it comes to issues of unsustainable debt.

The approach to sustainable development in trade has shifted dramatically since the creation of the modern trading system post-WWII. While the WTO preamble recognizes the role of trade in promoting sustainable development,[2441] the traditional approach to trade and development revolved around reciprocity and non-discrimination, removal of barriers to trade and liberalization, with access to developed country markets being seen as a way of driving growth in developing countries.[2442] Drawbacks in this approach led to the establishment of Part IV of the GATT in 1965, which included a best endeavors obligation to promote development and developing country interests, and assertion of non-reciprocity obligations for developing countries. The 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause) provided the legal basis for further developments like the Generalized System of Preferences, special and differential treatment (SD&T) provisions under the General Agreement on Tariffs and Trade, and for regional or global preferential agreements. In 1995, with the establishment of the World Trade Organization, developing countries took on expanded commitments as part of the single undertaking, constraining flexibility of national economic interests and development priorities.[2443] While the multilateral system continues to develop its approach to sustainable development, new normative approaches in regional trade agreements and new generation investment agreements provide new, and often more flexible, opportunities to address sustainable development in climate mitigation and adaptation.[2444]

The growing legal interconnection between trade and investment presents opportunities to link these disciplines with sustainable development. This is particularly important with United Nations Conference on Trade and Development projecting that global crises will result in fewer investment projects on climate change mitigation and adaptation, rather than the increase that is needed.[2445] The UN SDGs are playing a role in framing the sustainability of trade and investment, for example in target 17.5 which addresses investment in least developed countries. The UN has also proposed an approach to financing the SDGs through the Financing for Sustainable Development Report. Through developments such as these:

> "An approach is emerging that balances the needs of governments and investors with environmental, social, and corporate governance (ESG) implications of foreign

[2441] Marrakesh Agreement Establishing the World Trade Organization (adopted Apr. 1, 1994, entered into force Jun. 1, 1995) 1867 UNTS 154 preamble: "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."

[2442] Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How? (Economic Research and Statistics Division' (*WTO*, Jan. 2004) 3-4.

[2443] Ibid 4-6.

[2444] Khumalo (n 25) section 2.1.

[2445] Katrin Kuhlmann, 'Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements' (*UN Economic and Social Commission for Asia and the Pacific*, 2023) 166.

investments, linking trade and investment rules with sustainable development considerations."[2446]

More regional trade agreements are beginning to include investment provisions which require sustainability considerations. Some examples are the Zero Draft of the African Continental Free Trade Area (AfCFTA) Protocol on Investment (AfCFTA Investment Protocol), the 2016 Morocco-Nigeria Bilateral Investment Treaty (Morocco-Nigeria BIT) and Economic Community of West African States (ECOWAS) Common Investment Code (ECOWIC).[2447]

The AfCFTA Investment Protocol includes numerous references to sustainable development in its preambular language.[2448] It also requires stakeholder coordination to provide technical assistance (Art. 41), promotes domestic development and local content (Art. 25), facilitates transfer of technology (Art. 26).[2449] It also links investment facilitation to sustainable development (Art. 7): "Each State Party shall, subject to its respective laws and regulations, facilitate investments that contribute to sustainable development."[2450] The ECOWIC includes binding obligations on investors regarding certain environmental obligations,[2451] encourages promotion of internationally-recognized standards[2452] and requires public impact assessments.[2453] The Morocco-Nigeria Bilateral Investment Treaty (BIT) requires investors to conduct social and environmental impact assessments,[2454] and requires that investors uphold human rights, abide by the ILO Declaration on Fundamental Principles of Rights of Work, 1998, and not circumvent "international environmental, labor and human rights obligations to which the host state and/or home state are Parties."[2455] Some agreements

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[2446] Ibid.

[2447] Ibid 167-169, 178-180.

[2448] For example, "DESIRING to promote within State Parties an overall attractive investment climate conducive to… long-term economic growth and contributes effectively to social development and the fight against poverty": 'Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, Zero Draft' (*African Continental Free Trade Area*, Nov. 2021) <https://www.tralac.org/documents/resources/cfta/4613-protocol-on-investment-to-the-agreement-establishing-the-afcfta-zero-draft-november-2021/file.html> preamble (AfCFTA Investment Protocol).

[2449] Kuhlmann (n 32) 181.

[2450] AfCFTA Investment Protocol art 7.

[2451] Katrin Kuhlmann, 'Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements' (*UN Economic and Social Commission for Asia and the Pacific*, 2023) 180.

[2452] For example, "(1) Investors… shall… (a) carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices of the Member States and other multilateral agreements"; Members "shall encourage investors… to adopt as part of their responsible business conduct policies, internationally-recognised environmental standards and guidelines." 'ECOWAS Common Investment Code' (Jul. 2018), <https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf> accessed May 10, 2023 art 27.

[2453] Ibid: for example, "(1) Investors… shall… (b) undertake pre-investment environmental and social impact assessments… (d) make the investor environmental and social impact assessments to the general public and accessible to the affected local communities".

[2454] For example, Article 14 requires that "(1) Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments… (2) Investors or the investment shall conduct a social impact assessment of the potential investment": 'Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria' (Dec. 3, 2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> accessed May 11, 2023 art 14 (Morocco-Nigeria BIT).

[2455] Ibid art 18.

cover issues such as governance and anti-corruption,[2456] corporate social responsibility,[2457] gender[2458] and digital inclusion.[2459]

Other agreements embed cooperation and collaboration on issues of sustainable development into trade and investment agreements, for examples in areas of labor,[2460] capacity building and technical assistance, governance and gender.[2461] Some of these cooperation provisions even establish institutional structures such as councils or committees to facilitate such cooperation.[2462]

Together, these provisions embed sustainable development into trade and investment agreements through requiring stakeholder coordination, promoting domestic development and technology transfer, providing environmental policy space, making impact assessments public and protecting labor rights. However, they do not directly address debt.

B. Sustainable debt in trade

While sustainable development being integrated into trade and investment agreements does not directly address debt, neither do debt provisions in trade and investment agreements directly address sustainability. While trade and investment agreements do include provisions on debt, the focus is on flexibility of payments or restructuring, both of which are most relevant at stages where debt has already become a significant burden on a country.

At a multilateral level, the IMF is tasked with making finances available in the case of balance of payments needs in order to "shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members."[2463] The IMF will lend to countries in balance of payments need when: (1) a country has sound economic fundamentals but needs financing due to external shocks;[2464] (2) when a country is in a balance of payments need and a program is implemented to adjust the economy to keep debt

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[2456] Morocco-Nigeria BIT art 17.

[2457] 'Canada-Israel Free Trade Agreement' (2018) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng&_ga=2.123933578.183317895.1684271439-1802771348.1684271439> accessed May 12, 2023 art 16.4 (*Canada-Israel FTA*).

[2458] 'Treaty Establishing the Common Market for Eastern and Southern Africa [COMESA]' (1993), <https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf> accessed May 12, 2023 art 154.

[2459] 'Digital Economy Partnership Agreement' (Jun. 11, 2020) <https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf> accessed May 12, 2023 art 11.1.

[2460] For example, the Korea-Australia Regional Trade Agreement (RTA), includes a cooperation provision on trade-related aspects of labor: 'Korea-Australia Free Trade Agreement' (2014) <https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/chapter-17-labour> accessed May 12, 2023 art 17.5; the United States-Peru Free Trade Agreement (FTA), establishes a labor affairs council: 'United States-Peru Free Trade Agreement' (Feb. 1, 2009) <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> accessed May 12, 2023 art 17.5.

[2461] AfCFTA: AfCFTA Investment Protocol art 41;[2461] the EU-Central American Association Agreement: 'Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other' (Jun. 29, 2012), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22012A1215(01)> accessed May 12, 2023 art 13; and the Canada-Israel FTA: Canada-Israel FTA art 13.3.

[2462] For example, Canada-Chile FTA: 'Canada-Chile Free Trade Agreement' (1997) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng&_ga=2.205640214.443568279.1684165809-1741899084.1684165809> art N BIS-04 (1997); Canada-Israel FTA: Canada-Israel FTA art 13.4.

[2463] 'Articles of Agreement' (*International Monetary Fund*, Jul. 22, 1944) <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> art I(v)-(iv) (IMF Articles).

[2464] 'The Flexible Credit Line' (*International Monetary Fund*, Mar. 2023) <https://www.imf.org/en/About/Factsheets/Sheets/2023/Flexible-Credit-Line-FCL> accessed May 12, 2023.

sustainable, or (3) when a country is in a balance of payments need and a program includes debt restructuring to bring the debt back from being unsustainable.[2465] Restructuring debt requires collaboration between the IMF, the country in question, and its creditors, who can be other governments, MDBs or private creditors.

Restructuring official debt from other countries is often conducted through the Paris Club, an informal group of countries who collaborate on debt issues associated with countries they lend to.[2466] Notably the Paris Club does not include newer lenders such as China or India. However, the Group of 20 (G20) countries, which does include China and India, have agreed to a framework for dealing with debt in developing countries, called the G20 Common Framework for Debt Treatments beyond the DSSI,[2467] though it has yet to prove effective.

As in the case of developments in approaches to sustainable development, regional trade and investment agreements have begun to include debt related provisions, but more focused on flexibility of payments rather than sustainability, though those concepts are connected. Some agreements cover this by way of addressing government debt or balance of payments issues.[2468]

In terms of government debt, the United States-Mexico-Canada Agreement states that any government debt restructured is outside of the scope of arbitral claims under the agreement if the restructuring occurs in accordance with the debt instrument's terms and governing law.[2469] The 2004 Canadian Model Foreign Investment Promotion and Protection Agreement achieves a similar outcome by explicitly carving out government debt securities from the definition of 'investment'.[2470] This does not mean that a government will not be subject to creditor contractual claims under the debt instrument itself, only that those claims will not be litigated under the terms of the investment agreement. The Dominican Republic-Central America Free Trade Agreement provides that rescheduling of a Central American Party or Dominican Republic debts owed to the United States or to creditors are not subject to the investment provisions of the agreement other than most-favored nation (MFN) and national treatment (NT) obligations.[2471] This effectively means that any rescheduling cannot be more preferential for another party vis-à-vis the U.S., or more preferential for domestic creditors than external creditors.

[2465] IMF Articles art V section 3; 'Guidelines on Conditionality' (*International Monetary Fund*, Sep. 25, 2002) <https://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf> accessed May 12, 2023; 'Debt Sustainability Analysis' (*International Monetary Fund*, Jul. 29, 2017) <https://www.imf.org/external/pubs/ft/dsa/> accessed May 12, 2023.

[2466] 'Paris Club' (*Paris Club*) <https://clubdeparis.org/> accessed May 15, 2023.

[2467] 'Statement, Extraordinary G20 Finance Ministers and Central Bank Governors' Meeting November 13, 2020' (*G20*, Nov. 13, 2020) <https://www.imf.org/-/media/Files/News/news-articles/english-extraordinary-g20-fmcbg-statement-november-13.ashx> accessed May 12, 2023; DSSI being the Debt Service Suspension Initiative established during the COVID-19 pandemic, designed to suspend debt owed by developing countries. The initiative lapsed in December 2021: 'Debt Service Suspension Initiative' (*The World Bank*, Mar. 10, 2022) <https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative> accessed May 12, 2023.

[2468] Kuhlmann (n 32) 181.

[2469] Ibid 187; 'Agreement between the United States of America, the United Mexican States, and Canada' (Jul. 1, 2020), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf> accessed May 12, 2023 ch. 14, appendix 2.

[2470] 'Canadian Model Foreign Investment Promotion and Protection Agreement' (2004) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download> accessed May 10, 2023 section A, article 1, definition of 'investment' (V)(iii).

[2471] 'Dominican Republic-Central America Free Trade Agreement' (2006) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf> annex 10-A (2006).

Agreements that deal with balance of payments issues include the French Model BIT and the 2002 Japan-Korea BIT, which respectively allow for safeguards on capital movements which cause serious disequilibrium[2472] or for creditor protection.[2473] Under the Mexico-UAE BIT, the parties can prevent a transfer for similar reasons[2474] and in a case of "series balance of payments difficulty or of a threat thereof", can temporarily restrict transfers provided that the party implements a program in line with the International Monetary Fund Articles of Agreement.[2475] The PACER Plus agreement has similar provisions.[2476] In the Asia-Pacific context, the Association of Southeast Asian Nations 'plus 3'[2477] established the Chiang Mai Initiative after the Asian Financial Crisis to address balance of payments or short-term liquidity difficulties of members through a network of bilateral debt swap agreements between members.[2478] While these debt provisions give some flexibility in a balance of payments or when debt begins to be unsustainable or needs restructuring, they do not prevent the build up of problematic debt in the first place.

Using a different approach, the AfCFTA Adjustment Fund provides an interesting model for concessional financing in the context of trade agreements. The Fund was established by the AfCFTA Secretariat, African Export-Import Bank, and African Union Commission and consists of three funds: a Bank Fund, General Fund and Credit Fund.[2479] The Base Fund provides contributions and technical assistance to member countries to address tariff revenue losses, and the credit fund will mobilize commercial funding. The General Fund, however, is intended to mobilize concessional financing for development of trade-enabling infrastructure. While the General Fund is a partnership and not contained within the text of a trade agreement itself, it does provide a mechanism through which concessional finance can be accessed in connection with a trade agreement. The example of the General Fund provides an interesting framework from which to consider whether sustainable trade and development can be further

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[2472] For example, "When, in exceptional circumstances, capital movements from or to third countries cause or threaten to cause a serious disequilibrium to its balance of payments, each Contracting Party may temporarily apply safeguard measures to the transfers": 'France Model Bilateral Investment Treaty' (2006) <https://edit.wti.org/document/show/4dd30824-38f3-4e5e-9d05-79a9d1bfb422> art 6.

[2473] For example, parties can delay financial transfers for certain reasons, including bankruptcy and protection of creditors reasons: 'Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment' (Mar. 22, 2002), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1727/download> art 12(3)(a).

[2474] 'Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments' (Jan. 19, 2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5359/download> art 7(2).

[2475] Ibid.

[2476] 'Pacific Agreement on Closer Economic Relations Plus' (2020) <https://pacerplus.org/resources/public/pacer-plus-agreement/download/0pya46evmbq9/PACER-Plus-consolidated-legal-text.pdf> ch 11 art 3.

[2477] The members consist of the original ASEAN members plus the People's Republic of China, Japan and the Republic of Korea: 'ASEAN Plus Three' (ASEAN Plus Three) <https://aseanplusthree.asean.org/> accessed May 15, 2023.

[2478] 'Overview of the CMIM' (*ASEAN+3 Macroeconomic Research Office*) <https://www.amro-asia.org/about-amro/amro-and-the-cmim/#overview> accessed May 15, 2023.

[2479] 'AfCFTA Secretariat and Afreximbank Sign AfCFTA Adjustment Fund Host Country Agreement with the Republic of Rwanda' (*Afreximbank*, Mar. 13, 2023) <https://www.afreximbank.com/afcfta-secretariat-and-afreximbank-sign-afcfta-adjustment-fund-host-country-agreement-with-the-republic-of-rwanda/> accessed Sep. 27, 2023.

integrated with sustainable debt through concessional financing in trade and investment agreements themselves.

III. Connecting Sustainable Climate Projects with Sustainable Debt

Providing incentives for sustainable debt to accompany sustainable development is crucial if developing countries are going to adapt to climate change without sacrificing their fiscal space, so necessary for basic social programs like education and health, to debt repayments. This final section explores possibilities for tying sustainable development and sustainable debt together through integration of sustainable lending in future trade and investment agreements and a concessional lending mechanism for climate related projects, along with the incentives that could bring lenders to the table.

A. Including sustainable debt provision in trade and investment agreements

While there is no conceptual issue with including debt in trade and investment agreements – as noted above there are already provisions on debt included in some agreements – it is important to note first that the more finance and debt elements are brought into such agreements, the more complex and challenging negotiating those agreements become. This is the case especially when it is difficult to foresee all the future effects of climate change.

To begin with, concessional financing in trade and investment must be at the forefront of governments' minds when they consider entering a trade agreement. The issue demands response at the highest levels of governments and so priorities in attempts to integrate economies should reflect this, particularly when wealthier countries are entering agreements with developing countries.

A good place to start might be for relevant government departments to include sustainable debt in negotiating mandates for such agreements.[2480] Including sustainable debt in negotiating mandates would at least force negotiators from both or all sides of the agreement to discuss how an agreement could contribute to sustainability of debt. The negotiators themselves, those with long experience of such negotiations, will have a sense of how and where sustainable debt might fit within the agreement, whether it would take on its own section within an investment chapter or sit within a section regarding sustainability, or be incorporated throughout the agreement. There are also various options for how hard or soft the commitment might be. For example, a clause on sustainable debt might use aspirational language, designed more to put the issue on the table for the countries, or more hard language, such as a provision which provides for a quid pro quo arrangement for concessional financing of climate projects, which will be explored below.

As noted above, the partnership between the AfCFTA and African Exim Bank in the General Fund provides an interesting model for considering how concessional finance could be mobilized for climate projects within a trade area. Negotiators for a trade agreement could craft the agreement with such a partnership with an Exim bank in mind, or could craft an agreement with a fund for concessional financing for climate projects built into it. While this does not directly establish a market incentive for concessional rates, it might help get concessional finance flowing while the market incentive is established.

Another mechanism to support either a concessional financing fund or to help facilitate market concessional funding within a trade area is to establish a mechanism for collaboration

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[2480] 'A Sustainability Toolkit for Trade Negotiators' (*International Institute for Sustainable Development*, 2016) <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/6-process/6-1-negotiating-mandate/> accessed Sep. 27, 2023.

as part of a trade and investment agreement. As noted above, some agreements establish institutional structures such as committees or councils to collaborate on issues related to sustainable development, like in the United States-Peru FTA[2481] and Canada-Chile FTA.[2482] For example, the Canada-Chile FTA establishes a Trade and Gender Committee composed of representatives of each government to facilitate cooperation, including by meeting at least annually, inviting experts to meetings, reviewing implementation, and developing mechanisms to report publicly on the activities of the committee. A similar mechanism could be established for directing concessional lending for climate projects within a trade area. This could help to oversee soft or hard commitments on concessional lending built into an agreement and help to connect the supply and demand side within the trading area. It would also help communication on local contexts for climate mitigation and adaptation projects and on appropriate levels of debt within the trade and investment area.

B. One option for a hard commitment

Finally, this section sets out one option for a commitment on concessional lending in a trade and investment agreement.

1. A concessional lending clause for climate projects

One approach would be to negotiate for a maximum interest rate on lending conducted within the framework of the trade or investment agreement, in much the same way that countries negotiate to lower their tariff rates on goods and services. This could also extend to other elements of the debt, for example grace periods and timeframes for repayment. The principles of MFN and NT on the one hand, or of SD&T on the other, could be applied to debt as well in an effort to lower lending rates and account for developing country needs. This would complement the later stage debt provisions already in trade and investment agreements by making them less likely to be necessary.

Though it would be helpful to developing countries to apply this to all debt, which would help give room for climate related spending, applying this concessional lending clause to all lending within the agreement though would present difficulties. Using MFN to incentivize lowering borrowing rates too much may pose some risk for some countries. As the market typically prices risk of default with higher or lower interest rates, capping the maximum rate might induce what economists describe as 'moral hazard.'[2483] A more realistic approach would be to apply the same concept of lowering the maximum lending rate in the trade or investment area, but only in relation to climate mitigation and adaptation projects, in recognition of their existential importance. For example, in a hypothetical agreement between the U.S. and Pacific Island nations, the agreement might state that the interest on any bilateral lending between countries to the agreement (which will typically be from the larger developed country to the smaller developing country) not exceed a certain percentage if it is for a climate mitigation or adaptation project. It might also provide extended timeframes for initial payment grace periods and the timeframe for repayments. The agreement could also set a formal procedure for

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[2481] 'United States-Peru Free Trade Agreement' (Feb. 1, 2009) <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> art 17.5.

[2482] 'Canada-Chile Free Trade Agreement' (1997), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng&_ga=2.205640214.443568279.1684165809-1741899084.1684165809> art N BIS-04.

[2483] For example, when Greece entered the EU it found itself in a position to borrow money at the same rate as Germany, borrowed too much and caused a Europe-wide financial crisis when it could not repay. See Sean Hagan, 'The Eurozone Crisis: Defining a Path to Recovery' (2015) 63 University of Kansas Law Review 1067-1075.

cancelling debt over a certain level or proportion of gross domestic product to keep debt in check in the medium term.

2. Incentives for lenders: Preferential products and services treatment associated with climate projects, and recognition of commercial opportunities lost

While developed countries have caused the climate crisis that is fueling the developing world's adaptation needs and debt issues, experience dictates that some incentives are necessary to get developed countries with the capacity to lend to do so at less than market rates. Seeking to negotiate a cap on lending interest rates, either for the whole agreement or only in relation to climate projects, will inevitably result in a push for commercial advantages for lenders in other areas of the agreement.

First, the agreement could provide for deeper commercial advantages through lower tariffs than would otherwise be granted, even under a regional trade agreement, which seeks to go beyond rates at the multilateral level. This could involve both goods and services. If the lending rate was capped only for climate related projects, the deeper tariff cuts could also be limited to products and services associated with those projects. The agreement might also provide that the lender could choose a contractor from their own nation to complete the project, which often happens as a matter of practice anyway, so long as it complies with other best practices, like transparent governance of the project, community consultation, local labor inclusion, and technology transfer. These incentives certainly have drawbacks, and have represented practices that developing countries have pushed back on, but are nevertheless options if appropriate guardrails are put in place, and as incentives to provide other commercial and social benefits to the developing country through sustainable climate projects and sustainable debt.

Second, lending at concessional rather than commercial rates is a significant benefit that the lending country gives to the recipient country, and an indication that it is willing to bear some commercial cost to help the recipient country adapt to climate change while not placing a heavy debt repayment burden on them. Though the debt repayment burden and therefore the possibility of a debt repayment default in the future has been reduced, it does not eliminate it. Further, just because one country might provide concessional lending, it does not prevent the recipient country from taking out non-concessional financing for other projects from sources outside of the trade or investment agreement, which if ill-advised may nonetheless put it in debt distress.

A trade or investment agreement could provide that if lending for a climate project within the framework of the agreement ultimately needs to be restructured, the amount of the debt reduction should be recognized as a contribution (though separately categorized) to the loss and damage fund proposed at COP27, or an equivalent loss and damage fund under the trade or investment agreement itself, or to a regional fund. For example, in the Pacific context, The Pacific Resilience Facility[2484] has been established to finance climate adaptation projects.[2485] While no new money would actually go into such a fund, recognizing the amount restructured could be seen as a kind of *ex-post* contribution. The amount of the debt canceled is funds

[2484] 'The Pacific Resilience Facility' (*Pacific Islands Forum*) <https://www.forumsec.org/prf/> accessed May 15, 2023.

[2485] Luke Fletcher, 'Don't saddle Pacific Islands with disaster debt' (*The Interpreter: The Lowy Institute*, Jun. 1, 2022) <https://www.lowyinstitute.org/the-interpreter/don-t-saddle-pacific-islands-disaster-debt> accessed May 14, 2023.

foregone by that country in seeking to promote climate adaptation projects, which is in line with the purposes of the proposed loss and damage fund (or other similar funds). In a similar way, another approach would be to recognize the commercial cost of the lower lending rate (effectively the difference between market rate and concessional rate) as a contribution to a climate fund, in recognition of commercial opportunities lost to finance climate development. If a lending country is able to say that they contributed a certain amount through debt reductions, it at least gives it an opportunity to present itself to the wider international community as taking steps to finance climate development but to also reduce debt burdens, which may help with incentives to keep lending at concessional rates – creating a market for sustainable climate projects financed by sustainable debt would ultimately be the aim of such an agreement.

Conclusion

Many developing countries face growing challenges with respect to climate change adaptation and debt sustainability, and numerous initiatives and approaches have been implemented to address these challenges separately. Many novel approaches to these issues are being incorporated into regional trade and investment agreements, placing a greater emphasis on sustainable development, inclusion and equity, and many of these novel approaches can help frame sustainable climate mitigation and adaptation projects. Yet the connection between sustainable climate project development and sustainable debt in regional trade and investment agreements is underexplored. If concessional lending rates could be incorporated into regional trade and investment agreements, at least for climate related lending, this could help prevent the build-up of unsustainable debt while also facilitating the completion of sustainable climate projects that are context specific, with a bottom-up approach facilitated through the sustainable development aspects of the trade or investment agreement. Lending countries, however, would likely need incentives to sign on to such agreements. This might be achieved through preferential tariff or services treatment in relation to projects funded concessionally, and / or through public recognition of the commercial opportunities foregone by the lender to provide concessional financing for such projects.

The ultimate aim of these incentives is to create a market with a trade or investment agreement for sustainable climate projects while maintaining sustainable debt. While further integrating debt and finance into trade and investment agreements would add significant complexity, the outcome could be worth the effort. By connecting sustainable debt with climate adaptation, developing countries can prepare for their adaptation needs without further sacrificing their fiscal space to debt repayments, reflecting the need to respond to the existential threat of climate change while freeing up finances necessary for other aspects of social and sustainable development.

CHAPTER 28: AN UNINVITED COMMODITY: SYNERGIZING INTERNATIONAL TRADE AND ENVIRONMENTAL AGREEMENTS TO COMBAT THE SPREAD OF INVASIVE ALIEN SPECIES

OLIVIA KREFT*

Abstract

This paper focuses on the unintentional spread of "invasive alien species" (IAS) through international trade and whether pre-existing trade agreements can be utilized to effectively curb the spread of IAS. Part I gives an introduction and overview to how international trade and the spread of IAS intersect. In doing this, I first look at how IAS threaten biodiversity worldwide and hamper the achievement of 10 of the United Nations Sustainable Development Goals (SDGs), particularly for developing nations dependent on agricultural sectors. I then look at how globalization and international trade have exacerbated the threat of IAS, outlining the challenges existing at two stages of the IAS invasion process: the transportation of IAS and establishment of IAS across international boundaries.

Part II then looks at the current legal landscape surrounding IAS prevention. In terms of trade agreements, I look in-depth at the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the standard-setting bodies of the SPS Agreement: The International Plant Protection Convention (IPPC) and The World Organization for Animal Health (OIE). In terms of environmental agreements, I look at the United Nations Convention on Biological Diversity (CBD) and The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Finally, Part III looks at opportunities and challenges for effective implementation of IAS prevention measures through trade agreements. First, I look at gaps, challenges, and opportunities for synergy and harmonization between the SPS Agreement, IPPC, OIE, and the CBD. Second, I look to issues of capacity building for developing nations in implementing these potential legal solutions, outlining opportunities to increase the flexibility of the SPS Agreement's risk assessment and scientific finding requirement as well as highlighting opportunities to utilize pre-existing risk assessment mechanisms.

Ultimately, I find that while the spread of IAS is one of the most serious, albeit overlooked, ecological and social problems of our time, it has the potential to be mitigated through international trade agreements.

I. Introduction to International Trade and the Threat of Invasive Species

Since humans began trading and traveling across borders, invasive species have hitchhiked alongside us on our journeys and wreaked havoc in the process. From the spread of the black rat throughout medieval Europe via Roman trading routes, to the explosion of invasive zebra mussels in the Great Lakes in the 20th century via ballast water systems, invasive species have asserted themselves as uninvited trade commodities throughout the millennium.[2486] However, fast-paced globalization has resulted in unprecedented levels of trade, transport, travel, and

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[2486] *See, e.g.*, New research reveals how the black rat colonised Europe in the Roman and Medieval periods, University of York, (May 3, 2022), https://www.york.ac.uk/news-and-events/news/2022/research/black-rat-europe/#:~:text=Black%20rats%20were%20widespread%20across,rat%20species%20in%20temperate%20Europe; *See, e.g.*, Heather A. Triezenberg, James Roche, Invasive species and global trade: Finding the Connections, Michigan Sea Grant, Michigan State University, (Sept. 1, 2015), https://www.canr.msu.edu/news/invasive_species_and_global_trade_triezen15.

tourism across borders, facilitating the introduction and spread of invasive species like never before.[2487] Invasive species and international trade have become so intertwined that a country's level of imports is now the strongest predictor of the number of invasive species within their borders.[2488]

Invasive species, formally known as "invasive alien species" (IAS), are defined by the International Union for Conservation of Nature (IUCN) as "animals, plants or other organisms that are introduced by humans, either intentionally or accidentally, into places outside of their natural range, negatively impacting native biodiversity, ecosystem services or human economy and well-being."[2489] While trade inherently relates to both the intentional *and* accidental spread of IAS, there is currently no multilateral trade agreement that addresses the issue. In this paper, I will look to how concepts in international trade agreements and international environmental agreements can be harmonized to create potentially powerful tools in helping countries, particularly those still developing, confront the growing ecological, economic, and social concerns presented by IAS.

A. IAS Threatening Biodiversity and United Nations Sustainable Development Goals

While IAS have become an intersectional threat – affecting food systems, economies, and human health – they are particularly known for their negative impacts on biodiversity, having contributed to nearly 40% of all animal extinctions since the 17th century.[2490] Plant species are also at risk as invasive plants often exhibit rapid growth, prolific seed production, and efficient dispersal abilities, allowing landscapes to be completely altered in relatively short growth cycles.[2491] IAS also pose immense risks to sustainable development, reflected in the United Nations (UN) listing the prevention of IAS invasions as Target 15.8 under Sustainable Development Goal (SDG) 15: "Life on Land."[2492] While IAS are not mentioned directly in other SDGs, the IUCN has estimated that the spread of IAS threatens the attainment of 10 of the 17 UN SDGs, including SDG 2: Zero Hunger, where IAS severely threaten agricultural production and food security, particularly in less developed nations.[2493] In terms of relative impact, countries in Sub-Saharan Africa are the most vulnerable to IAS threats to their agricultural sectors.[2494] One species of note is the 'fall armyworm,' a moth indigenous to the Americas that has spread rapidly across the African continent and has the potential to damage

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[2487] *See e.g.,* Philip E. Hulme, *Unwelcome exchange: International trade as a direct and indirect driver of biological invasions worldwide*, One Earth, Volume 4, Issue 5, pg. 670, (2021).

[2488] *See* Michael I. Westphal, Michael Browne, Kathy MacKinnon, Ian Noble, *The link between international trade and the global distribution of invasive alien species*, Biological Invasions, Issue 10, pg. 391, (2008).

[2489] *See* Invasive Alien Species, Our Work, IUCN.org, (2023), https://www.iucn.org/our-work/topic/invasive-alien-species.

[2490] *See* What are Invasive Alien Species? Convention on Biological Diversity, (2009), https://www.cbd.int/idb/2009/about/what/.

[2491] *See* Reuben P. Keller, Charles Perrings, International Policy Options for Reducing the Environmental Impacts of Invasive Species, BioScience, Vol. 61, No. 12, pg. 1005, (December 2011).

[2492] *See* Target 15.8, Goal 15, UN Sustainable Development Goals, https://sdgs.un.org/goals/goal15.

[2493] *See* Invasive Alien Species and Sustainable Development, IUCN Issues Brief, (July 2018), https://www.iucn.org/resources/issues-brief/invasive-alien-species-and-sustainable-development.
See "The 17 Goals", United Nations Sustainable Development Goals, Department of Economic and Social Affairs, https://sdgs.un.org/goals.

[2494] *See* Dean R. Paini, Andy W. Sheppard, David C. Cook, Paul J. De Barro, Susan P. Worner , and Matthew B. Thomas, *Global threat to agriculture from invasive species*, Proceedings of the National Academy of Sciences of the United States of America, Vol. 113, No. 27, pg. 7575, (July 5, 2016).

53% of annual maize production in Africa's 12 top maize producing countries.[2495] With maize accounting for almost half the calories and protein consumed in eastern and southern Africa, the armyworm poses a serious threat to food security in the region.[2496]

General economic prosperity and poverty levels are also impacted by the spread of IAS, implicating SDG 1: No Poverty and SDG 8: Decent Work and Economic Growth. While there has yet to be an evaluation of the total cost to agricultural crop production from IAS across all countries, forest and crop production losses from invasive insects and pathogens cost the United States an estimated $40 billion per year.[2497] Across the African continent, the aforementioned 'fall armyworm' has the potential to cause maize yield losses estimated between $2.5 billion and $6.2 billion per year.[2498] Many of these countries fall under the UN's Least Developed Country (LDC) identification and tend to be more dependent on natural resources, healthy ecosystems, eco-tourism, and agriculture for their livelihoods, making IAS a severe threat to their overall economies.[2499] Research by the Center for Agriculture and Biosciences International (CABI) found that just five invasive species are causing up to $1.1 billion in losses to smallholder farmers every year across just six eastern African countries: Ethiopia, Kenya, Malawi, Rwanda, Tanzania, and Uganda.[2500] Other economic burdens include the cost of herbicides and pesticides to control the spread of IAS or the costs of cleaning industrial facilities and infrastructure that become overrun by certain species, implicating SDG 8: Decent Work and Economic Growth and SDG 9: Industry, Innovation and Infrastructure.[2501] Explosions of IAS have been known to block irrigation canals and hydroelectric projects, as well as hinder transportation across aquatic ecosystems.[2502] In Lake Victoria, water hyacinth blooms now cover 12,000 hectares and have blocked shipping pathways and access to ports, as well as halted fishing activities in many areas, ultimately impacting 40 million people.[2503]

The spread of IAS also has serious implications for attaining SDG 3: Good Health and Well-Being, as disease transmitting IAS spread across borders. While native to Southeast Asia, the Asian-tiger mosquito has spread pervasively around the world, particularly in the Americas.[2504] This species of mosquito is a common vector of several human diseases, such as dengue fever and West Nile virus, heightening the risk for infection around the world.[2505] Also many aquatic invasive plant species, like the water hyacinth, provide for increased standing water, making them prime habitats for mosquitos.[2506]

Finally, on a social and cultural front, women and children are disproportionately affected by the spread of IAS as many invasive plant species are varieties of weeds. In many LDCs,

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[2495] *See* Invasive Species: The hidden threat to sustainable development, CABI, (2019), pg. 9, https://www.invasive-species.org/wp-content/uploads/sites/2/2019/02/Invasive-Species-The-hidden-threat-to-sustainable-development.pdf.

[2496] *See* Grote et al., *Food Security and the Dynamics of Wheat and Maize Value Chains in Africa and Asia, Frontiers in Sustainable Food Systems*, Volume 4, (February 2021).

[2497] *See* Paini et al., supra note 9, at 7577.

[2498] *See* CABI, supra note 10, at 6.

[2499] *See* Paini et al., supra note 9, at 7577.

[2500] *See* CABI, supra note 10, at 9.

[2501] *See* Keller and Perrings, supra note 6.

[2502] *See* CABI, supra note 10, at 7.

[2503] *See* IUCN Issues Brief, supra note 8; See also Eseza Kateregga and Thomas Sterner, *Indicators for an invasive species: Water hyacinths in Lake Victoria*, Ecological Indicators, Issue 7, pg. 362, (2007).

[2504] *See* Benedict et al., *Spread of the Tiger: Global Risk of Invasion by the Mosquito Aedes albopictus*, National Center for Biotechnology Information, National Library of Medicine, 76-85, (2008).

[2505] *See* IUCN Issues Brief, supra note 8.

[2506] *See* CABI, supra note 10, at 7.

weeding is still primarily done by hand by women and children, leading to increased time spent in the fields and less time for children to attend school or women to be more substantially involved in economic or political activities.[2507] Further, IAS can be so damaging to farmland that it can cause communities to abandon their agricultural land which can be particularly damaging for indigenous communities who have traditional and cultural connections to the land itself.[2508] Ultimately, sustainable development problems such as this will only be exacerbated by climate change as climatic zones shift and potential ranges for IAS expand.[2509]

B. How International Trade Spreads IAS Around the Globe

In order to become successful biological invaders, species must cross a series of spatial, environmental, and biological barriers.[2510] This is ultimately a three-stage process that includes 1) the transportation of the species across borders, 2) the establishment of the species in the new environment, and 3) the eventual spread throughout and beyond the initially invaded ecosystem.[2511] Once a species reaches stage three, there is often little to do to eradicate the problem before it becomes uncontrollable. Thus, it is important to evaluate methods of bolstering prevention methods for the first two stages and to determine what drives the initial transporting of IAS and their lack of detection at the establishment stage.

1. Stage One: Transportation of IAS

While IAS can be transported through tourism or through the intentional wildlife trade, the majority of IAS are moved across borders *unintentionally* as a byproduct of international trade.[2512] This occurs in various ways, including parasitic IAS being transported on the bodies of traded livestock, IAS hiding as stow-aways in cargo containers, or even IAS clinging directly on and in transport vessels, through soil on the exterior of cargo containers or water in the ballast tanks of ships.[2513]

As global trade has become more wide-reaching and fast-paced, the distance and the speed in which species can travel has increased, providing an increasing number of new host-ecosystems in which an IAS can thrive.[2514] Several major trade and globalization developments have accelerated the spread of IAS in recent decades, including the increased speed of transport by sea, new trade routes, changes to ballast technology, the use of refrigeration, containerization, air transport, and the development of global communication technologies.[2515] The decrease in transit times for globally traded goods – often tied to the growth of intermodal shipping containers that can be transported seamlessly between ships, trucks and trains – have also vastly improved IAS's chance of survival while in transit.[2516] Further, market demands for faster shipping times, particularly from purchases via the

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[2507] *See id.*

[2508] *See* Keller and Perrings, supra note 6.

[2509] *See* Mick N. Clout and Peter A. Williams, *Invasive Species Management: A Handbook of Principles and Techniques*, Techniques in Ecology and Conservation, pg. 4, (2009).

[2510] *See id.*

[2511] *See id.*

[2512] *See* Charles Perrings, Stas Burgiel, Mark Lonsdale, Harold Mooney, Mark Williamson, *International cooperation in the solution to trade-related invasive species risk*, Ann NY Acad. Sci, 1195, pg. 200, (2010).

[2513] *See* Hulme, supra note 2, at 666.

[2514] *See* Clare Shine, Overview of existing international/regional mechanisms to ban or restrict trade in potentially invasive alien species, Convention on the Conservation of European Wildlife and Natural Habitats, Council of Europe Standing Committee, pg. 5, (2006).

[2515] *See* Hulme, supra note 2, at 667.

[2516] *See* Shine, supra note 29, at 6.

internet, have resulted in essential phytosanitary measures and checkpoints being skirted in the name of meeting deadlines.[2517]

2. Stage Two: Establishment of IAS

The second key challenge that emerges from the vast increase in globally traded goods is the inability of governments to properly inspect imports at the border, allowing IAS to make it to the second stage: entry and establishment. Given their ability to wreak havoc on various economic sectors, the resources needed to prevent the spread of IAS are generally lower than the resources needed for eradication, containment, and long-term control.[2518] Therefore, early detection through effective risk assessments and increased border control measures, such as quarantine and emergency plans, are key in stopping the spread of IAS.[2519] However, given the overburdened state of global trade hubs, early detection can prove to be one of the biggest challenges for states.

While the spread of IAS is an intersectional problem that is fueled by multiple sources, including climate change and intentional introduction by humans, the growth of international trade is by far the largest and most imbedded cause of the phenomenon.[2520] With the potential to negatively affect the achievement of SDGs in every nation, with particular concern for developing nations, the problem of IAS calls for international cooperation and coordination through multilateral legal agreements.[2521]

II. The Current Legal Landscape: International Trade and International Environmental Law Agreements Related to IAS Prevention

Just as IAS cross over a multitude of international borders, the current landscape of international law regarding IAS crosses over a wide array of disciplines. From infectious disease prevention to wildlife conservation to ballast water management laws, there exists a mosaic of over fifty internationally agreed legal instruments that now relate either directly or indirectly to IAS.[2522] This mix of agreements, some binding and some non-binding, creates immense challenges for coordinated action against the spread of IAS. However, it also represents an exciting opportunity to harness the power of pre-existing legal agreements to bring the concept of IAS prevention more concretely into the international trade legal regime.

A. Trade Law Mechanisms for Preventing the Spread of IAS

Even though international trade is widely regarded as the leading spreader of IAS around the globe, there is no explicit mention of IAS in any of the major international trade agreements. Regardless, there are still promising legal frameworks within international trade law that could be bolstered and effectively applied to stop the spread of IAS. Here, I will be focusing on the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which is generally considered the agreement

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[2517] *See* Hulme, supra note 2, at 669.

[2518] *See* Glynn Maynard and David Nowell, Chapter 1, *Biosecurity and quarantine for preventing invasive species*, pg. 2, (within Clout and Williams, Invasive Species Management: A Handbook of Principles and Techniques), (2009).

[2519] *See* International Trade and Invasive Alien Species, Standards and Trade Development Facility (STDF), pg. 9, (June 2013), https://standardsfacility.org/sites/default/files/STDF_IAS_EN_0.pdf; *See also* Tracy Holcombe and Thomas J. Stohlgren, Chapter 3, *Detection and early warning of invasive species*, pg. 36, (within Clout and Williams, Invasive Species Management: A Handbook of Principles and Techniques), (2009).

[2520] *See* Hulme, supra note 2, at 676.

[2521] *See* Perrings et al., supra note 27, at 198.

[2522] *See* Maj De Poorter, Chapter 8, *International legal instruments and frameworks for invasive species,* pg. 111, (within Clout and Williams, Invasive Species Management: A Handbook of Principles and Techniques), (2009).

most fit to address IAS and has the most potential for synergy with international environmental laws. While the WTO and the international trade regime operate under the main goal of facilitating free trade, there is a grounding focus, as outlined in the Preamble to the Marrakesh Agreement, on balancing the expansion of trade with sustainable development and efforts to protect and preserve the environment.[2523] Since most activities that lead to the introduction of IAS, like global trade, have legitimate economic and social exceptions, legal instruments aimed at combating IAS must strike a balance between preserving socio-economic goals and creating effective safeguards for the environment and public health.[2524]

1. WTO Agreement on the Application of Sanitary and Phytosanitary Measures

Enacted in 1995, the SPS Agreement provides the international framework for national measures to protect human, animal or plant health and life from risks arising from the entry, establishment or spread of pests, diseases, or disease-causing organisms where these may directly or indirectly affect international trade.[2525] The Agreement creates a balance between trade liberalization and the inherent sovereign rights of nations to enact measures for protecting human, animal, plant life and public health.[2526] This balance is seen in the requirement that SPS measures are not exercised arbitrarily or for a purely protectionist purpose and that their adoption must be based on scientific findings and risk assessments.[2527]

While the SPS Agreement does not explicitly mention IAS, curbing the spread of IAS arguably falls under the definition of SPS measures. Annex A of the SPS Agreement defines SPS measures as "any measure applied to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests," in addition to measures taken to protect human, animal and plant life or health from risks arising, inter alia, from "pests."[2528] The SPS Agreement provides nations with the power to impose measures that could result in a higher level of SPS protection than normally achievable through international standards, as long as the proposed national policies are based on available science and a risk assessment that is tailored to the specific case.[2529] If leveraged properly, SPS can be a powerful tool because there is no limit to the level of protection that a state can seek as long as it is supported by "scientific" evidence and risk assessments. The goal of "zero risk" can even be accepted, and states may even adopt measures provisionally while they wait for a risk assessment to be carried out.[2530] In the context of IAS, the risk being analyzed would be the evaluation of the likelihood of entry, establishment, or spread of a disease or pest; the likelihood that the same disease or pest would be established in the importing country in the

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[2523] *See* Marrakesh Agreement Establishing the World Trade Organization, Preamble, Paragraph 1, (April 15, 1994), 1867 U.N.T.S. 154.
[2524] *See* De Poorter, supra note 37.
[2525] *See* Shine, supra note 29, at 8.
[2526] *See* Boris Rigod*, The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),* European Journal of International Law, Volume 24, Issue 4, pg. 504, (2013).
[2527] *See* Goemeone Mogomotsi, Patricia Mogomotsi, Onthatile Moeti, *WTO Law and Jurisprudence on Invasive Alien Species in the Global South*, Chinese Journal of Environmental Law, 6, pg. 71, (2022).
[2528] *See* The World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A, Definitions, 1(a –d), (January 1, 1995), 1867 U.N.T.S. 493 [hereinafter SPS Agreement].
[2529] *See* Mogomotsi and Moeti, supra note 42, at 73.
[2530] *See* Michael Margolis and Jason F. Shogren, Disguised Protectionism, Global Trade Rules and Alien Invasive Species, Environmental and Resource Economics, 51, pg. 104, (2012).

absence of the measure; and a finding that the probability is reduced in the presence of the prevention measure.[2531]

2. SPS Standard Setting Bodies: The International Plant Protection Convention (IPPC) and The World Organization for Animal Health (OIE)

While the SPS Agreement can be used in the absence of domestic or international environmental laws, it also encourages the use of international standards, guidelines, and recommendations when developing SPS measures.[2532] The SPS Agreement recognizes three international key organizations for setting standards: the International Plant Protection Convention (IPPC); the World Organization for Animal Health (OIE, referring to its original name, "Office International des Epizooties"); and the Codex Alimentarius Commission, a group that sets food safety standards.[2533] For the purpose of analyzing IAS prevention, both the IPPC and the OIE are relevant and can be leveraged and potentially synergized with multilateral environmental agreements.[2534]

The International Plant Protection Convention (IPPC)

The IPPC aims to prevent the spread of plants and plant products deemed to be "pests" between countries and to promote domestic legal measures aimed at controlling their spread.[2535] Parties to the Convention must establish national plant protection organizations and implement import regulations and systems for compliance, surveillance, reporting, control, and export certification.[2536] The governing body of the IPPC is the Commission on Phytosanitary Measures (CPM), which sets International Standards for Phytosanitary Measures (ISPMs).[2537] Article II of the Convention defines a "pest" as "any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products."[2538] Thus, while IPPC's main focus is on preventing damage to plants of economic importance, it can also be used to cover IAS that meet Article II's definition of "pest" and cause damage to wild plants or to the natural environment.[2539]

The World Organization for Animal Health (OIE)

In terms of fauna, the SPS Agreement invokes the standards set by the World Organization for Animal Health (OIE), which aims to improve animal health and welfare by collecting, analyzing, and disseminating veterinary scientific information.[2540] With international trade being a driving force in spreading animal diseases, OIE's mandate is to safeguard world trade by publishing health standards for international trade in animals and animal products, called the Terrestrial and Aquatic Animal Health Codes.[2541] A key focus is harmonizing trade requirements on a global scale and developing risk analyses for the importation of animals and

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[2531] *See id.*
[2532] *See* Shine, supra note 29, at 8.
[2533] *See* Standard-setting bodies and other observer organizations, Sanitary and phytosanitary measures, World Trade Organization, https://www.wto.org/english/tratop_e/sps_e/sps_e.htm#standard_bodies.
[2534] *See* Shine, supra note 29, at 4.
[2535] *See id.* at 9.
[2536] *See id.* at 10.
[2537] *See* Adopted Standards (ISPMS), International Plant Protection Convention (IPPC), https://www.ippc.int/en/core-activities/standards-setting/ispms/.
[2538] *See* International Plant Protection Convention, Article II, (Jan. 1, 1999) [hereinafter IPPC].
[2539] *See* Shine, supra note 29, at 10.
[2540] *See* 'What we do', World Organization for Animal Health (OIE), https://www.woah.org/en/what-we-do/.
[2541] *See* Shine, supra note 29, at 11.

animal products.[2542] Because the OIE deals with the trading of livestock and their health indicators, it could potentially be applied in the case of IAS in situations where the IAS is a disease-causing parasite or other pathogen carrying species.

B. Environmental Law Mechanisms for Preventing the Spread of IAS

Unlike international trade agreements, there are some explicit legal measures aimed at slowing the spread of IAS in multilateral environmental agreements (MEAs). The most directly applicable is the Convention on Biological Diversity (CBD), which contains provisions related to IAS as a threat to biodiversity, while a less explicit is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), though it notably blends conservation and free-trade objectives.

1. United Nations Convention on Biological Diversity

The United Nations Convention on Biological Diversity (CBD) is the international legal instrument for the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[2543] The CBD has identified IAS as a major factor in the loss of biodiversity, based on their capacity to out-compete or prey on native species, and thus Article 8(h) directly refers to IAS by stating that "each contracting Party shall, as far as possible and as appropriate, prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species."[2544]

While there has been quite minimal action under the CBD in combatting IAS, one notable development was the 2010 approval of the "Aichi Biodiversity Targets."[2545] Target 9 specifically targets IAS and recommends that "by 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment."[2546] However, despite the CBD's goals, only 10% of reporting parties have national targets to address the risk of IAS and are on track to meet them. Thus, like many MEAs, the lack of binding law has led to a lack of initiative amongst the majority of nations.[2547] There is a hopeful sign of resurgence though as the Kunming-Montreal Global Biodiversity Framework, recently agreed upon at COP 15 in December of 2022, includes a target for urgent action by 2030 on IAS prevention.[2548] Target 6 urges the parties to:

> "Eliminate, minimize, reduce and or mitigate the impacts of invasive alien species on biodiversity and ecosystem services by identifying and managing pathways of the introduction of alien species, preventing the introduction and establishment of priority invasive alien species, reducing the rates of introduction and establishment of

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[2542] *See* 'What we do', World Organization for Animal Health (OIE), https://www.woah.org/en/what-we-do/.

[2543] *See* Convention on Biological Diversity, key international instrument for sustainable development, International Day for Biological Diversity, United Nations, https://www.un.org/en/observances/biological-diversity-day/convention#:~:text=The%20Convention%20on%20Biological%20Diversity,been%20ratified%20by%20196%20nations.

[2544] *See* United Nations Convention on Biological Diversity, Article 8(h), (June 5, 1992), 1760 U.N.T.S. 69, [hereinafter CBD].

[2545] *See* Aichi Biodiversity Targets, CBD COP 2010, Strategic Plan for Biodiversity, https://www.cbd.int/sp/targets/.

[2546] *See* Aichi Target 9, CBD COP 2010, Strategic Plan for Biodiversity, https://www.cbd.int/sp/targets/.

[2547] *See* Hulme, supra note 2, at 676.

[2548] *See* Kunming-Montreal Global Biodiversity Framework, 15th Conference of the Parties, (Dec. 22, 2022).

other known or potential invasive alien species by at least 50 percent, by 2030, eradicating or controlling invasive alien species especially in priority sites, such as islands."[2549]

This is one of the most specific and urgent international law provisions on IAS and is grounded in an emphasis from that it should be implemented while also considering other relevant international obligations, national circumstances, and socioeconomic conditions.

2. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the only MEA to address international trade in certain categories of animals and plants. While IAS is not directly mentioned in the agreement, the parties recognized the potential relevance of the agreement to IAS in 1997 and came together to establish a list of potentially invasive species in different regions of the world.[2550] Further, Resolution 13.10 on Trade in Alien Invasive Species was passed in 2004 which recommended that CITES Parties should, "consider the problems of invasive species when developing national legislation and regulations that deal with trade in live animals or plants."[2551] A limitation however is that CITES mainly deals with the *intentional* trade of potential IAS, which involves a different set of prevention measures than for the *unintentional* spread through the trade of non-IAS commodities.

III. Opportunities and Challenges for Effective Implementation of IAS Prevention Measures

A. Synergy and Harmonization of Language between Trade and Environmental Agreements

If harnessed properly, the SPS Agreement and its Standard Setting bodies could be a powerful tool in allowing nations to enact strict IAS prevention protocols while remaining compliant with international trade rules.[2552] Article 3 of the SPS Agreement calls for the "harmonization" of sanitary and phytosanitary measures "on as wide of a base as possible" and allows members to introduce or maintain sanitary or phytosanitary measures that result in a higher level of protection that would be achieved by relevant international standards, as long as there is a scientific justification.[2553] Further, all sanitary and phytosanitary measures which conform to international standards, guidelines or recommendations are presumed to be consistent with the SPS Agreement and the General Agreement on Tariffs and Trade (GATT).[2554] Therefore there is great potential to harmonize the SPS Agreement, in conjunction with the IPPC and OIE regulatory frameworks, with the protection against the spread of IAS that is outlined in the CBD.

A similar nod to synergy between international trade and environmental agreements is seen in the CBD's Conference of the Parties (COP) 6 in their Decision VI/23 that introduced

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[2549] *See id.* at Target 6.

[2550] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, (March 3, 1973), [hereinafter CITES].

[2551] *See* Trade in alien invasive species, Conference of the Parties 14, Conf. 13.10, CITES, (2000), https://cites.org/sites/default/files/document/E-Res-13-10-R14.pdf.

[2552] *See* Mogomotsi and Moeti, supra note 42, at 75.

[2553] *See* SPS Agreement, Article 3.

[2554] *See id.*

"Guiding Principles for the Implementation of Article 8(h)."[2555] In implementing CBD Article 8(h), which directs parties to prevent the introduction of IAS, the parties acknowledged the contribution of the IPPC and OIE in developing relevant standards and agreements related to IAS.[2556] Further, in COP 9 Decision IX/4, titled "*In-depth review of ongoing work on alien species that threaten ecosystems, habitats or species*", the Conference of the Parties encouraged the use of the risk assessment guidance and other procedures and standards developed by the IPPC and the OIE in order to contribute to closing gaps on IAS at the national level.[2557]

1. Gaps in Utilizing Existing Legal Frameworks to Prevent the Spread of IAS

While harmonizing the SPS Agreement and its standard-setting bodies with the CBD could make the agreement a powerful tool in regulating the spread of IAS while maintaining compliance with trade rules, there are key gaps that need to be addressed before synergy between the agreements is possible. The applicable international agreements for IAS prevention, notably the CBD and SPS along with the standard setting bodies of the IPPC and OIE, were developed at different times and emerged from different sectors with different guiding goals. Thus, it is not surprising that the terminology and conceptual frameworks differ. For example, even though they both refer to preventing the introduction of harmful species, the CBD and IPPC define terms regarding this scenario quite differently. In the CBD, the "introduction" of species refers to "the movement by human agency, indirect or direct, of an alien species outside its natural range," however in the IPPC it refers to "the entry of a pest resulting in its establishment."[2558] With the initial "introduction" of an IAS being a key step in the chain of preventing its spread through an ecosystem, aligning these two definitions will be key place to start in bridging the agreements.

Another gap is that, while CBD refers to IAS in a broad manner that includes *all* potential flora and fauna that could be invasive, the SPS Agreement, the IPPC, and the OIE refer solely to "pests" or other limited categories of species. The CBD defines an alien species as "a species, subspecies or lower taxon, introduced outside its natural past or present distribution; includes any part, gametes, seeds, eggs, or propagules of such species that might survive and subsequently reproduce" and describes an invasive alien species as "an alien species whose introduction and/or spread threaten biological diversity."[2559] On the other hand, while the SPS Agreement allows for the protection of "animal or plant life or health" and "human life or health" – which is important in applying to IAS prevention as IAS tend to cause biodiversity loss or human health issues in the ecosystems they invade – the agreement is limited in protecting these entities *only from* "pests, diseases, disease-carrying organisms or disease-causing organisms."[2560]

In defining "pest", the only definition in the SPS Agreement appears in the notes of the agreement, where it details, "[f]or the purpose of these definitions, 'animal' includes fish and wild fauna; 'plant' includes forests and wild flora; 'pests' include weeds; and 'contaminants' include pesticide and veterinary drug residues and extraneous matter."[2561] While the definition

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[2555] *See* COP 6 Decision VI/23, Alien species that threaten ecosystems, habitats or species, Guiding Principles for the Implementation of Article 8(h), https://www.cbd.int/decision/cop/?id=7197.
[2556] *See id.*
[2557] *See* COP 9 Decision IX/4, In-depth review of ongoing work on alien species that threaten ecosystems, habitats or species, https://www.cbd.int/decision/cop/?id=11647.
[2558] *See* CBD COP 6 Decision VI/23; See IPPC, ISPM No. 5, Glossary of Phytosanitary Terms, (2010).
[2559] *See* CBD COP 6 Decision VI/23.
[2560] *See* SPS Agreement Annex A, Definition 1(a).
[2561] *See* SPS Agreement, "Notes", https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

of "weeds" would apply to some harmful plant species of IAS like the water hyacinth in Lake Victoria, it is an extremely limiting definition. While many noxious weeds are indeed invasive, invasive plants are often those that are simply not native to the country or ecosystem in which they are growing.[2562] Thus, the SPS definition excludes IAS plant species that are not considered "weeds" and all IAS that are fauna, or animal species.

However, the nature of the SPS Agreement is that it relies on the IPPC and OIE in determining which species can be regulated, so the definition of "pest" extends beyond just "weeds" through the IPPC and OIE. Under IPPC Article II, "pest" is defined as "any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products."[2563] Further, the IPPC defines "quarantine pest" as "a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled."[2564] These definitions are imperative for extending the application of the SPS Agreement to the protection of agricultural crops, timber, and other economically and ecologically important plant varieties. In fact, in 2001 the IPPC's governing body adopted recommendations highlighting the relationship between IAS and quarantine pests and the role of the IPPC with regard to IAS and decided that IAS can indeed be plant pests.[2565] On this basis, the IPPC is directly relevant to implementing Article 8(h) of the CBD.

The IPPC however leaves a pervasive gap in IAS management, leaving out any species that may be invasive but do not directly affect plants or plant products or do not have adverse impacts on plant health and plant biodiversity.[2566] For animals in this category, which notably include most fauna and flora that affect aquatic ecosystems, such as the highly invasive zebra mussel, there is no legal framework through IPPC (and therefore SPS) to regulate their invasions.[2567]

As with IPPC, certain limits exist in applying OIE regulations to IAS. While there is a clear connection between the OIE's published health standards covering animal diseases and pathogenic agent and IAS in that animal IAS can be sources for introduced pathogens into a native animal population, the OIE has not established specific standards for IAS except OIE-listed pathogens considered to be IAS.[2568] Particularly, OIE standards do not provide a basis to ban imports of animal species that may be invasive in their own right nor do they address risks of invasiveness related to potential 'carriers' of animal diseases.[2569] Rather, OIE standards currently focus on pathogens, not on the animals potentially carrying the pathogens, hence "the OIE does not specifically consider hazards that are not infectious diseases, or the ecological impacts that invasive animal species may have on the biodiversity of a country."[2570]

The CBD COP expressed concern over this gap and in the aforementioned COP 9 Decision IX/4, where they invited the OIE "to note the lack of international standards covering invasive alien species, in particular animals, that are not pests of plants under the International Plant Protection Convention, and to consider whether and how [the OIE] could

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[2562] *See* About Weeds and Invasive Species, U.S. Department of the Interior, Bureau of Land Management, https://www.blm.gov/programs/natural-resources/weeds-and-invasives/about.
[2563] *See* IPPC, Article II, Use of Terms.
[2564] *See id.*
[2565] *See* IPPC, Adopted Standard, 2001-04 ICPM-3.
[2566] *See* STDF, supra note 34, at 7.
[2567] *See* Shine, supra note 29, at 11.
[2568] *See* STDF, supra note 34, at 19.
[2569] *See* Shine, supra note 29, at 11.
[2570] *See* STDF, supra note 34, at 21.

contribute to addressing this gap."[2571] The CBD COP suggested either expanding the OIE's list of pathogens to include a wider range of animal diseases, including diseases that solely affect wildlife and not just agricultural livestock, as well as urging OIE to consider if they could expand their role as an organization to address IAS that are not considered as causative agents of diseases under OIE.[2572]

2. Potential Solutions and Recommendations

Ultimately, in looking across the SPS agreement policy framework, a pervasive gap exists for IAS that are neither plant pests nor OIE-listed pathogens and parasites.[2573] The SPS Committee should thus consider developing guidance regarding synergy between CBD, the SPS Agreement, the IPPC, and the OIE in terms of embedding IAS management into the global trade law framework.

One path forward could be to amend the SPS Agreement itself to align it with IAS prevention goals. This could be done by expanding on the definition of "pest" in Annex A, Definition 1(a) of the SPS Agreement to go beyond "weeds" and include "invasive alien species." This would likely have to either be done in tandem with adding an inclusive definition of "invasive alien species" to Annex A, or having the IPPC expand on their definition of "pest" to encompass IAS. A similar outcome could occur through the expansion of the OIE to reference threats from IAS outside of the scope of pathogen carriers. While both of these are possible, it would likely take a high level of coordination.

Further, as flagged by CBD COP 9, there would have to be in-depth conversations regarding the scope of these standard setting bodies and whether their purposes would be undermined by expanding to include all forms of IAS in their protections.[2574] With the IPPC formulated specifically to deal with protecting the world's plant resources from the spread and introduction of pests and the OIE formulated to deal with animal health in the context of pathogens spreading to livestock, the inclusion of generic references to IAS prevention could be viewed as undermining the purpose of the IPPC and OIE.[2575] However, this concept does find support among other MEAs, like CITES, in which their Resolution 13.10 on Trade in Alien Invasive Species recommended that parties should, "consider the problems of invasive species when developing national legislation and regulations that deal with trade in live animals or plants."[2576] Regardless, this is likely a conversation worth having in light of the deep connection that IAS concerns have to each of their overarching goals and SDGs at large.

A second and arguably simpler path forward could be the SPS Committee expanding their standard-setting organizations to include the CBD. The SPS Agreement would then be guided by standards set by Codex Alimentarius Commission (for food safety), the IPPC (for plant protection), the OIE (for animal health and zoonoses), and the CBD (for environmental and human health protection against IAS).[2577] Therefore, the all-encompassing definition of IAS included in the CBD (and the standard set under CBD 8(h) to prevent the introduction of IAS

[2571] *See* COP 9 Decision IX/4, In-depth review of ongoing work on alien species that threaten ecosystems, habitats or species, https://www.cbd.int/decision/cop/?id=11647.
[2572] *See id.*
[2573] *See* STDF, supra note 34, at 21.
[2574] *See* COP 9 Decision IX/4, In-depth review of ongoing work on alien species that threaten ecosystems, habitats or species, https://www.cbd.int/decision/cop/?id=11647.
[2575] *See* 'Who we are', World Organization for Animal Health (OIE), https://www.woah.org/en/who-we-are/.
[2576] *See* Trade in alien invasive species, Conference of the Parties 14, Conf. 13.10, CITES, (2000), https://cites.org/sites/default/files/document/E-Res-13-10-R14.pdf.
[2577] *See* Standard-setting bodies and other observer organizations, Sanitary and phytosanitary measures, World Trade Organization, https://www.wto.org/english/tratop_e/sps_e/sps_e.htm#standard_bodies.

which threaten ecosystems, habits, or species), would fall under protections of the SPS Agreement.

B. Issues of Capacity Building for Developing Nations

International and regional organizations that work in IAS prevention have sounded the alarm on the desperate need to enhance the capacity of governments to control IAS risks at the entry stage.[2578] Effective national SPS systems in the form of border controls, quarantine infrastructure, and on-site eradication measures are a necessary foundation for bolstering the capacity of IAS management at the point of entry.[2579] In some countries, SPS systems are well-equipped to address the majority of trade-related IAS. However, many developing countries, and particularly LDCs, require substantial additional resources and support to strengthen their SPS systems. Overarching challenges in this arena emerge from a legal feasibility standpoint and a developmental capacity standpoint, the two of which will be discussed in turn.

1. Increasing the Flexibility of the SPS Agreement's Risk Assessment Requirement

A challenge faced by developing countries is that while SPS disciplines offer the potential to enact far-reaching measures to protect against IAS, the measures must be backed by robust scientific evidence and risk analyses in order to withstand legal challenges.[2580] This presents a problem as there is a pervasive lack of pre-existing technical and scientific resources aimed at preventing the spread of IAS through trade that countries can rely on.[2581] Thus, in order to conduct proper risk assessments for IAS invasions, it would likely require a team of technical experts to conduct research and make appropriate recommendations for each specific case of a potential IAS threat emerging from each specific trade commodity. This is a massive undertaking for even the most developed nations, making it even more out of reach for developing nations. While Article 5.7 of the SPS Agreement contains a potential exception to the requirement of a risk-assessment and hard scientific evidence through the "precautionary principle", there is some disconnect between this principle and the "precautionary approach" outlined in the CBD that if harmonized could ease some of the burden on developing countries to begin to combat IAS invasions through SPS principles.[2582]

The "precautionary principle" of the SPS Agreement allows states to take action when international standards do not exist, provided that available scientific information and risk assessment are applied and the measure is reevaluated within a reasonable period of time in order to take into account new scientific information.[2583] In slight contrast, while the CBD does encourage the successful use of risk assessment procedures in evaluating the economic, health, and environmental impacts of IAS, when there is a threat of significant reduction or loss of biological diversity, the "lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."[2584] Known similarly as the "precautionary approach", this concept emerges from Principle 15 of the Rio Declaration on

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[2578] *See* STDF, supra note 34, at 22.
[2579] *See id.*
[2580] *See* Environment and Trade: A Handbook, UN and Environment Handbook, The United Nations Environment Programme Division of Technology, Industry and Economics, Economics and Trade Branch, and the International Institute for Sustainable Development, pg. 39, (2005).
[2581] *See* Shine, supra note 29, at 21.
[2582] *See* SPS Agreement, Article 5.7; *See also* CBD, Preamble.
[2583] *See* SPS Agreement, Article 5.7.
[2584] *See* CBD, Preamble.

Environment and Development.[2585] With the potential damage of IAS invasions being so severe and threatening to many SDGs in developing nations, there could be value in modifying the SPS precautionary principle to align more with the CBD's precautionary approach. Given the speed in which an IAS invasion can escalate into a full blown emergency, particularly in terms of food-security, it could be important to provide developing countries with a clearer indication that their IAS prevention measures will not be legally challenged, even if they lack the capacity to complete a full risk assessment within a reasonable period of time, a is the standard in Article 5.7 of the SPS Agreement.[2586]

2. Utilize Pre-existing Mechanisms and Collaborate with External Sectors

As a parallel effort to changing the legal structure around risk assessments, there is also promise in bolstering the capacity for countries to complete risk assessments and monitor ongoing IAS threats by collaborating with pre-existing mechanisms in related third-party sectors. Notably, there are already extensive international programs in place for identifying and managing the spread of human diseases and animal diseases.[2587] Administered by the World Health Organization (WHO), the International Health Regulations (IHR) mandates cooperative international action to address the human-health risks posed by trade and travel related disease introductions.[2588] In particular, Article 9 of the IHR requires notification of any international public health risk due to the movement of people, disease vectors, or contaminated goods.[2589] In light of the Covid-19 pandemic, these efforts have only been bolstered, providing ample risk management frameworks for developing countries to use as a basis for IAS prevention, rather than having to start from scratch.

This idea has been codified in the new concept of "One Biosecurity," an interdisciplinary approach to biosecurity policy and research that "enhances the interconnections among human, animal, plant, and environmental health to prevent and mitigate the impacts of invasive alien species."[2590] The hopeful outcome of "One Biosecurity" is a more coordinated approach to dealing with the pandemic risks introduced by IAS through early identification and risk management of potentially invasive species before they get exported. While One Biosecurity currently applies only to IAS that are potential carriers of human diseases, it is a promising development in species surveillance and data reporting that could potentially be adopted by developing countries as part of their overall IAS risk assessment process.[2591]

IV. Conclusion

While the path forward in combatting the spread of IAS is legally complex and will likely involve the tactful synergizing of multiple international trade and environmental agreements, it is a path we desperately need to take. With the ongoing threat of IAS invasions only being exacerbated by quickening globalization and climate change, the time to act is now. As a first step in inspiring global cooperation against IAS, the international trade and international environmental legal communities would benefit from coming together and formally incorporating IAS prevention measures into their agreements. While IAS invasions are

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[2585] *See* United Nations Rio Declaration on Environment and Development, Principle 15, A/CONF.151/26 (vol. I), 31 ILM 874 (1992).
[2586] *See* SPS Agreement, Article 5.7.
[2587] *See* Keller and Perrings, supra note 6.
[2588] *See* Keller and Perrings, supra note 6, at 1007.
[2589] *See id.*
[2590] *See* Hulme, supra note 2, at 676.
[2591] *See id.*

inherently environmental issues, they touch on almost every other sector of sustainable development, making it one of the defining issues of our time.

CHAPTER 29: PROMOTING ENVIRONMENTAL EQUITY: CBDR AS AN INTERNATIONAL STANDARD IN THE WTO TBT AGREEMENT

FANG-HUA WANG*

Abstract

The escalating prominence of climate change within the international arena has led to its integration into the agendas of various international organizations. Concurrently, numerous countries are adopting climate change mitigation and decarbonization measures at the domestic level. While these initiatives are aimed at environmental conservation, it is imperative to acknowledge that such climate change measures can potentially impose significant burdens on the economies of developing countries.

This imbalance in addressing environmental concerns between developed and developing countries carries substantial implications. Developed countries, having undergone substantial industrialization and environmental degradation, have transitioned into advanced economies. In contrast, developing countries must grapple with the repercussions of past environmental degradation, compounded by pressures to mitigate the ecological harm caused by more prosperous countries. This dynamic has led to calls for developing countries to adhere to many environmental regulations, further exacerbating the existing disparities between developed and developing countries.

Recognizing the historical responsibility of developed countries in contributing to environmental degradation and the concurrent need to support developing countries in their pursuit of sustainable development, this paper contemplates the feasibility of leveraging Article 2.4 of the World Trade Organization's Agreement on Technical Barriers to Trade (TBT Agreement). The aim is to encourage and ideally mandate developed countries to incorporate the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC) as an international standard within their climate change policies. Such a move would not only afford developing countries the requisite flexibility and Special and Different Treatment (S&DT) in framing their policies and measures but would also contribute to advancing principles related to intergenerational and intragenerational equity.

I. Introduction

Climate change is one of the most pressing issues facing humanity today. As the international community increasingly recognizes the urgent need for action, many states are pursuing climate change policies and measures at a national level. However, these actions may also disproportionately burden developing nations with respect to trade and economic development.[2592] This imbalance between developed and developing countries in environmental issues is a crucial concern that must be addressed. Historically, developed countries have achieved advanced development by first polluting the environment. Now these countries are calling upon developing nations to comply with various environmental regulations, further exacerbating the divide between developed and developing economies. The principle of intergenerational and intragenerational equity has thus arisen to ensure that the burden of environmental degradation is not unfairly placed upon future generations.

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[2592] US Global Leadership Coalition, *Climate Change and the Developing World: A Disproportionate Impact,* available at https://www.usglc.org/blog/climate-change-and-the-developing-world-a-disproportionate-impact/ (2021).

Intergenerational equity refers to the principle that present generations are responsible for preserving and protecting the environment for future generations.[2593] It recognizes that current actions can affect both present and future quality of life. Therefore, it requires an approach that balances economic development with environmental protection.[2594] Intragenerational equity, on the other hand, pertains to the equitable treatment of individuals within a single generation.[2595] It underscores the rights and responsibilities of each member of a generation to use and steward resources equitably, especially among marginalized sections of society,[2596] as reflected in Rio Principle 6, mandating particular priority for the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable.[2597]

In light of these challenges and issues, the principle of intergenerational and intragenerational equity emerges as a pivotal bridge between the disparities in environmental compliance among developed and developing nations and the pursuit of ecologically sustainable development.[2598] As a concept, sustainable development confronts several challenges in the face of entropy, exhaustible resources, and the looming specter of resource scarcity.[2599] The conventional understanding of sustainability may be an elusive goal due to the inherent limitations of our natural world. Nevertheless, there is a path forward for humanity to advance toward ecologically sustainable development that can extend the tenure of social and ecological stability. This path lies in cultivating intergenerational and intragenerational equity through recognizing the historical responsibility of developed countries for their role in environmental degradation, making it a pressing agenda for the global community.[2600] The first step to achieve this goal might be a multilateral agreement consensus in multilateral environmental agreements (MEAs).

One way in which MEAs attempt to address this issue is through the principle of Common but Differentiated Responsibilities (CBDR).[2601] CBDR is widely accepted in Multilateral Environmental Agreements. This principle recognizes the unequal burden of responsibility between developed and developing countries regarding environmental degradation. Developed nations are expected to take greater responsibility due to their historical emissions while developing nations require flexibility within their policies and

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[2593] Alam, Shawkat, *the United Nation's Approach to Trade, The Environment and Sustainable Development,* ILSA *Journal of International & Comparative Law:* Vol. 12 (2006), 4-8.

[2594] *Id.*

[2595] Sovacool, B. K., A. D'Agostino, A. Rawlani and H. Meenawat, *Improving Climate Change Adaptation in Least Developed Asia*, Environmental Science & Policy 2012; 21(8): 112–25.

[2596] Jonathan Portes, *Intergenerational and Intragenerational Equity*, 227 National Institute Economic Review, F4–F11 (2014).

[2597] Bodansky, Daniel, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford Handbooks, Chapter 1(2008), https://doi.org/10.1093/oxfordhb/9780199552153.001.0001, accessed 12 Oct. 2023.

[2598] *See generally* United Nations, The Sustainable Development Goals Report 2023 (2023).

[2599] Igor Vojnovic, *Intergenerational and Intragenerational Equity Requirements for Sustainability*, 22 Environmental Conservation, 223-28 (1995).

[2600] Shawkat Alam, *Trade and the Environment: Perspectives from the Global South*, International *Environmental Law and the Global South,* Cambridge University Press 2015, at 303-05 (2015).

[2601] Katrin Kuhlmann, UN Handbook on Provision and Option for Trade and Sustainable Development, at 23-24 (2023) available at https://www.unescap.org/kp/2023/handbook-provisions-and-options-inclusive-and-sustainable-development-trade-agreements; *See also* Simon J. Evenett & Richard Baldwin, *Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?*, in Revitalizing Multilateralism: Pragmatics Ideas for the New WTO Director-General 9 (Simon J. Evenett & Richard Baldwin eds., 2020), https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general.

measures. The focus of CBDR has been a contentious issue in the climate change regime, with developed countries arguing that CBDR should be based on "capabilities." In contrast, developing countries emphasize the term "responsibility."[2602] Ultimately, the debate resulted in a compromise in the form of "common but differentiated responsibilities and respective capabilities" (CBDR-RC) as a basis for differentiation.[2603] The CBDR-RC is mentioned under the preamble[2604] and article 3 of the UNFCCC[2605] as one of its guiding principles. The Kyoto Protocol supplemented the Convention and applied an Annex-based differentiation model.[2606] With the furtherance of the principle of the CBDR-RC, the Paris Agreement was able to make some changes beyond the UNFCCC and Kyoto Protocol. The Paris Agreement seeks to reconcile conflicts between developed and developing countries, making the agreement more universally acceptable. In broad terms, it abandons the annex categorization of countries present in the original Kyoto Protocol and instead recognizes that all contracting parties have an obligation to combat climate change.[2607] However, in its specifics, the Paris Agreement employs a considerably flexible regulatory approach to adjust the differences in responsibilities between developed and developing countries. This paper explores how MEAs can be used to promote Intergenerational and intragenerational Equity and whether Article 2.4 of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) could provide a platform for CBDR-RC to become an international standard, allowing for appropriate flexibility and Special and Different Treatment (S&DT) of developing countries in the future climate change policies and measures.

II. Common but Differentiated Responsibilities and Respective Capacities (CBDR-RC)

In the realm of global climate governance, the concept of "equality" has consistently occupied a central position within relevant regulations. Since the inception of the United Nations Framework Convention on Climate Change (UNFCCC), the institutional framework for climate governance has underscored that contracting parties should, under the premise of "equality," exert collective efforts to protect and preserve the Earth's atmospheric system.[2608] This endeavor is guided by the principle of "common but differentiated responsibilities and respective capabilities" (CBDR-RC). However, the precise content of the CBDR-RC principle and its correlation with "equality" remain subjects of inquiry.

In theory, the CBDR-RC principle emphasizes the international community's collective responsibility in safeguarding and maintaining the Earth's atmospheric system.[2609] Yet, the specific means of discharging this responsibility, especially in terms of mitigating the causes of warming and adapting to its consequences, should consider vital considerations. These considerations encompass the historical contributions of a country to greenhouse gas

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[2602] Daniel Bodansky et al., International Climate Change Law 27 (2017).

[2603] Stellina Jolly & Abhishek Trivedi, *Principle of CBDR-RC: Its Interpretation and Implementation Through NDCS in the Context of Sustainable Development*, 11(3) Washington Journal of Environmental Law & Policy 309, at 318-321.

[2604] UNFCCC, 1771 U.N.T.S. 107, pmbl. ¶ 6 (May 9, 1992).

[2605] *Id*., at art. 3.1.

[2606] Kyoto Protocol to the UNFCCC, 2303 U.N.T.S. 162, arts. 2, 3 (Dec. 11, 1997).

[2607] Ralph Bodle & Sebastian Oberthür, *Legal Form of the Paris Agreement and Nature of Its Obligations*, in the Paris Agreement on Climate Change: the Analysis and Commentary 91, 97 (Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer & Andrew Higham eds. 2017).

[2608] UNFCCC, 1771 U.N.T.S. 107, at art. 3 (May 9, 1992).

[2609] Christina Voigt and Felipe Ferreira, Dynamic Differentiation: The Principles of CBDRRC, Progression and Highest Possible Ambition in the Paris Agreement, Transnational Environmental Law, Vol. 5, No. 2 (2016): 285-303.

concentrations in the atmosphere and disparities in climate change adaptation capacities, among others. Within this context, CBDR-RC reflects a contemplation of the "equality" issue, aligning it to some extent with the concept of distributive justice.[2610] Specifically, it entails seeking fairness in the allocation of responsibilities for climate action, assuming uniform objectives among nations.

Nevertheless, in the history of climate governance frameworks such as the UNFCCC, the Kyoto Protocol, and the Paris Agreement, the concept of "equality" has not been explicitly defined in terms of its specific content and whether it should be independent of or interconnected with the CBDR-RC principle.[2611] This ambiguity has perpetuated debates surrounding "equality" and hindered consensus on how to operationalize the CBDR-RC principle.[2612] Historically, the CBDR-RC principle was understood to distinguish responsibilities based on a nation's economic status, development level, and its historical contributions to greenhouse gas concentrations in the atmosphere. This understanding necessitates industrialized developed nations to play a pioneering role in reducing domestic greenhouse gas emissions while supporting and aiding developing countries in mitigating and adapting to the various impacts of climate change. However, should "equality" also encompass the vulnerability of nations to climate change when considering responsibilities? When the capacity to withstand and recover from the impacts of climate change varies among nations, it inevitably influences the urgency with which they must respond to climate change policy.

Although with all the arguments, climate change still consistently presents intragenerational equity challenges as both vulnerabilities to climate change and financial and technological capacities for mitigation and adaptation are unequal among countries.[2613] Therefore, the discussion has persisted in their influence upon the annual climate negotiations convened by the United Nations (UN).

The principle of differentiation, which involves distinct treatment for different categories of countries, has been a conspicuous regulatory instrument within multilateral environmental agreements, particularly since the 1992 United Nations Conference on Environment and Development.[2614] This concept of differentiation bears a close nexus to the ideals of sustainable development and intragenerational equity as it provides a framework for harmonizing economic advancement and environmental conservation while also considering equitable principles. The principle known as "common but differentiated responsibilities and respective capabilities" (CBDR-RC) functions as an instrument that operationalizes notions of equity and fairness. CBDR-RC takes into account historical responsibilities and current emissions contributions, all the while recognizing the differing vulnerabilities and variances in financial and technological capacities among states. It has evolved into the foundational tenet of the UNFCCC, as clearly reflected in Article 3.1, which stipulates:

[2610] *Id.*

[2611] Christina Voigt and Felipe Ferreira, Dynamic Differentiation: The Principles of CBDRRC, Progression and Highest Possible Ambition in the Paris Agreement, *Transnational Environmental Law,* Vol. 5, No. 2 (2016): 285-303.

[2612] *Id.*

[2613] IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Chang (2014), 76-77.

[2614] Principles 6 and 7 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992); *See* Mark Stallworthy, Differential Treatment in International Environmental Law by Lavanya Rajamani, Journal of Environmental Law, Volume 20, Issue 2, 2008, 334-36 (2008).

> "The Parties should protect the climate system for the benefit of present and future generations of humankind, *on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.* Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[2615]

Under the UNFCCC, this principle's implementation resulted in a situation where only Annex I countries were obligated to adopt and report on national policies and measures aimed at mitigating climate change.[2616] Subsequently, the Kyoto Protocol translated the CBDR-RC principle into practical measures by establishing quantified emission limitations specifically applicable to Annex I countries.[2617] The category of Annex I countries encompassed industrialized members of the Organization for Economic Co-operation and Development (OECD) and economies undergoing transition.[2618] However, differentiation under the CBDR-RC within the climate change regime has faced substantial criticism, primarily from the United States. The high emissions of non-Annex I countries, including China and India, have prompted the United States and other nations to advocate for greater parity.[2619] As a result, CBDR-RC has been subject to significant scrutiny and calls for revision.[2620]

In contrast to previous approaches, the Paris Agreement makes a difference, juxtaposing "equality" with the CBDR-RC principle, thereby implying an intrinsic relationship between the two concepts.[2621] In terms of interpretation, "equality" can be seen as a crucial supplement to the CBDR-RC principle.[2622] Article 2 of the Paris Agreement establishes specific objectives aimed at limiting global warming to well below 2 degrees Celsius and striving to limit it to 1.5 degrees Celsius. This article places particular emphasis on the significance of "adaptation" and "finance" while noting the importance of the principles of "equity" and "CBDR-RC" as fundamental guiding principles for the implementation of the agreement. It is important to note that this article does not create specific legal obligations but rather outlines the overall objectives of the agreement.

Furthermore, Article 3 of the agreement can be considered its core provision. It imposes an obligation on the contracting parties to communicate their NDCs concerning Articles 4 (mitigation), 7 (adaptation), 10 (technology development and transfer), 11 (capacity-building), and 13 (transparency). The fulfillment of this obligation must be linked to the objectives set forth in Article 2, with efforts increasing over time and considering the needs of developing countries to implement the agreement effectively.

[2615] UNFCCC, at art 3.1. Emphasis added.

[2616] U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev/1 (Vol. I), annex I, Principal 7 (Aug. 12, 1992) ("States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.").

[2617] Kyoto Protocol, at art. 3(1).

[2618] *Id.*

[2619] Lavanya Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law,* 88 int'l affs. 605, 615 (2012).

[2620] *See generally* Rike Krämer-Hoppe, *The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide*, 22(8) German Law Journal 1393, 1401-02 (2021) translated by Chien-Liang Lee.

[2621] Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 int'l & compar. L. Q. 493, 500 (2016).

[2622] Rajamani, Changing Fortunes, *supra note* 28, at 608.

Under the core idea of implementing to reflect equity and the principle of CBDR-RC, the design of the Paris Agreement presents a revised formulation of the CBDR-RC principle. While incorporating three different possibilities for differentiation between developed and developing countries within the Paris Agreement:[2623] differentiation in mitigation,[2624] differentiation in transparency,[2625] and differentiation in finance.[2626]

Regarding mitigation, the Paris Agreement requires parties to prepare, communicate, and maintain successive NDCs they intend to achieve. Parties have the autonomy to determine the scope of their contributions, which has been termed "self-differentiation." This provision allows developing states to set lower targets compared to developed states. Nonetheless, the Paris Agreement establishes a normative expectation for developed countries. Article 4(4) states:

> "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."[2627]

Rajamani argues that this expectation may serve to regulate self-differentiation among developed countries.[2628]

Transparency plays a crucial role in the Paris Agreement. Accordingly, the agreement establishes a framework for reporting requirements that applies to all countries.[2629] However, there is some "built-in flexibility" for developing countries and their capacities.[2630] For instance, all the information provided regarding mitigation and support undergoes a "technical expert review."[2631] Developing countries needing assistance can receive support in areas where capacity building is necessary. The Paris Agreement relies on national pledges (NDCs) made by the Parties, and transparency is deemed essential for ensuring the credibility of these pledges and building trust among major emitters.[2632]

The provisions concerning finance and funds adhere to the traditional understanding of CBDR, resulting in a tangible differentiation between developed and developing countries. Article 9(1) of the Paris Agreement states: "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."[2633] The specific details of this obligation were subsequently determined through party decisions.[2634] In 2018, it was

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[2623] Krämer-Hoppe, *supra note* 29 at 1402.
[2624] Paris Agreement art.4 (2).
[2625] *Id.* 13(11).
[2626] *Id.* at art. 9 (1).
[2627] *Id.* at art. 9 (1).
[2628] Rajamani, Paris Agreement, *supra note* 30, at 509.
[2629] *Id.* at 511.
[2630] Paris Agreement, at art. 13(1), (2).
[2631] *Id.* at 13(11).
[2632] Robert Falkner, The Paris Agreement and the new Logic of International Climate Politics, 92 INT'L AFFS., 1107, 1116, 1124 (2016).
[2633] Paris Agreement, at art. 9(1).
[2634] Hao Zhang, Implementing Provisions on Climate Finance Under the Paris Agreement,9CLIMATE L. 21 (2019).

decided to establish a new collective quantified goal with a minimum floor of $100 billion per year, taking into account the needs and priorities of developing countries.[2635]

Besides the individual differentiation, however, the Paris Agreement's approach is not just about differentiation. The first element of the principle, common responsibility, is a crucial component of its content.[2636] The existence of common responsibility, echoing the recognition that climate change is a 'common concern of humankind'[2637] clarifies the content of States' legal obligations on climate change. The common objective, defined in the Agreement, is to hold the increase in global warming to below 2°C (and 'pursue efforts' to limit it to 1.5°C).[2638] is the key provision that requires CBDR-RC for the Parties to perform their 'fair share.'[2639]

Thus, it is said that under the core idea of implementing to reflect equity and the principle of CBDR-RC, the design of the Paris Agreement applies the mix of "bottom-up" approach and "top-down" approach through balancing the NDC levels by contracting parties (bottom-up) while simultaneously compelling compliance with their respective obligations through mechanisms such as transparency and "global stocktake"[2640] (top-down).[2641] The Agreement has generally been regarded as a significant milestone in international climate diplomacy.[2642]

Therefore, to answer the question about equity mentioned above, the shift in differentiation methodologies in the Paris Agreement does not diminish the enduring significance of equity within the climate regime, as epitomized by the CBDR-RC principle.[2643]

It remains widely acknowledged that equity considerations must underpin any policy measures to attain sustainable development and alleviate poverty.[2644] In the absence of a precise and explicit definition of equity within climate accords, it has consistently been interpreted as essentially synonymous with, or at the very least closely aligned with, the principles encapsulated in CBDR-RC.[2645]

As we see the significance of the principle of CBDR-RC and how it performs through the MEAs, can the principle be implemented in all kinds of national-level climate change measures as well to adapt to the blooming new climate change measure, providing some flexibility for the developing countries? Can Trade be of some help on this?

[2635] U.N. Framework Convention on Climate Change, Conference of the Parties Serving as the Meeting to the Parties of the Paris Agreement, Decision -/CMA.1 (Mar. 19, 2019).

[2636] Benoit Mayer, *The Applicability of the Principle of Prevention to Climate Change: A Response to Zaha*r, 5 Climate Law 1 (2015).

[2637] Paris Agreement preamble; *See also* Philippe Sands and others, *Principles of International Environmental Law* (4th ed), 245 (2018).

[2638] Paris Agreement, at art. 2(1)(a).

[2639]Stockholm Environment Institute, The Climate Equity Reference Calculator (2023), available at https://calculator.climateequityreference.org/, last visit 12 October 2023.

[2640] Paris Agreement, at art. 11; *see also* Jürgen Friedrich, *Global Stocktake (Article 14)*, in the Paris Agreement on Climate Change: Analysis and Commentary, 319, 329-30 (Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer & Andrew Higham eds. 2017).

[2641] Rajamani, *supra note* 31, at 502.

[2642] Falkner, *supra note* 41, at 1121.

[2643] Rajamani, Changing Fortunes, *supra note* 28, at 623.

[2644] IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 76 (2014).

[2645] Cinnamon P Carlarne and JD Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement & The Future of International Climate Change Law*, 27 NYU Envtl. LJ 107, 125 (2019).

III. International Standard under WTO TBT Agreement Article 2.4

The Agreement on Technical Barriers to Trade (TBT Agreement)[2646] is an integral component of the overarching framework of the World Trade Organization (WTO), serving the fundamental principle of reducing trade barriers among states to promote international trade activities and thereby enhance global living standards.[2647] Specifically addressing the potential discriminatory and non-necessary trade obstacles that may arise from the formulation and implementation of technical measures by WTO members, the TBT Agreement applies to technical measures constituted by technical regulations, international standards, and conformity assessment procedures.

The TBT agreement not only reaffirms the non-discrimination and fair-trade principles established by the General Agreement on Tariffs and Trade (GATT)[2648], such as the principles of national treatment and most-favored-nation treatment but also places certain limitations on member governments when developing and implementing their technical measures, requiring them to grant equal treatment to all members' products in a fair manner. In other words, the standards or inspection requirements set by member governments should not be designed to protect or favor their domestic industries at the expense of foreign firms, and the requirements imposed should not go beyond what is necessary to achieve their legitimate objectives. Failure to adhere to these principles could constitute unjustified barriers to trade among members, impeding international trade activities and contravening the fundamental principles of free trade pursued by the WTO.

Furthermore, the TBT Agreement acknowledges the need for member states to establish standards or inspection measures that may vary in content due to their unique technological development, economic and political circumstances, and cultural considerations. Therefore, the critical issue lies in determining the necessity and degree of the requirements set by standards or measures. The agreement explicitly provides a method to presume the legitimacy and necessity of technical regulations: if the content of such regulations is fully "in accordance with" with the requirements of relevant "international standards," it may be presumed not to create an unnecessary obstacle to trade.[2649]

Moreover, the TBT Agreement goes beyond merely incentivizing the adoption of the same international standards among its members. It imposes an obligation on all types of technical measures to use the relevant international standards as a reference point, thereby fostering the harmonization of technical measures among members. This harmonization aims to reduce disparities in the technical requirements for specific products to the extent possible, except where inherent differences are inevitable, enabling products from member countries to flow more freely in the international market in terms of regulatory compliance.

As this paper mentioned above, the ambition of developed countries that are trying to fulfill the NDC of Partis Agreement, more and more national-leveled climate change measures are established. Not only might new climate change measures be a more unreasonable burden to developing countries, but also, the divergence in the regulatory requirements imposed in different countries increases the cost and difficulty of gaining market access for exporters. As a result, the role of the WTO TBT Agreement plays a significant part. The harmonization

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[2646] Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

[2647] Understanding the WTO: Basics – Principles of the trading system, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited 2023/10/12).

[2648] General Agreement on Tariff and Trade, Oct.30, 1947, 55 U.N.T.S. 194; General Agreement on Tariff and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

[2649] TBT Agreement, at art. 2.5.

function in the TBT Agreement of national technical regulations, standards, and conformity assessment procedures around international standards greatly facilitates the conduct of international trade. Harmonization around international standards diminishes the trade-restrictive effect of technical barriers to trade by minimizing the variety of requirements that exporters have to meet in their different export markets. On top of that, this paper also suggests that the obligation on all types of technical measures to use the relevant international standards could be a tool to not only foster harmonization of technical measures among members but also mandate developed members apply the principle of CBDR-RC to their new climate change regulations.

The WTO TBT Agreement requires Members to base their technical regulations, standards, and conformity assessment procedures on international standards. Article 2.4 of the TBT Agreement provides in relevant part:

> "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations."[2650]

Moreover, the WTO TBT Agreement also strongly encourages using relevant international standards when drafting technical regulations. Article 2.5 of TBT the agreement provides that:

> "A Member preparing, adopting, or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted, or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[2651]

The WTO TBT Agreement confers a presumption of conformity upon governmental measures that adhere to internationally recognized standards. Regulations that align with pertinent international standards are presumed, prima facie, to refrain from generating superfluous impediments to international trade (as articulated in Article 2.5).[2652] In other words, the function of Article 2.4 and Article 2.5 of the TBT Agreement is to ensure that technical regulations, which could encompass mandatory climate and environmental measures, have a legitimate objective and follow international standards where they exist.[2653] The consistent use of "International standards" also means that policy and regulatory compatibility can extend to other countries that are not parties to a bilateral or multilateral agreement.[2654] Any other approach can artificially create new technical barriers to trade by using additional, unique, or partially accepted standards and provisions. In addition, this use of International Standards supports regulatory harmonization. It helps save resources that can result from additional testing or other duplicative procedures that can occur when regulators develop their solutions.[2655]

[2650] TBT Agreement, at art. 2.4.
[2651] TBT Agreement, at art. 2.5.
[2652] WTO Analytical Index TBT Agreement Article 2.4 & Article 2.5.
[2653] Barrios Villarreal, A. (2018). *International Standardization and the Agreement on Technical Barriers to Trade*. Cambridge: Cambridge University Press. doi:10.1017/9781108591348, chapter IV.
[2654] *Id.* at 109-114.
[2655] *Id.*

However, what constitutes an international standard? International standard is not defined in the WTO TBT Agreement. However, if we look into WTO cases, the Appellate Body found in the US–Tuna II (Mexico) (2012) that it is primarily the characteristics of the entity approving a standard that makes a standard an 'international' standard.[2656] The subject matter of a standard is not material to the determination of whether a standard is 'international.' A standard is an international standard if an international standardizing body approves it.[2657] pursuant to a TBT Committee decision of November 2000, for a standardizing body to be an 'international standardizing body' within the meaning of Article 2.4 of the TBT Agreement, its membership 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members.'[2658] Would CBDR-RC be qualified as one of the international standards that the WTO members are obligated to use as a basis?

IV. Can the CBDR-RC be the International Standard under Article 2.4 of the TBT Agreement?

Aiming to promote equity and sustainability in international trade and future climate change measures, this paper would like to debate the integration of CBDR as an international standard under the WTO TBT Agreement. The common critics would raise concerns about its feasibility and compatibility with the legal framework of the TBT Agreement.[2659] In other words, for the purpose of this paper, using Article 2.4 of the WTO TBT Agreement as a tool to mandate future climate change measures to implement the principle of CBDR-RC, providing differential treatment to developing countries, this paper has to first answer three questions: (1) can CBDR-RC become an international standard?; (2) what entity should we use for CBDR-RC when an international standardizing body is required?; (3) how can CBDR-RC become a relevant international standard of climate change policy?

Lastly, another question might need to be answered: if CBDR-RC is qualified as an international standard under the TBT Agreement, how must the developed countries adopt the CBDR-RC principle to fulfill the obligation of using the international standard as the basis? However, due to the page limit, this paper might not be able to answer the last question.

A. Can CBDR-RC become an international standard?

The Appellate Body began its analysis by observing that the composite term "international standard" is not defined in Annex 1 of the TBT Agreement; however, Annex 1.2 to the TBT Agreement defines a "standard" as follows: "Document approved by a recognized body that provides, for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may

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[2656] *See* Appellate Body Report, *US – Tuna II (Mexico) (2012)*, para. 353.

[2657] *See Id.*, para. 356.

[2658] *See* TBT Committee Decision on *Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement*, in WTO document G/TBT/1/Rev.10, dated 9 June 2011, pp. 46–8, para. 6; Annex 1 para. 4 of the TBT Agreement; *See also* WTO Analytical Index.

[2659] *See e.g.,* Horváthy, B. International Trade Law and Emerging Technologies: A Conceptual Framework. *Brat. L. Rev.* 2020, *4*, 9-20; Thow, A.M., Annan, R., Mensah, L. et al., *Development, implementation, and outcome of standards to restrict fatty meat in the food supply and prevent NCDs: learning from an innovative trade/food policy in Ghana,* BMC Public Health 14, 249 (2014), available at https://doi.org/10.1186/1471-2458-14-249.

also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."[2660]

The appellate Body also mentioned that it is primarily the characteristics of the entity approving a standard that makes a standard an 'international' standard.[2661] The subject matter of a standard is not material to the determination of whether a standard is "international." A standard is an international standard if an international standardizing body approves it.[2662]

Here, while CBDR-RC is not a traditional technical standard, it possesses some characteristics that align with the definition of a standard. CBDR-RC is a principle recognized and adopted by a multitude of international agreements and organizations, particularly in the context of environmental and climate agreements. It provides a framework for differentiated responsibilities based on historical contributions and capabilities among countries. In addition, CBDR-RC has gained recognition and widespread acceptance in the international community. It is not specific to one particular treaty or agreement but has been referenced in various international documents and negotiations, including within the UNFCCC.

Critics might argue that the CBDR-RC principle's generality and lack of specificity can lead to challenges in its practical application and monitoring, making it challenging to assess whether nations are effectively complying with the principle.[2663] However, it's essential to consider the broader context of international environmental principles and legal norms. Many principles of international law, including environmental law, are intentionally formulated in a way that is not overly specific.[2664] This imprecision is not inconsistent with principles fundamental to a legal system.[2665] Despite this imprecision, the principle has been repeatedly applied and has guided international legal decisions.[2666] Environmental principles, including CBDR-RC, are intended to guide judicial reasoning and the interpretation of legal rules.[2667] While they may not provide detailed, step-by-step instructions for behavior, they serve as fundamental guiding principles within the legal framework.[2668] In this sense, CBDR-RC is not unique in its level of generality but instead aligns with the broader practice of international law. It establishes the fundamental concept that countries should take differentiated actions based on their historical contributions and capabilities. This standard allows for a nuanced evaluation of states' responsibilities and contributions to addressing global challenges, such as climate change.[2669]

Lastly, CBDR-RC has a significant impact on international trade, particularly in the context of environmental regulations. It influences the formulation of technical measures, standards, and regulations related to trade in environmental goods and services. Given its

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[2660] Appellate Body Report, *US – Tuna II* (Mexico), para. 350.
[2661] Appellate Body Report, *US – Tuna II (Mexico) (2012)*, para. 353.
[2662] *See Id*., para. 356.
[2663] *See e.g.,* Thomas Deleuil, The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties, 21 Review of European Community & International Environmental Law 271, 272 (2012).
[2664] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (2017).
[2665] Daria Shapovalova, I*n Defense of the Principle of Common but Differentiated Responsibilities and Respective Capabilities*, in Debating Climate Law, 63-75, 70 (2021).
[2666] *Id*., at 71.
[2667] Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules,* 264-65 (2002).
[2668] Scotford, *supra note* 101.
[2669] Shapovalova, *supra note* 74, at 71.

global recognition and influence, CBDR-RC can be considered an international standard indirectly affecting trade.

B. What entity should we use for CBDR-RC when an international standardizing body is required?

When deciding whether a standard is an international standard under Article 2.4 of the TBT Agreement, what recognized body establishes the "standard" should also be considered. It is worth noting that a 'body' is a broader concept than an 'organization.'[2670] As the Appellate Body found in US – Tuna II (Mexico) (2012), a 'body' is a 'legal or administrative entity that has specific tasks and composition,' whereas an 'organization' is a 'body that is based on the membership of other bodies or individuals and has an established constitution and its own administration.'[2671] It follows that international standardizing bodies may be, but need not necessarily be, international organizations.[2672] Second, pursuant to a TBT Committee decision of November 2000, for a standardizing body to be an 'international standardizing body' within the meaning of Article 2.4 of the TBT Agreement, its membership 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members.'[2673]

Here, the whole formulation and the revision of the CBDR-RC was under the UN. Therefore, the UN should be considered the subject matter that establishes, applies, and approves the principle of CBDR-RC. The UN can be viewed as a "body" under the TBT Agreement because it is a legal entity with specific tasks and composition. The UN encompasses a wide range of specialized agencies, programs, and bodies that address various global issues, including technical standards and regulations. These entities often collaborate and contribute to standardization efforts in their respective domains. Furthermore, The UN has a broad membership that includes virtually all sovereign states globally. While some specialized agencies and bodies within the UN may have specific criteria for membership, the overarching principle of the UN system is to be inclusive and open to all nations, which aligns with the TBT Agreement's requirement for membership openness. Thus, the UN should be considered a qualified international standardizing body that approves CBDR-RC.

C. How can CBDR-RC become a relevant international standard of climate change policy?

As to the third question, namely, how can CBDR-RC become a 'relevant" international standard, the panel in EC – Sardines (2002) found that the international standard 'Codex Stan 94,' developed by an international food-standard-setting body, the Codex Alimentarius Commission, and the EC's technical regulation at issue both covered the same product (Sardina pilchardus), they both also included similar types of requirements regarding this product, such as labeling, presentation, and packing medium.[2674] The panel concluded that the

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[2670] *See* Appellate Body Report, *US – Tuna II (Mexico) (2012)*, para. 356.
[2671] *See Id.*, para. 355.
[2672] *See Id.*, para. 356.
[2673] *See* TBT Committee Decision on *Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement*, in WTO document G/TBT/1/Rev.10, dated 9 June 2011, pp. 46-48, para. 6.

[2674] *See* Panel Report, *EC – Sardines (2002)*, paras. 7.69–7.70 (The finding was upheld by the Appellate Body). *See* Appellate Body Report, *EC – Sardines (2002)*, para. 233.

Codex Stan 94 was a relevant international standard for the EC's technical regulation at issue.[2675]

It seems to this paper that, for an international standard to be "relevant," it has to deal with the same product, which is pretty narrow. However, in the US – COOL, the Panel noted the parties' disagreement on whether CODEX-STAN 1-1985 was a "relevant" international standard within the meaning of Article 2.4 and observed: "In this context, we also recall that the SPS Agreement recognizes the relevance of the Codex Alimentarius Commission by acknowledging that for food safety, international standards, guidelines, and recommendations are the ones established by the Codex Alimentarius Commission. We also recognize that CODEX plays a crucial role in food safety and quality."[2676] It seems to this paper that for an international standard to be relevant, it should play a crucial role or significantly influence that specific policy or area.

As a result, this paper aims to argue as widely as possible for the CBDR-RC so that it could be relevant to as much climate change policy as possible.

1. Multilateral Environmental Agreements (MEAs)

As this paper mentioned in sections I and II, the development of CBDR-RC has been through UNFCCC, the Kyoto Protocol, and the Paris Agreement. Take the Paris Agreement as an example, its preamble and the main content of the agreement emphasize the relationship between climate change actions and responses to equitable access to sustainable development and the eradication of poverty.[2677] As a result, when a national climate change measure is established based on responding to MEAs, the CBDR-RC can be interpreted into a relevant international standard. Thus, the national measure should use the principle of CBDR-RC as a basis.

2. Nationally Determined Contributions (NDCs)

The pursuit of climate action and the achievement of Sustainable Development Goals (SDGs) are closely intertwined, with the principle of CBDR-RC serving as a bridge between them.[2678] At the heart of this connection lies the implementation of NDCs, a critical component of the Paris Agreement.

NDCs are pivotal commitments countries make to reduce their greenhouse gas emissions and enhance resilience to climate change. However, their significance extends beyond climate action alone. NDCs also play a substantial role in advancing sustainable development and contributing to the broader global goal of achieving the SDGs.[2679]

One of the primary reasons behind this synergy is the cyclical nature of the NDCs process, which involves collective assessment through global stocktaking "in light of equity." Here, the concept of equity becomes instrumental. By applying the SDG lens to NDCs, countries can craft more comprehensive and ambitious targets that not only address climate change but also

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[2675] *Id.*
[2676] *See* Panel Report, US – COOL, para. 7.729.
[2677] Paris Agreement, at pmbl. ¶ 8 & art. 2.2.
[2678] Paris Agreement, at art. 14.1.
[2679] *Id.*

align with multiple dimensions of the United Nations' 2030 Agenda for Sustainable Development (UN 2023 Agenda).[2680]

This intersection highlights the inherent interconnectedness of environmental protection, climate action, and sustainable development. While NDCs primarily focus on climate mitigation and adaptation, their impact ripples through various sectors, influencing poverty reduction, gender equality, clean energy access, and more. Thus, NDCs not only serve as a climate roadmap but also as a catalyst for broader sustainable development endeavors, and CBDR-RC is the connecting part of this endeavor. Therefore, as an essential part of the NDCs, CBDR-RC can be broadly interpreted as a relevant international standard to NDCs. When states' measure is to respond or with the ambition of reaching its NDCs level, the CBDR-RC should be the relevant international standard they must base on.

3. Sustainable Development Goals (SDGs)

The Paris Agreement underscores the interrelation between climate change actions and the pursuit of equitable access to sustainable development and poverty eradication. This connection finds its roots in the overarching goals of the UN Agenda 2030, where sustainable development and poverty eradication are paramount.

Article 2 of the Paris Agreement further amplifies this linkage by setting an ambitious target of limiting global temperature rise to 2 degrees Celsius within the framework of sustainable development. Article 4 of the Agreement emphasizes that its goals, including NDCs, should be achieved and implemented on the basis of equity and in the context of sustainable development.

Notably, the Paris Agreement extends the association between global climate adaptation goals and sustainable development. It mandates that domestic adaptation measures adopted by nations should align with the objectives of sustainable development. Additionally, Parties under the Paris Agreement explicitly recognize the role of sustainable development in reducing the risk of loss and damage.[2681]

Simultaneously, Sustainable Development Goal 13 (SDG-13) underscores the importance of enhancing nations' resilience and capacity to respond to climate change. SDG-13 adopts a comprehensive approach by considering both country-specific requirements, with a focus on the special needs of least-developed countries (LDCs) and small island developing States, and individual-level considerations, including those related to women, youth, and marginalized communities.[2682]

This harmonious integration of climate action, equity through CBDR-RC, and sustainable development aspirations signifies a multifaceted strategy to address global challenges. It emphasizes the need for cohesive policies that retain the pursuit of climate resilience and sustainable development.[2683] In a world marked by diverse capabilities and historical legacies,

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[2680] *See* Eliza Northrop et al., *Examining the Alignment Between the Intended Nationally Determined Contributions and Sustainable Development Goals*, World Resource INST., at 1, 2, 13 (2016), https://www.wri.org/publication/examining-alignment-between-intended-nationally-determined-contributions-and-sustainable.

[2681] *See generally* David Griggs et al., *An Integrated Framework for Sustainable Development Goals*, 19(40) ECOL. SOC. 49 (2014); William Boyd, *Climate Change, Fragmentation, and The Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32(2) U. OF PA. J. OF INT'L L. 457, 513 (2010).

[2682] *See* G.A. Res. 70A/1, Transforming Our World: The 2030 Agenda for Sustainable Development, pmbl. (Sep. 2015) [hereinafter U.N. 2030 Agenda], SDG 13.2.

[2683] Ye Jiang, *The CBDR Principle in the UN 2030 Agenda for Sustainable Development,* 2(2) CHINA Q. OF INT'L

CBDR-RC becomes a pivotal instrument in ensuring climate action harmonizes with broader developmental goals and aspirations.[2684]

Through the link of CBDR-RC and SDGs, CBDR-RC might get a broader stage to be considered a "relevant" international standard.

Lastly, another question might need to be answered: if CBDR-RC is qualified as an international standard under the TBT Agreement, how must the developed countries adopt the CBDR-RC principle to fulfill the obligation of using the international standard as the basis? According to the panel in *EC – Sardines (2002)* concluded that the requirement to "use as a basis" imposes the obligation to "employ or apply" the international standard as "the principal constituent or fundamental principle for the purpose of enacting the technical regulation."[2685] In addition, according to the Appellate Body in *EC – Sardines (2002)*, this comes down to an analysis of "whether there is a contradiction between Codex Stan 94 and the EC regulation".[2686] Here, how much a developed country applies or how detail should they apply the principle of CBDR-RC remains unknown and would probably depend on a case-by-case basis and would need more time to observe. However, due to the time and page limits, this paper chooses not to answer this question.

Nevertheless, through the discussion above, this paper believes there is a chance of using Article 2.4 of the WTO TBT Agreement to mandate states to establish new climate change policies responding to NDCs or the UN 2023 Agenda to provide appropriate differential treatments for developing countries. Because of its nature, the CBDR-RC principle can be argued as an international standard under the TBT Agreement. On top of that, CBDR-RC plays a significant part in the Paris Agreement, the NDCs, and the SDGs. The CBRD-RC principle should therefore be used to encourage newer climate change policy that focuses more on fairness and equity considerations, especially intergenerational and intragenerational equity.

V. Conclusion: What else can be created?

This paper has delved into the prospect of integrating the principle of CBDR-RC into the WTO TBT Agreement as an international standard. Through an examination of CBDR-RC's characteristics, CBDR-RC exhibits characteristics aligning with the definition of an international standard, finds an appropriate entity in the United Nations (UN) for its imprimatur, and can attain relevance in climate change policy across MEAs, NDCs, and SDGs. This integration holds the potential to foster equity, sustainability, and global cooperation, harmonizing international trade with climate action and the pursuit of sustainable development, thereby contributing to a more inclusive and just future for all. Therefore, whenever a developed country establishes a new climate change policy with a legitimate objective of fulfilling NDC promises of the Paris Agreement, responding to the UNFCCC guideline, or simply reacting to the United Nations' 2030 Agenda for Sustainable Development, especially SDG 13 climate action, the principle of CBDR-RC can be a relevant international standard under article 2.4 of WTO TBT Agreement, which obliged the developed

STRATEGIC STUDIES 169, 170 (2016).

[2684] Achala C. Abeysinghe & Gilberto Arias, *CBDR as a Principle of Inspiring Actions Rather Than Justifying Inaction in the Global Climate Change Regime, in* Climate Change: International Law and Global Governance, 235-57 (2015).

[2685] *See* Panel Report, *EC – Sardines (2002)*, para. 7.110.

[2686] *See* Appellate Body Report, *EC – Sardines (2002)*, para. 249. The Appellate Body thus concluded in *EC – Sardines (2002)* that the EC technical regulation at issue was not based on Codex Stan 94 because the former contradicted the latter.

parties to base on. In this way, future national climate policies can provide more appropriate flexibility and S&DT for developing countries while protecting the environment.

On top of that, when a newer climate policy is "in accordance with" the international standard, Article 2.5 of the WTO TBT Agreement can provide a safe harbor for the policies from a time-consuming dispute settlement process; in terms, this measure can be rebuttably presumed not to create an unnecessary obstacle to international trade. This might encourage more developed parties of the WTO to provide a more comprehensive regulation design according to the principle of CBDR-RC. Incorporating CBDR-RC into international trade norms can offer a vital bridge between environmental responsibility and economic growth, fostering a harmonious coexistence of trade, climate actions, and sustainable development while ensuring international equity and cooperation.

However, while the theoretical foundation for this integration appears sound, there are several critical questions that we could think over. To what extent can the integration of CBDR-RC as an international standard within the TBT Agreement accommodate the nuanced demands of climate change policy? How might developed countries implement CBDR-RC in their domestic measures to meet the obligations set forth by the TBT Agreement?

Pursuing a fair, equitable, and sustainable global future in the environment will never end. During this journey, this paper wishes to find more trade tools to help facilitate more climate change policy.

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Georgetown Law's Center on Inclusive Trade and Development (CITD) was established to bring together scholars, students, practitioners, NGOs, business and labor leaders, and international organizations to find solutions to the challenges facing the international trading system and develop global approaches to making trade rules more inclusive and sustainable. Today, the rules-based international trading system faces its most significant turning point in decades.

Around the world, multilateral alliances are breaking apart, sustainable development concerns are gaining attention, the core mission of the World Trade Organization (WTO) of policing discrimination is out-of-date, and the forces that pushed the world toward globalization over the past 40 years are shifting. The COVID-19 pandemic has forced a reexamination of supply chains, while the need for the trading system to affirmatively contribute to the fight against climate change and the growth in income inequality has become truly urgent. Many countries and communities are also pressing for approaches that address historical biases and inequities and take into account a diverse range of state and individual needs. As the multilateral system comes under strain, new models for international trade law are emerging, particularly in the form of regional trade agreements (RTAs), shaping law in areas where the WTO has not been able to gain ground, such as sustainability, digital regulation, gender equity, and more sustainable investment regimes.

Understanding how we get from where we are today to a future rules-based trading system that addresses the implications of trade rules for development, for the environment, for global health, and for labor rights is the core of the CITD. The work has both a top-down approach that examines the WTO and how it can be reformed and revitalized to meet these challenges and a bottom-up assessment of what women, workers, farmers, and small- and medium-sized enterprises (MSMEs) need from a trading system to ensure their full and fair participation in the global trading system. CITD serves as the hub and coordinator for research, writing, teaching, events, and clinical work on key aspects of inclusive trade and development, focused around five key pillars:

1) Development – The link between economic and social development and international economic law is becoming stronger in both academic literature and practice. However,

vulnerable communities, minorities, women, and MSMEs continue to face greater challenges in the global economy, and existing trade rules are yet to fully address these gaps. CITD focuses on these intersecting dimensions of law, trade, and development, generating scholarship and thought leadership that more closely link trade and development through engagement with both international institutions and with MSMEs and communities on the ground.

2) Environment and Climate Change – CITD's work under this pillar focuses on how to make the link between trade and the environment real and practical, including crafting specific tools that would allow trade officials to see trade rules through the prism of their impact on the environment and sustainable development. CITD is also working in partnership to conduct research at the intersections between trade and climate change and environmental sustainability and development, with the goal of enabling the trading system to make an affirmative contribution to fighting climate change.

3) Gender – CITD contributes to the growing body of literature focused on the impact of trade on women's empowerment and gender related issues. This includes research on everything from trade's potential to exacerbate income inequality or racial or gender disparities, to the implications for the workforce of the future, to the effectiveness of including gender and labor provisions within the text of trade agreements, to how to assess impact and help those affected by trade adapt to the changes brought about by trade and globalization, to specific proposals for how trade rules or trade policies could be designed.

4) WTO Institutional Reform and Governance – The WTO, and with it the rules-based trading system, is in deep trouble. Its dispute settlement system has been crippled by blockages to appointments to its Appellate Body. With few notable exceptions in areas like trade facilitation and fisheries subsidies, the WTO rule book has remained largely stuck in the 1990s. CITD is working toward an ambitious but realistic road map to reform the WTO as an institution and to modernize its basic rules, working to ensure that the WTO can remain at the core of a rules-based trading system addressing 21st century trade concerns.

5) Regionalism – Among the many paradigm shifts occurring in the trade arena is the shift away from globalization to a greater emphasis on regionalism, both in patterns of trade and in trade agreements. CITD focuses its research on the drivers and the implications of this shift and on what can be done to ensure that regional arrangements serve to support, or at least to operate in parallel to the multilateral trading system, and drive positive change as new issues are incorporated. This pillar also focuses on particular regional models to address sustainable development through trade.

Governance

Co-Directors: Georgetown Law professors Jennifer Hillman and Katrin Kuhlmann serve as co-directors of the CITD. Jennifer Hillman currently teaches and writes about international trade law, WTO reform, the rise of China, and climate change and brings decades of experience in the trade arena from her service on the WTO's Appellate Body, the U.S. International Trade Commission, and as a lawyer and negotiator at USTR. Katrin Kuhlmann teaches and writes about trade and development, gender, and regional trade issues, with a focus on Africa, and has spent decades working on trade and development as a negotiator at USTR and leader at NGOs and think tanks, combining expertise at both the policy level and through grass-roots applications of trade law in developing economies.