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Moonlighting Revisited: International Court of Justice Judges as Adjudicators in Investment Arbitration

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Abstract:
This article presents a quantitative analysis of the involvement of judges of the International Court of Justice (ICJ) as adjudicators in investor-state dispute settlement (ISDS). As ICJ judges participated in more than 10% of known investment arbitrations and almost one third of ICSID annulment proceedings, the 2018 decision to prohibit active ICJ members to decide investment disputes bear relevant implications for both the ICJ and ISDS. The article discusses the reasons for and implications of ICJ judges adjudicating investment disputes. The quantitative analysis shows that ICJ status is a relevant factor in arbitral appointment process, ICJ judges are often appointed presidents or arbitrators for the respondent and the overall dynamic of appointments follows patterns of general ISDS developments. At the same time, the outcomes of investment disputes decided by ICJ judges are balanced and do not confirm the assumed pro-state bias of the judges.

1. Introduction

In 2017, the International Institute for Sustainable Development (IISD) published a commentary on the involvement of the judges of the International Court of Justice (ICJ) in investor-state dispute settlement (ISDS) as arbitrators or members of committees deciding on annulments of awards issued under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) of 1966.[1] The IISD is a non-governmental organization concerned with, among others, investment policies and sustainable development. It is known for its critical stance towards ISDS.[2] Its report brought to the public attention the practice of former and sitting full-time ICJ members working as arbitrators or annulment committee members (for the purposes of this article defined collectively as 'adjudicators') in ISDS despite the express stipulation in the ICJ Statute that they were not to 'engage in any other occupation of a professional nature'.[3] The IISD raised several concerns arising from that practice, labelled as 'moonlighting', including significant remuneration of ICJ judges for arbitral work, their workload, independence

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1 Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, Is *"Moonlighting" a Problem? The role of ICJ judges in ISDS,* International Institute for Sustainable Development (Nov. 23, 2017), https://www.iisd.org/articles/policy-analysis/moonlighting-problem-role-icj-judges-isds.

2 Nathalie Bernasconi-Osterwalder, *Rethinking Investment Policy to Support Sustainable Development,* IISD (Sept. 17, 2020) https://www.iisd.org/articles/success-story/rethinking-investment-policy-support-sustainable-development.

and impartiality.[4] At the same time, it noted that ICJ members have been involved as adjudicators in roughly 10% of all known investment treaty cases,[5] showing the scale of the issue.

The IISD commentary has raised some concerns about the ICJ members' work outside the Court.[6] In response to these concerns, in October 2018, in his annual speech before the United Nations General Assembly, the ICJ President Yusuf has announced a joint decision of the ICJ members not to participate in investment or commercial arbitration.[7] While Judge Yusuf did not mention ICSID annulment committees, when he became the ICJ President in February 2018 he resigned from sitting on an annulment committee.[8] Despite this example, other ICJ members did not, however, resign from their respective arbitral or annulment appointments, but continued their work in at least 11 investment cases.[9]

In 2020, the ICJ issued guidelines on the external activities of its members. The guidelines begin with arbitration activity and stipulate that sitting ICJ members 'may only participate in inter-state arbitration cases,' and only one case at a time.[10] One may ask why only this particular type of moonlighting, apart from the fact that ICJ judges often serve as arbitrators between states, was allowed. The case limit suggests that the workload increase at the ICJ has been taken into account. While it is still unclear whether the prohibition applies to ICSID annulment proceedings as these are not arbitrations *per se,* what is clear is that it does apply to active ICJ judges serving as arbitrators in ISDS.

This article discusses how the role of ICJ judges in deciding investment disputes which became a legitimacy concern both for the Court and ISDS. As that engagement has since been substantially limited, it is a good moment to assess this phenomenon and revisit the data and observations

3 Statute of the International Court of Justice, Art. 16 (1946), https://www.icj-cij.org/en/statute (describing how vacancies shall be filled).

4 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 2–5.

5 *Id.* at 1.

6 Jack Ballantyne & Alison Ross, *Past and present ICJ judges welcome curb on moonlighting,* Global Arbitration Review (Apr. 9, 2021), http://globalarbitrationreview.com/past-and-present-icj-judges-welcome-curb-moonlighting; Ashira Vantress, *A Review of "Moonlighting" ICJ Judges and the International Call for Impartiality in Investor-State Dispute Resolution,* 12 World Arb. & Mediation Rev. (2020).

7 Abdulqawi A. Yusuf, President of the International Court of Justice at the Seventy-Third Session of the United Nations General Assembly 11–12 (Oct. 25, 2018), https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf.

8 Joel Dahlquist, *ICJ President reveals that ICJ judges will not participate in investor-state arbitration in the future,* Investment Arbitration Reporter (Oct. 27, 2018), http://www.iareporter.com/articles/icj-president-declares-that-judges-will-not-participate-in-international-arbitration-in-the-future/.

9 The three other ICJ judges involved in ISDS at the time did not resign from their appointments: Judge Crawford – four cases, Judge Donoghue – one case, and Judge Tomka – six cases.

10 International Court of Justice, Compilation of decisions adopted by the Court concerning the external activities of its Members 3 (last visited May 22, 2022), https://icj-cij.org/public/files/basic-documents/compilation-of-decisions-en.pdf.

made by the IISD commentary. While it appears that ICJ judges have substantially reduced their involvement in investment disputes given the abovementioned developments, it is useful to explore their past relevance and the implications of that relevance for the future of ISDS. The multifaceted role of the ICJ and its judges in ISDS makes the limitation of their involvement relevant for the developments in the field. A quantitative analysis will demonstrate which ICJ judges were involved in ISDS in what role and how often, thus making it possible to delineate the actual size of that involvement. These observations are relevant as it appears to be increasingly visible how important, both in terms of legitimacy and practice, is who decides international disputes.[11]

The involvement of ICJ judges as adjudicators in ISDS bears some normative considerations. Does the participation of an ICJ judge in investment arbitration the affect legal reasoning applied therein and its outcome? Does that participation affect the perception of the proceedings, its outcome or the ISDS as a whole? Empirical evidence suggests that the tribunals and committees including ICJ judges rely more often on ICJ references in their legal reasoning than those without ICJ judges.[12] Arguably, because of their provenance, ICJ judges lent their authority and legitimacy to the tribunals they sat in, their decisions and the ISDS as a whole. They might also have fostered consistency and coherence of international investment law, both internally (within the regime) and externally (with other fields of international law), even if only unintentionally due to their profession. All in all, besides resolving international disputes and developing international law, the concern with consistency and coherence is a part of their function as ICJ judges. Although their role within ISDS was slightly different than that at the Court, that function had similar significance in their arbitral work.

The structure of the piece is as follows. Firstly, it describes the role of the ICJ and its judges in international dispute settlement, the explanations for and implications of their involvement in ISDS (Section 2). Secondly, it presents the quantitative analysis of appointments of ICJ members (leaving aside *ad hoc* judges)[13] as adjudicators in known investment disputes (Section 3).[14] Finally, it concludes with the implications of limiting the ICJ members' involvement in ISDS (Section 4).

2. Involvement of the ICJ in ISDS – explanations and implications

The International Court of Justice appears in international investment law and arbitration in numerous ways as, among others, institution, example to follow or source of jurisprudence and adjudicators. This section presents, first, the ways in which the Court appears in ISDS, second, the explanations for it, and third, implications of these appearances.

11 David Collins, *ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?,* 30 J. Int'l Arb. 335 (2013); Sergio Puig, *Social Capital in the Arbitration Market,* 25 European J. Int'l L. 387, 388–90 (2014).

12 Damien Charlotin, "Authorities" in International Dispute Settlement: a Data Analysis, 213–214 (Oct. 31, 2020) (Ph.D. thesis, University of Cambridge), available at https://www.repository.cam.ac.uk/handle/1810/312324.

2.1. The Court in ISDS

From all standing international courts, the ICJ has the broadest scope of jurisdiction. It applies the broadest range of international legal norms from different sources. Moreover, the Court makes pronouncements on a wide variety of issues, from establishing the existence of a customary international legal norm or a general principle of law, through treaty interpretation to using secondary rules on state responsibility. As a result, the ICJ has made numerous important pronouncements on general international law which are often cited in international jurisprudence and scholarship. It is the richest source of general principles of law[15] which are indispensable for gap-filling in arbitral law-making.[16] ICJ judges thus develop international law by identifying, clarifying and establishing its rules.[17] Due to this role and experience, they are perceived as authoritative adjudicators in international legal disputes.

ICJ judges professionally solve international legal disputes involving states, interpreting international treaties. Their expertise in public international law and its application in international disputes is not to be underestimated among investment arbitrators. The latter are criticized, also by some insiders,[18] for their lack knowledge of international law or incorrect application of treaty interpretation rules

13 At every contentious case decided by the ICJ, each of the parties may appoint an *ad hoc* judge if no judge of the party's nationality is at the bench. While often respected international lawyers take *ad hoc* judge position, they are not taken into consideration as they do not benefit from that position to get ISDS appointments. Rather, it is the other way around. Nevertheless, among the ICJ judges *ad hoc* one can also find numerous individuals important in investment arbitration, just to mention Georges Abi-Saab, Franklin Berman, Charles N. Brower, David Caron, Ahmed Sadek El-Kosheri, Yves Fortier, Marc Lalonde or Donald McRae.

14 The dataset includes all publicly known (as of May 1, 2022) investment disputes regardless their legal basis – an investment treaty, an investment contract and/or a domestic law. Involvement of ICJ members in ISDS other than directly deciding the case, e.g. appointing arbitrators, deciding on arbitrator challenges, as counsels or expert witnesses, was not taken into account.

15 Charlotin, *supra* note 12, at 216–21.

16 Alec Stone Sweet & Florian Grisel, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy 107, 240–47 (Oxford University Press, 2017); *see also* The Renco Group Inc. v. Republic of Peru II, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections ¶¶ 212-14 (June 30, 2020); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award ¶ 72 (Oct. 31, 2005).

17 Lyndel V. Prott, The latent power of culture and the international judge 77–78 (1979).

18 Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis,* 19 European J. Int'l L. 301, 315 (2008); William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, in* The backlash against investment arbitration: perceptions and reality 407, 409 (Michael Waibel et al. eds., 2010); Julie A. Maupin, *Differentiating Among International Investment Disputes, in* The Foundations of International Investment Law 466, 488 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?,* 29 European J. Int'l L. 551, 552 (2018); Niccolò Ridi, *'Mirages of an Intellectual Dreamland'? Ratio, Obiter and the Textualization of International Precedent,* 10 J. Int'l Disp. Settlement 361, 372–75 (2019).

19 Thomas Waelde, *Interpreting Investment Treaties: Experiences and Examples, in* International Investment Law for the 21st Century 724, 724–27 (Christina Binder et al. eds., 2009); Michael Waibel, *International Investment Law and Treaty Interpretation, in* International Investment Law and General International Law 29 (Rainer Hofmann & Christian J. Tams eds., 2011); Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law, in* The Foundations of International Investment Law 257, 269–80 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014).

stipulated in the Vienna Convention on the Law of Treaties.[19] Many times, ICJ judges collectively have made decisions related to international arbitral awards[20] while individually they have been deciding on appointing or challenging arbitrators in ISDS. Thus, besides the role of 'direct' decision makers, the ICJ judges appear in the field of international arbitration as power brokers, capable of playing numerous roles. They are able to act as such thanks to the general prestige of the Court and its judges. That prestige is a foundation of particular trust in the ICJ of virtually all the actors and stakeholders in ISDS: parties, other arbitrators, arbitral institutions and scholars.

When solving investment treaty disputes, the adjudicators often face various general international law issues, including, for example, treaty interpretation, identification and interpretation of other sources of international law, matters of territorial sovereignty, nationality, state succession, attribution of a conduct to a state, remedies for violations or circumstances precluding wrongfulness of state conduct.[21] They often seek references to these matters in the ICJ jurisprudence.

In addition to its jurisprudence as a source of law, which might go beyond its secondary role provided for in Article 38 of its own Statute (an influential legal source in itself), the ICJ is a source of practices (e.g., in procedure or taking evidence) and, as argued in this article, adjudicators. Thus, there are normative, institutional and personal connections between the Court as proxy for general international law and the ISDS tribunals as emanations of investment lex specialis.

The Court also played a role in the emergence of investment law as we know it today. Both the Permanent Court of International Justice (PCIJ) and the ICJ as its successor have decided several cases which would currently qualify as investment disputes.[22] The dissatisfaction with inherent limitations of customary law on diplomatic protection of aliens and foreign property and the challenge to these practices made by the recently independent, post-colonial countries in the 1970s led several states to turn to investment treaties providing for international arbitration in which investors have direct standing against host states. Thus, the ICJ had a role in the development of investment treaty regime as a distinct field of practice and research in international law.[23]

Coming back to its legal function, the Court is by far the most popular external source of precedents in investment arbitration.[24] Moreover, empirical evidence shows that the presence of a sitting or former ICJ judge in the bench is correlated with more citations of the ICJ by both the parties

20 *See e.g., Arbitral Award made by the King of Spain on 23 December 1906* [1960] ICJ Rep 192; *Arbitral Award of 31 July 1989* [1991] ICJ Rep 53. *See also* Michail Risvas, *Review and enforcement of arbitral awards in international investment law and general public international law, in* International Investment Law and General International Law 368 (Christian Tams et al. eds., 2023).

21 Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis,* 20 J. Int'l Econ. L. 279, 288 (2017).

22 *See e.g.,* The Oscar Chinn Case, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12); Barcelona Traction, Light and Power Company, Limited, 1970 I.C.J. Rep. 3; Elettronica Sicula SpA, 1989 I.C.J. Rep. 15. All these cases are often cited in investment arbitration cases; Stone Sweet & Grisel, *supra* note 16, at 156–57.

23 Mārtiņš Paparinskis, *Barcelona Traction: A Friend of Investment Protection Law,* 8 Baltic Y.B. Int'l L. 105 (2008).

24 Charlotin, *supra* note 21.

and the tribunal.[25] This suggests that the personal composition of the bench influences the legal reasoning, that is which legal arguments are put forward by the parties. However, law is not the only factor possibly influencing the ICJ/PCIJ citations in arbitral decisions. The involvement of the Court, its judges and jurisprudence may play a particular role in strengthening the authority and legitimacy of the tribunal and, in turn, whole investment arbitration. Below, several theoretical explanations for that versatile involvement of the ICJ/PCIJ in investment arbitration are presented.

2.2. Explanations for ICJ involvement in ISDS

Historically, arbitration was a less legalized, more informal method of dispute settlement. The authority an arbitral tribunal's decision depended heavily on the social capital of its members.[26] When modern international arbitration emerged, the first generation of arbitrators were European international law professors[27] or the experienced and respected members of 'international bar' or 'judiciary'. For example, the famous arbitration case concerning *Island of Palmas*[28] was decided by a former President of the PCIJ. Arguably, his PCIJ status was a currency of social capital needed to become a respectable arbitrator.[29] A continuity can be noted between the PCIJ and the ICJ also in the involvement of their judges in international arbitration.

The ICJ (and previously, the PCIJ) is one of the most prestigious courts of international law. The Court and its judges are highly esteemed, at least superficially, in international jurisprudence and scholarship.[30] The ICJ is the closest equivalent to the non-existent Supreme Court of international law. Moreover, various proposals on introducing appellate instance in international adjudication involve the ICJ or its judges.[31] The Court's prestige is one of the reasons its decisions are extensively cited by itself, other courts, and scholars. Its prestige also explains why ICJ judges are involved in other fields of international dispute settlement, including ISDS, as members of 'international judiciary' alongside members of other international courts and judges of domestic supreme courts. The standing international court character and fixed terms of appointment for its judges increase the ICJ's appearance as a stable institution. The institutional framework of the Court and the selection process of its judges reinforce its prestige as a neutral, diverse, professional and respectable

25 Charlotin, *supra* note 12, at 213–14; Fuad Zarbiyev, *Saying Credibly What the Law Is: On Marks of Authority in International Law,* 9 J. Int'l Disp. Settlement 291, 303 (2018).

26 Yves Dezalay & Bryant G. Garth, Dealing in virtue: international commercial arbitration and the construction of a transnational legal order 18–19, 52–60 (1996); Stone Sweet & Grisel, *supra* note 16, at 72–75.

27 Dezalay & Garth, *supra* note 26, at 34–42.

28 Island of Palmas Case (Netherlands v. U.S.), 2 R.I.A.A. 839 (Perm. Ct. Arb. 1928).

29 Daniel-Erasmus Khan, *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations,* 18 European J. Int'l L. 145 (2007); Antoine Vauchez, *The International Way of Expertise. The first World Court and the Genesis of Transnational Expert Fields* (EUI, Working Paper RSCAS 2014/80, 2014).

30 Chester Brown, A common law of international adjudication 232 (2007); Sara Dezalay & Yves Dezalay, *Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration, in* International Law as a Profession 311, 315–23 (Jean d'Aspremont et al. eds., 2017).

31 Mohamed Sameh M. Amr, The role of the International Court of Justice as the principal judicial organ of the United Nations 374–76 (2003); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration,* 73 Fordham L. Rev. 1521, 1602–03, 1609–10 (2005).

institution. The Statute and the Rules of the Court have ceased to be of internal importance only, having become points of reference for other international adjudication bodies. This concerns not only the indication of the sources of international law in the Article 38 of the Statute but also practical matters.[32]

The ICJ, mindful of its prestige, actively promotes its own status. At the annual speeches to the General Assembly, ICJ Presidents emphasize the need for peaceful dispute settlement and thus for the Court. They also draw attention to the consistency and coherence of international decisions, deploring the fact that the Court is not consulted or cited as often as it should be.[33] At the same time, the Court is known to being reluctant to employ external citations so as not to dilute its prestige.[34] Even before the moonlighting controversy sparked by the IISD commentary, the Court was mindful of the risks of potential issue conflicts arising. In the ICJ Practice Directions, judges *ad hoc* were prohibited from serving in various roles in different cases before the Court, e.g., as a counsel in one and as a judge in another, at the same time (so-called 'double hatting').[35] Moonlighting by the ICJ judges had already been discussed internally in the 1990s. After the UN Advisory Committee on Administrative and Budgetary Questions raised an issue of the judges being remunerated for, among others, 'acting as arbitrators in inter-State and private international arbitrations', the Court in its report asserted the legality of this practice dating back to the origins of the PCIJ. In addition, it emphasized that the issue concerned 'a very limited number of judges for very limited periods' and that it had 'no adverse effect on the pace of the work of the Court'.[36] While the limited involvement, without effect on the Court's workload, might have been the case in the 1990s, the matter has resurfaced with the IISD commentary when the ICJ, ISDS and involvement of ICJ judges therein were much more active. In the meantime, the ISDS started facing the legitimacy crisis and thus the judges' involvement in it became problematic for the public perception of the Court.

The relative popularity of ICJ judges as arbitrators can, on the one hand, be explained by the formal presumption of both moral quality and legal expertise, required also in international arbitration. According to the Statute of the ICJ, its judges must be 'of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.'[37] In practice, most ICJ judges are indeed recognized experts of international law, as the appointment to the ICJ is often considered the apex of an international legal career. The appointment formally confirms this status, adding to the appearance of impartiality.[38] The 'ICJ aura' is not, however, absolute: Judge Bedjaoui, for

32 Brown, *supra* note 30, at 226–34.

33 Erik Voeten, *Borrowing and Nonborrowing among International Courts,* 39 J. Legal Stud. 547, 548 (2010).

34 *Id.* at 569.

35 Philippe Sands, *Judicialization and its Challenges, in* The judicialization of international law: a mixed blessing? 245, 253 (Andreas Føllesdal & Geir Ulfstein eds., 2018).

36 International Court of Justice, *Report of the International Court of Justice. 1 August 1995 - 31 July 1996,* 43, ¶ 199, https://www.icj-cij.org/public/files/annual-reports/1995-1996-en.pdf.

37 ICJ, Statute of the International Court of Justice, Article 2 (describing the organization of the ICJ).

38 Callum Musto, *New Restrictions on Arbitral Appointments for Sitting ICJ Judges,* EJIL:Talk! (Nov. 5, 2018), https://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/.

example, despite his eminence in international arbitration and former ICJ President status, was disqualified from an ICSID dispute, which rarely happens.[39]

Another potential explanation of the reference to general public international law through the ICJ judges and jurisprudence is the strengthening connection between the regimes and thus perception of ISDS. The legitimacy crisis of investment arbitration is related to its alleged alienation from the mainstream international law.[40] Thus, public international law as a more 'state-friendly' paradigm could be assumed to be strengthened in investment arbitration to 're-balance' the latter towards the interests of the states. This 'state-friendly' paradigm would be construed as such due to the foundation of public international law on respect for states' sovereignty and equality, providing some deference to their rights and interests in their mutual relations. Similar reasoning may stand behind the involvement in ISDS of ICJ judges, who often have a background as public international law scholars or even civil servants.[41] If 'the enemy of the state'[42] takes more of a 'friend of the state' perspective, the outcome may appear to be more acceptable for the states. In addition, due to the vague wording and numerous gaps in the applicable law, in particular investment treaties, embedding legal interpretation of these in the general international framework may be perceived as attempting to ensure coherence between the investment *lex specialis* and the public international *lex generalis,* thus also increasing legitimacy through a convincing justification.[43]

Engaging ICJ judges in investment disputes may indeed have been aimed at both the legitimacy crisis itself and its sources. ICJ judges might lend their own prestige and legitimacy to ISDS where they appear in as adjudicators from another, more prestigious dispute settlement mechanism. As argued above, the legitimacy crisis of investment arbitration is at least partially related to the unclear relationship between international investment law and general public international law. ICJ judges might have been willing to authoritatively clarify that relationship.

The involvement of ICJ judges might also have aimed at increasing consistency of investment tribunals' decisions. Although an arbitrator has slightly different function to a judge when it comes to

39 Puig, *supra* note 11, at 406.

40 Andrea K Bjorklund, *The Legitimacy of the International Centre for Settlement of Investment Disputes, in* Legitimacy and International Courts 234, 244–45 (Nienke Grossman et al. eds., 2018); Thomas Dietz et al., *The legitimacy crisis of investor-state arbitration and the new EU investment court system,* 26 Rev. Int'l Pol. Econ. 749, 756–61 (2019); Michael Waibel et al., The backlash against investment arbitration: perceptions and reality, 1–4 (London: Kluwer law International, 2010).

41 Freya Baetens, *The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are Under Fire and Trade Adjudicators are Not: A Response to Joost Pauwelyn,* 109 AJIL Unbound 302, 306 (2015); Ernst-Ulrich Petersmann, *Fragmentation and judicialization of international law as dialectic strategies for reforming international economic law,* 5 Trade, L. & Dev. 209, 236 (2013).

42 José E Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases,* 6 World Arb. & Mediation Rev. 491, 494 (2012).

43 With regard to the WTO Appellate Body, it is suggested that the quality of its "jurisprudence in cases involving competing public values . . . may in part be attributable to a broader public international law outlook of a number of its members"; R. Howse & E. Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jurgen Kurtz,* 20 European J. Int'l L. 1087, 1094 (2009).

resolving a dispute, the concerns of consistency and coherence are significant also in ISDS.[44] Judges of permanent courts, in comparison to arbitrators appointed *ad hoc* to decide a particular dispute, are expected to be more mindful of systemic implications of their decision and its consistency with previous decisions.[45] The consistency is particularly relevant for annulment proceedings to which, reportedly, the ICSID was appointing committee members from 'a small cohort of individuals', apparently including several ICJ judges, 'in the hopes of some greater continuity and cohesiveness of approach' in the procedure closest to an appeal in international arbitration.[46] Thus, having a judge as an adjudicator may foster the consistency of reasoning, if not of the outcomes, in ISDS. As we will see further below, ICJ judges appeared particularly often in the annulment proceedings.

Besides institutional and systemic motivations, the potential personal motivations of ICJ judges to accept appointments should be discussed. The IISD commentary emphasized the financial aspect, i.e. the substantial remuneration some ICJ judges received for their arbitral work.[47] Indeed, while an ICJ judge's yearly remuneration is around USD 170,000,[48] the financial incentives of international arbitrators, including hourly rates between USD 375 and 700 (depending on the arbitral institution) are often indicated as reasons for entering this lucrative profession.[49] ICSID annulment committee members are also satisfactorily remunerated for their work, earning on average USD 95,000 per proceeding as remuneration, fees and expenses.[50] This is not to suggest that ICJ judges were moonlighting just for additional money. Nevertheless, the staggering remuneration they received does not necessarily improves the perception of the practice. It is worth noting that for most of the Court's existence, its docket was rather empty and, as argued by the Court in its exchange with the UN agency mentioned above, its judges had plenty of free time. It is no surprising that, given the opportunity, they might dedicate that free time to judging other international disputes. Recent decades, however, have brought an increase of cases before the ICJ, thus reducing ICJ judges free time.[51]

Another factor, arguably, is the prestige of an international arbitrator.[52]Although the ICJ status itself appears to be a significant prestige token, social capital in the field of international dispute settlement can be increased further. Thus, ICJ judges may accept their appointments as a sign

44 The Legitimacy of Investment Arbitration: Empirical Perspectives 1 (Daniel Behn et al. eds., 2022); Kurtz, *supra* note 19; Andrés Rigo Sureda, Investment Treaty Arbitration: Judging Under Uncertainty 97–141 (2012); Thomas Schultz, *Against Consistency in Investment Arbitration, in* The foundations of international investment law: bringing theory into practice 297 (Zachary Douglas et al. eds., 2014); Irene M Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration,* 51 Columbia J. Transnat'l L. 418 (2013).

45 Wolfgang Alschner & Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network,* 29 European J. Int'l L. 83, 99–101 (2018).

46 Luke Eric Peterson, ICSID *committee confirms Egypt's lack of treaty breaches in hotel dispute, but takes issue with tribunal's comment on recourse to local courts,* Investment Arbitration Reporter (2010), http://www.iareporter.com/articles/icsid-committee-confirms-egypts-lack-of-treaty-breaches-in-hotel-dispute-but-takes-issue-with-tribunals-comment-on-recourse-to-local-courts/.

47 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 2–3.

48 Robert Kolb, The Elgar Companion to the International Court of Justice 51 (Edward Elgar Publishing, 2014).

49 Susan D Franck, *Rationalizing Costs in Investment Treaty Arbitration,* 88 Wash. U. L. Rev. 769, 839–41 (2011); Puig, *supra* note 11, at 398; ICSID, *Schedule of Fees* (2020), https://icsid.worldbank.org/services/content/schedule-fees.

of recognition for their skills, knowledge and prestige as well as an expression of trust. There is a noticeable feedback loop between the legitimacy and prestige of investment arbitration and its adjudicators, where the adjudicators lend their own social capital to ISDS and thus doing they also receive a 'prestige boost'. It is thus understandable why ICJ judges tended to accept such lucrative and prestigious appointments until they became problematic and prohibited.

2.3. Implications of ICJ involvement in ISDS

The implications of the involvement of ICJ judges in ISDS appear from the explanations discussed above. The status of an ICJ judge seems to be a formal seal of approval of high standards, legal expertise and thus social capital of the appointee. The process of appointing an ICJ judge is much more complex and thorough than arbitral appointment. As a result, ICJ judges appear to be more impartial and professional than an average international adjudicator. ICJ judge appointments can be construed as an attempt to influence the ISDS' perception, practice and outcomes by appointing arbitrators outside of international commercial arbitration.[53] Thus, the involvement of ICJ judges may be read as a more or less deliberate attempt to infuse more of the 'state-friendly' paradigm into ISDS. Whether these appointments indeed lead to increased consistency, coherence and legitimacy of investment tribunals' decisions, is beyond the scope of this article. However, the outcomes of the disputes involving ICJ judges as adjudicators, that is, whether they are biased in favor of the state, will be quantitatively inspected.

The involvement of ICJ judges visibly marks the judicialization of ISDS. Just as other fields of international law and international dispute settlement,[54] even less formalized methods follow the example of more permanent judicial institutions and their procedures, with the ICJ experience in the lead.[55] Whether judicialization of ISDS is a positive trend in itself is debatable.[56] Nevertheless, arguably it fosters coherence and consistency and thus, systemic development of the field.

While the involvement of ICJ judges arguably produces a legitimacy benefit to a given tribunal or committee, its decision and even ISDS as a whole, it also might cause, on the other hand, a legitimacy cost on the part of these judges or the Court itself. As noted above, the IISD drew attention to several problems of the ICJ judges' perception due to their involvement in ISDS,

50 International Centre for Settlement of Investment Disputes, *Background Report on Annulment for the Administrative Council of ICSID,* 19 (Aug. 10, 2012), https://icsid.worldbank.org/sites/default/files/Background%20Report%20on%20Annulment_English.pdf.

51 Ballantyne & Ross, *supra* note 6.

52 Susan D Franck et al., *International Arbitration: Demographics, Precision and Justice, in* ICCA Congress Series No. 18: Legitimacy: Myths, Realities, Challenges 33, 78–81 (2015); Malcolm Langford et al., *The Revolving Door in International Investment Arbitration,* 20 J. Int'l Econ. L. 301, 232 (2017).

53 Florian Grisel, *Marginals and Elites in International Arbitration, in* The Oxford Handbook of International Arbitration 259, 265–66 (Thomas Schultz & Federico Ortino eds., 2020).

54 Sands, *supra* note 35.

55 Brown, *supra* note 30, at 232; Kolb, *supra* note 48, at 14; Stone Sweet & Grisel, *supra* note 16, at 218–22.

56 Leon Trakman & Hugh Montgomery, *The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?,* 30 Leiden J. Int'l L. 405 (2017); The judicialization of international law: a mixed blessing?, (1st ed., Andreas Føllesdal & Geir Ulfstein eds., 2018); Sands, *supra* note 35.

opening a discussion on the topic.[57] First, by engaging in remunerated work outside the Court, ICJ judges apparently behave in direct violation of the ICJ Statute. Second, they earned staggering amounts of money for their additional work which might have incentivized them to prioritize it over their commitments at the Court. Third, the workload at the ICJ has increased in the recent decades. Fourth, the perception of independence and impartiality of the judges may be questioned if some of them are hired – often by states – to decide disputes at another forum. Even if overall the esteem around the ICJ and its judges remained high, these problems were legitimacy liabilities. To conclude, the involvement of the ICJ and its judges in ISDS has been visible in numerous ways. They also have several functions. Thus, appointing ICJ judges as adjudicators in ISDS was a purposeful process with significant normative implications. Also the legitimacy of both ISDS and the ICJ were at stake. The following section presents the quantitative analysis of ICJ judges' appointments in ISDS as adjudicators.

3. ICJ members as adjudicators in ISDS – data analysis

The 21st century international legal research, especially in the last decade, has seen an 'empirical turn'.[58] This concerned international dispute settlement in general[59] and ISDS in particular.[60] In the latter, the behavior of various actors, including adjudicators,[61] as well as outcomes[62] are analyzed. Empirical methods are employed to describe and explain social and legal phenomena and to challenge related assumptions. Network analysis has been employed to delineate relations between international arbitrators, to identify significant 'power brokers' and to assess the position of certain individuals (including several ICJ judges) in the field.[63] This article employs quantitative analysis of basic information on the appointments of ICJ judges as adjudicators in ISDS cases.

As of 31 July 2017, the IISD identified seven sitting and 13 former ICJ judges who have been working or worked in overall 90 cases, 78 of them treaty-based, being appointed 92 times during or before their respective terms.[64] I have revisited the available data on investment disputes, using

57 Ballantyne & Ross, *supra* note 6; Vantress, *supra* note 6.

58 Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship,* 106 American J. Int'l L. 1 (2012); Jakob V.H. Holtermann & Mikael Rask Madsen, *Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law,* 29 Leiden J. Int'l L. 1001 (2016).

59 Eric A Posner & Miguel F P de Figueiredo, *Is the International Court of Justice Biased?,* 34 J. Legal Stud. 599 (2005); Charlotin, *supra* note 21; Niccolò Ridi, *The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication,* 10 J. Int'l Disp. Settlement 200 (2019).

60 Catherine A Rogers, *The Politics of International Investment Arbitrators,* 12 Santa Clara J. Int'l L. 223 (2003); Wolfgang Alschner, Joost Pauwelyn & Sergio Puig, *The Data-Driven Future of International Economic Law,* 20 J. Int'l Econ. L. 217 (2017); Daniel Behn, Malcolm Langford & Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?,* 21 J. World Invest. Trade 188 (2020).

61 Puig, *supra* note 11; Langford et al., *supra* note 52.

62 Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration,* 50 Harv. Int'l L. J. 435 (2009); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration,* 50 Osgoode Hall L. J. 211 (2012); Daniel Behn, Tarald Laudal Berge & Malcolm Langford, *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration,* 38 Northwest. J. Int'l L. Bus. 333 (2018).

63 Puig, *supra* note 11; Langford et al., *supra* note 52.

64 Bernasconi-Osterwalder & Brauch, *supra* note 1, at 1. The difference between the number of cases and appointments arises from the fact that, in a single case, there can be more than one ICJ judge appointed.

the same databases as the authors of the IISD commentary,[65] looking for all the appointments of all ICJ permanent members before, during and after their respective terms. While appointment after ICJ tenure does not raise moonlighting concerns, it is nevertheless relevant for the analysis of the involvement of ICJ judges (sitting or former) in ISDS. As I have argued before, ICJ judge status appears to be a relevant factor in arbitral appointment and even after the respective ICJ term finishes, a (former) ICJ judge maintains status. In addition, the 2018 decision is likely to put an end to appointing sitting ICJ members and thus to encourage appointing former ICJ members (if any) instead.

3.1 Data overview

As of 1 May 2022, there were six sitting and 22 former ICJ judges being individually appointed 217 times to work in 200 cases, 191 of them treaty-based. While since the end of 2017 there have been further 29 appointments of sitting and former ICJ judges, the key difference from the IISD data is full inclusion of appointments of the prospective and former ICJ judges. Out of 217 total appointments, 37 took place before the respective ICJ term, 90 during the term and another 90 after the term. Thus, a vast majority of ISDS appointments occurred during or after the term of ICJ judges, suggesting that the ICJ judge status is a relevant factor in the appointing process. ICJ judges have been appointed 169 times (in 160 cases) as arbitrators and 48 times (in 40 cases) as ICSID annulment committee members. In 91 arbitrations and 18 annulments respectively, they had the function of the president. That particular aspect will be discussed further below.

Fifteen times we may find more than one ICJ judge, sitting, former or prospective, at a single tribunal or committee. In eight arbitrations and four annulments, two ICJ members adjudicated the same case and further two annulment committees were composed fully from three ICJ judges.[66] Fourteen times in 13 cases, ICJ judges did not participate in final decision (if any) due to their disqualification,[67] resignation[68] or death[69] preceding the conclusion of the dispute. To sum up, the IISD finding that ICJ judges are significantly involved in ISDS is confirmed by the fact that they decided in more than 10% of known investment arbitrations and in almost one third of ICSID annulment proceedings (40 out of 133). While treaty-based disputes are a vast majority of known investment cases, the dominance of these in cases involving ICJ judges (191 out of 200) tellingly

65 IISD conducted research of the following databases: Investment Policy Hub, www.italaw.com, International Centre for Settlement of Investment Disputes, Permanent Court of Arbitration Case Repository and Investment Arbitrator Reporter. For this research, I have used the same databases (as of May 1, 2022), supplemented with the data from Investor-State Law Guide and Jus Mundi as well as Python regex search of the publicly available investment jurisprudence at www.italaw.com to corroborate the findings.

66 CMS v. Argentina, ICSID Case No. ARB/01/8, Annulment (Guillaume, Crawford, Elaraby, Sept. 25, 2007); Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Annulment (Schwebel, Shahabuddeen, Tomka, Apr. 16, 2009); on the latter case, *see* Mahnoush H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: the "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties,* 104 American J. Int'l L. 597 (2010).

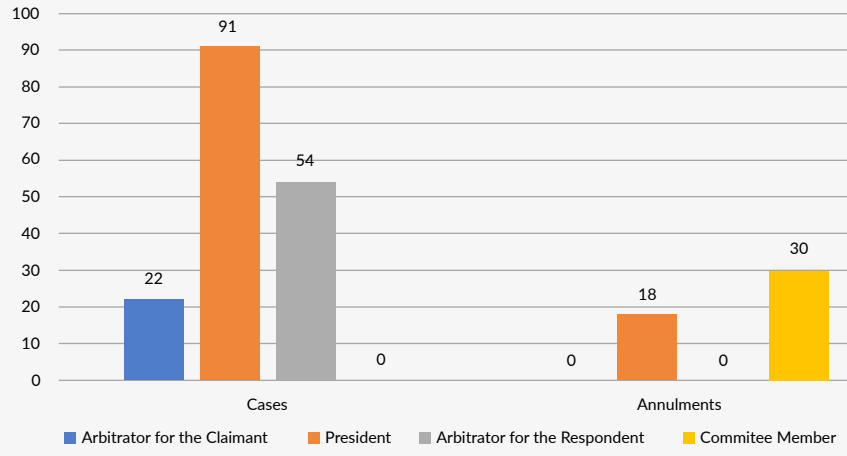
67 *See* Judge Bedjaoui, an ICJ judge from 1982–2001, in *Victor Pey Casado and President Allende Foundation v. Chile,* ICSID Case No. ARB/98/2, which disqualified the decision of the ICSID Chairman of the Administrative Council on February 21, 2006.

68 *See e.g.,* Judge Keith, ICJ judge from 2006–2015, in *ConocoPhillips v. Venezuela,* ICSID Case No. ARB/07/30, who resigned in 2016.

69 *See also* Judge Petrén, ICJ judge from 1967–1976, in *Holiday Inns v. Morocco,* ICSID Case No. ARB/72/1, who died in 1976.

points to the public international law dimension of these disputes and their settlement mechanism, with the use of international judges.

Graph 1: ICJ judges' appointments (divided by type of proceedings and function)



It is not only the numbers that matter here. ICJ judges were involved not only in many investment disputes but also in cases important for the development of investment law and arbitration as a field. An ICJ judge took part in deciding, to mention just a few, the first ICSID case ever,[70] a second known investment treaty dispute,[71] the first annulled ICSID case,[72] one of the first NAFTA disputes and reportedly the most often cited investment case,[73] a precedential case expanding the scope of the most-favored-nation treatment to arbitration clause,[74] cases with the largest compensations awarded,[75] several Argentine cases,[76] and an exceptional case of successful counterclaim against the

70 Holiday Inns v. Morocco, ICSID Case No. ARB/72/1, with Sture Petrén as President.

71 American Manufacturing & Trading, Inc. (AMT) v. Zaire (currently the Democratic Republic of the Congo), ICSID Case No. ARB/93/1, with Keba Mbaye, the ICJ judge from 1982–1991 as respondent's appointee.

72 Klöckner v. Cameroon, ICSID Case No. ARB/81/2, with Eduardo Jiménez de Aréchaga, the ICJ judge from 1970–1979 and ICJ President from 1976–1979).

73 Mondev v. the United States of America, ICSID Case No. ARB(AF)/99/2, with James Crawford, the ICJ judge from 2015 –2021, and Stephen Schwebel (ICJ judge 1981-2000 and ICJ President 1997-2000) as claimant's and respondent's appointees respectively. Charlotin, *supra* note 12, at 149.

74 Emilio Augustin Maffezini v. Spain, ICSID Case No. ARB/97/7, with Thomas Buergenthal (ICJ judge 2000–2010) as claimant's appointee.

75 Yukos Universal Limited (Isle of Man) v. Russian Federation, PCA Case No. AA227, with Stephen Schwebel as arbitrator for the respondent, and Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, with Bernardo Sepúlveda-Amor (ICJ judge 2006–2015 and ICJ Vice-President 2012–2015) as annulment committee member.

76 Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina (1), ICSID Case No. ARB/97/3, with Francisco Rezek (ICJ judge 1997–2006) as President and Thomas Buergenthal as arbitrator for the respondent, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, and LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, both with Francisco Rezek as arbitrator for the respondent. Even more ICJ judges were involved in annulment proceedings concerning these and other Argentine cases. *See supra* note 69.

investor.[77] These and many other cases with ICJ judge participation arguably contributed to the development of investment arbitral jurisprudence.[78]

3.2. The appointment of ICJ judges over time

The historical account of ISDS appointments of ICJ judges is parallel to the general history of investment arbitration. The first investment arbitration proceedings were usually based on a contract or domestic law.[79] Although a vast majority of ISDS appointments of ICJ judges concern treaty-based disputes, in the early years they were involved predominantly in contract-based cases. As investment treaty disputes focus on the interpretation of the international treaty underlying a given dispute while in contractual disputes more attention is usually put on domestic law governing the contract, with possible additions from international law, the involvement of ICJ judges in the former appears to be more understandable. As noted above, in 1972, a sitting ICJ judge was appointed to the first ICSID arbitration (which was contract-based),[80] the only ICJ judge's appointment in ISDS until the next decade. The 1980s, with the slow increase of investment disputes, saw nine appointments, including three to some of the first ICSID annulments.[81] In that period, ICJ members were also appointed four times as presiding arbitrators. In the 1990s, a decade which saw a significant increase of both investment treaties and disputes, 14 appointments were given to ICJ judges, nine of them being then active at the ICJ. Interestingly, all of these were arbitral appointments, i.e. no ICJ judge was appointed to an annulment committee. This may be explained by the fact that, until 2000, there were only very few annulment proceedings.[82]

In the following decades, the number of investment disputes exploded. This is also visible in the huge increase of appointments of ICJ judges to respectively 87 in the 2000s and 95 in the 2010s. ICJ judges were massively appointed arbitrators, particularly presidents, and members of ICSID annulment committees. While in the 2000s, 27 out of 87 appointments occurred before the respective ICJ term (20 out of these 27 concerned a single individual – the late James Crawford), in the 2010s only five out of 95 appointments concerned ICJ judges before their term. Thus, as noted above, a vast majority of ICJ judges' ISDS appointments concerned sitting or former judges. The current decade would probably mark the decline of appointing ICJ judges as ISDS adjudicators, mainly due to the 2018 decision. After that, only once was a sitting ICJ member appointed arbitrator and he resigned

77 Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, with Peter Tomka (ICJ judge from 2003, ICJ Vice-President 2009–2012 and ICJ President 2012–2015).

78 *See e.g.,* CME Czech Republic B.V. v. Czech Republic, UNCITRAL case, with Stephen Schwebel as arbitrator for the claimant; World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, with Gilbert Guillaume (ICJ judge 1987–2005 and ICJ President 2000–2003); Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, with the annulment committee composed exclusively from ICJ judges: Stephan Schwebel, Mohammad Shahabuddeen (ICJ judge 1988–1997) and Peter Tomka, *supra* note 69; Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, with James Crawford as arbitrator for the respondent.

79 Langford et al., *supra* note 52, at 306–08.

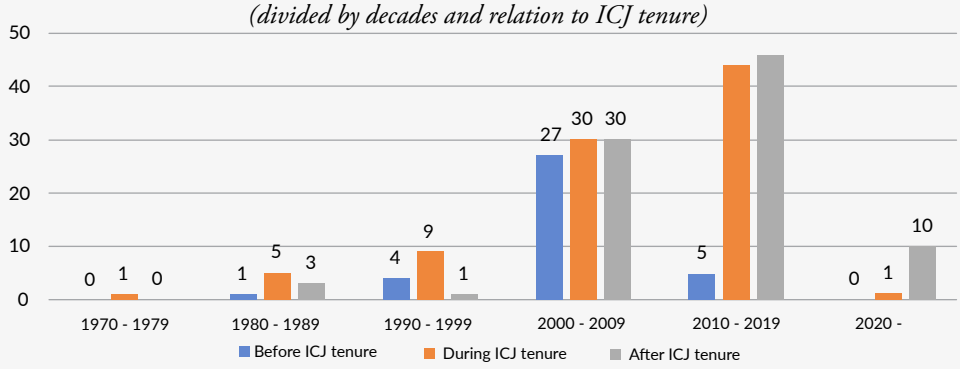
80 Holiday Inns v. Morocco, ICSID Case No. ARB/72/1, with Sture Petrén as President.

81 All these three annulment appointments concern Keba Mbaye during his ICJ term (1982–1991).

82 ICSID, *Decisions on Annulment,* https://icsid.worldbank.org/node/81661.

shortly afterwards.[83] The remaining 10 post-2018 appointments concerned former ICJ judges only. Most probably, this trend will continue in the future.

Graph 2: ICJ judges appointments (divided by decades and relation to ICJ tenure)



3.3. The appointment of ICJ judges – demographics

International arbitration professionals constitute a relatively small and closed group which is heavily male- and West-dominated.[84] They are described as 'pale, male, and stale'.[85] The gender and ethnic diversity, despite the international nature of the profession, is significantly low.[86] That low diversity among the adjudicators, combined with investment claims seemingly targeting mainly developing countries, is another ground for criticism of the ISDS legitimacy.[87] At the same time, the number of appointments is strongly diversified between individual group members. While most individuals are appointed only once or a few times, there some central figures (including some ICJ judges) with numerous appointments and thus symbolic power.[88] These individuals are often involved in the controversial practice of 'double-hatting', that is acting in various roles in different cases in the same field, e.g. as an arbitrator in one dispute and as a counsel in another.[89] Langford and others identified several ICJ judges who were 'double-hatting' before (Crawford, Greenwood) or after (Schwebel) their respective ICJ term.[90] It is worthy to reiterate that, at the ICJ, double-hatting is strictly prohibited for both sitting and *ad hoc* judges.

83 Judge Tomka was appointed arbitrator by the respondent in Macro Trading v. China, ICSID Case No. ARB/20/22; Damien Charlotin, *ICJ judge resigns from ICSID case involving China, following controversy over arbitral appointment,* Investment Arbitration Reporter (Feb. 9, 2021), http://www.iareporter.com/articles/icj-judge-resigns-from-icsid-case-involving-china-after-controversy-over-arbitral-appointment/.

84 Puig, *supra* note 11, at 404–07, 418–19.

85 Dezalay & Garth, *supra* note 26, at 9; Susan D Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration,* 53 Columbia J. 86 Transnat'l L. 429, 452–53; Langford et al., *supra* note 52, at 305.

86 Franck et al., *supra* note 85, at 452–53; Puig, *supra* note 11, at 404–05.

87 Langford et al., *supra* note 52, at 305.

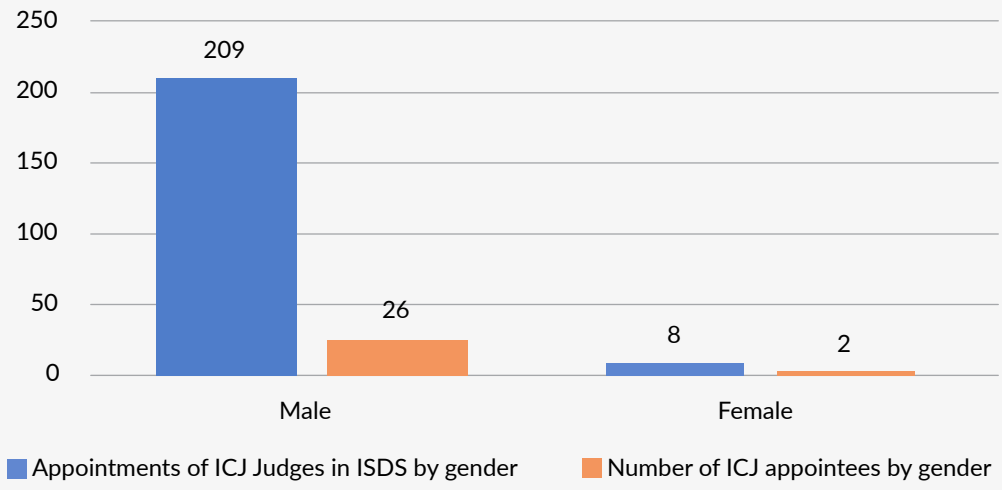
88 Puig, *supra* note 11, at 419–22; Langford et al., *supra* note 52, at 309–14.

89 Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration,* 113 Penn St. L. Rev. 1269, 1298 (2009); Langford et al., supra note 52, at 321.

90 Langford et al., *supra* note 52, at 322, 326–27.

Very similar dynamics of the arbitration network are present both in the ICJ itself and in ICJ members appointments in ISDS. While four out of 15 ICJ members are female, they constitute virtually all the female members in the Court's history. Out of 28 ICJ judges involved as adjudicators in ISDS, only two are female and were appointed only eight times. Judge Higgins and Judge Donoghue, both being the only former female ICJ judges, served as ICJ Presidents. Thus, as generally in ISDS, female adjudicators are a minority. While in the field there can be noted 'formidable women' with numerous appointments,[91] Judges Higgins and Donoghue apparently have no such position.

Graph 3: ICJ judges appointments (divided by gender)

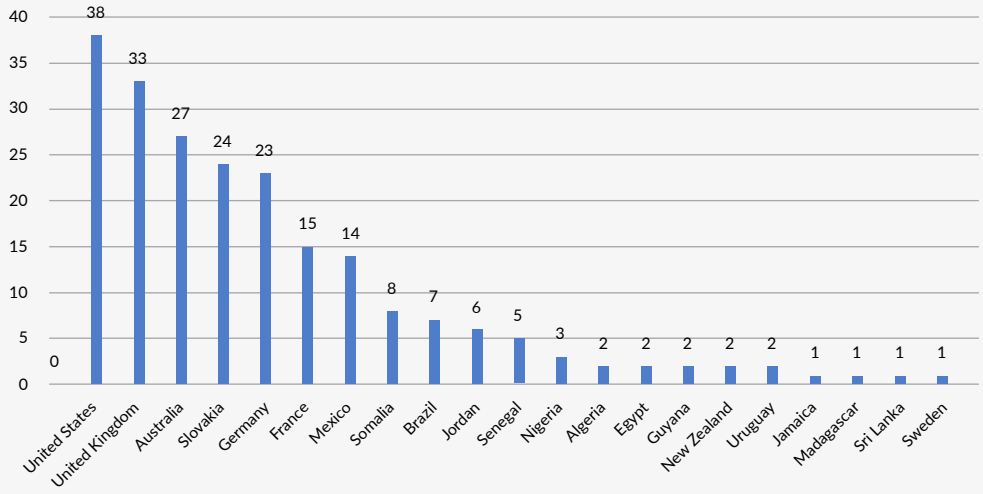


Both female judges have Anglo-American origin, comprising with other Anglosphere ICJ members almost a half of all the appointments of ICJ judges in ISDS. One Australian, three American and four British nationals at the ICJ have been appointed 27, 38 and 33 times respectively, in total 98 times. Adding five European ICJ members (France – two judges with 15 appointments, Germany – 23 appointments, Slovakia – 24 appointments and Sweden – one appointment), the Westerners comprise 74% of appointments, demonstrating their strong dominance in ISDS decision-making. The remaining 15 ICJ members from non-Western countries are thus appointed much less often (56 times) and individually not more than a few times. These numbers reflect only the nationality – if to take into account ICJ judges' education, often received at Western universities, and other previous professional activity, the dominance would be perhaps even starker.[92] As will be discussed later, however, Western-educated international lawyers from developing countries may play a particular role in ISDS and some ICJ judges perfectly match such a description.

91 Puig, *supra* note 11, at 404–05, 410–11.

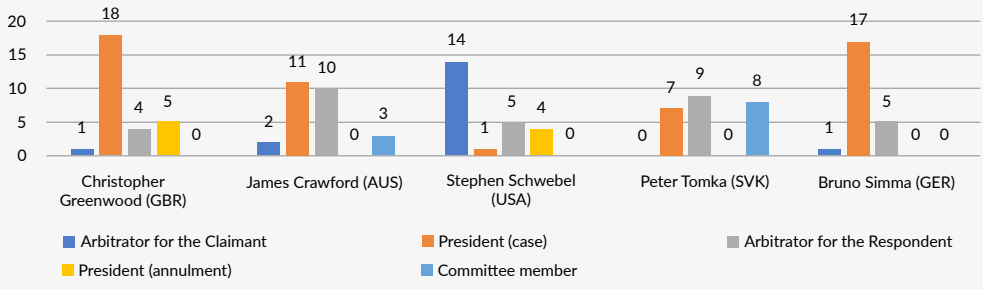
92 Prott, *supra* note 17, at 224–26; a similar observation concerns international arbitrators from traditionally non-Western countries. *See* Langford et al., *supra* note 52, at 309–10.

Graph 4: ICJ judges' appointments (divided by nationality, decreasing order)



The number of appointments of individual ICJ members show strong individual differences in involvement in ISDS, similar to those noticeable generally among international arbitrators. As noted above, fewer than half of ICJ judges, all from Western nations, concentrate almost 75% of all the appointments, while just five individuals have been appointed 127 times. These individuals with large portion of appointments represent certain overlapping types of ICJ judge appointments in ISDS as well as provide some general insights on the modes of appointment.

Graph 5: ISDS appointments - top 5 ICJ appointees (divided by function)



Sir Christopher Greenwood is the most popular (former) ICJ judge among investment arbitration professionals. He is likely to increase the collection of his 28 ISDS appointments in the near future. As one of the few ICJ judges, he received some (namely five) arbitral appointments before his term at the Court due to his work in international dispute settlement business. Almost half of his appointments (13) he obtained only after finishing his term at the ICJ in 2018 when, perhaps surprisingly, he was not reappointed by the UN General Assembly. He serves as an example of a strong preference to have an ICJ judge as president: he presided respectively 18 times over arbitral tribunals and five times over annulment committees.

The late James Crawford, similarly to Judge Greenwood, after whom he was the second most popular

ICJ appointee in ISDS (27 appointments), was a renowned international dispute settlement lawyer before his ICJ term. Despite the 2018 decision, he continued his arbitral work (but did not get new appointments) until his death in 2021. Understandably but still exceptionally among ICJ judges, most of his appointments (21) occurred before he became ICJ judge. Most often, he acted in arbitrations either as president or arbitrator for the respondent.

The third top ICJ appointee in ISDS, Stephen Schwebel, is exceptional among all the ICJ judges in the field for his strong preference for serving as arbitrator for the claimant (14 out of 22 appointments of ICJ judges in ISDS as arbitrator for the claimant). Judge Schwebel also had a large stake in contractual investment disputes. Twenty-two out of his 25 ISDS appointments occurred after his ICJ term.

Peter Tomka is the only one among top ICJ appointees to receive all his ISDS appointments during his (still ongoing) ICJ term. That arises mainly from the length and timing of his ICJ tenure as well as perhaps his nationality. As will be elaborated further below, and similarly to Judge Greenwood, a portion of disputes involving Judge Tomka concerns countries from the CEE region where he was born. Similarly to Judge Crawford, Judge Tomka usually served in arbitrations either as president (seven times) or arbitrator for the respondent (nine times) but also often participated in annulment proceedings (eight times), although never as the president.

Bruno Simma, similarly to Judge Greenwood, received most of his ISDS appointments after his ICJ term, most often as presiding arbitrator at investment tribunals (17 out of 23 cases). Already before his appointment, Judge Simma was a renowned scholar of international law. It is worth noting that both Judges Simma and Greenwood are now sitting at the Iran-U.S. Claims Tribunal, another international dispute settlement institution the jurisprudence of which is relevant in investment arbitration.

Further elaboration of these observations and considerations based on the profiles of these top appointees as well as other ICJ judges follow in the subsequent section.

3.4. Typology of ICJ judges' appointments

A first type to be identified are the ICJ judges who were appointed from one to three times only. They constitute a majority of all the ICJ appointees in ISDS (15 out of 28) while being appointed only 26 times (~12%) in total. As noted above, a significant portion (nine) comprise judges from non-Western states. These rare appointees usually have only either the role of the president (Higgins, Jennings, Jiménez de Aréchaga, Keith, Petrén) or the arbitrator for the respondent (Cançado Trindade, Ranjeva, Weeramantry). Others have been involved only in annulment proceedings (Bola, Robinson, Shahabudeen). Just a look at the names shows that Western 'one time players' appear usually as tribunal presidents[93] while non-Westerners take up other roles.

The non-Western ICJ judges another discernible type of ICJ appointments in ISDS and constitute

93 The only other two Western ICJ judges in this group are Ronny Abraham and Gerald Fitzmaurice, both appointed once as wing arbitrators.

a significant group. Several ICJ judges acted as arbitrators in disputes where the host state was either a state of their nationality or a state close geographically or otherwise (e.g., due to culture, language, or religion). In the former case, they were always respondent's arbitrators, in the latter also at times presidents. We find in this group, for example, Judge Al-Khasawneh from Jordan, who was involved in disputes against Egypt, Iraq, Mauritius, Pakistan, and Turkey; Judge Mbaye from Senegal who decided cases against Cameroon, the Democratic Republic of the Congo, Egypt, Guinea, and his own Senegal; Judge Rezek from Brazil who had cases concerning only Argentina, Chile, and Paraguay. Judge Tomka from Slovakia, while having a broader 'geographical portfolio', heard cases involving Czechia, Estonia, Latvia, Poland, and his own Slovakia, adding further three involving post-Soviet republics. While Judge Greenwood has also often been appointed to decide on the disputes involving countries form the CEE region (11 out of 28 cases), that may rather just confirm that post-Communist countries have been often found respondents in investment disputes.[94] A strong geographical focus on Latin America and Spanish speaking countries can be also ascribed to Judge Sepúlveda-Amor from Mexico (Bolivia, Colombia, Cuba, Ecuador, Equatorial Guinea, Spain). At the same time, no geographical focus can be noted in annulment appointments. Generally, these appointments appear to be much more balanced geographically when compared to arbitral appointments.

The geographical focus of ICJ judges' appointments, particularly those from non-Western countries, suggests a pattern to look for intermediaries between the universal of international law and the local of domestic context. That search is understandable in the logic of investment disputes, a large part of which involves an investor claimant from the West and a non-Western state respondent. In their seminal work on the sociology of international arbitration, Dezalay and Garth emphasize that transnational role of international arbitrators.[95] explicitly indicate 'appointment to the World Court' as a way for local legal notables, often educated in the West, to be recognized as impartial adjudicators, sufficiently distanced from their domestic setting.[96] The ICJ judge status enables recognition as a 'local universalist', having sufficient international social capital and the aura of neutrality to get arbitral appointments but also perceived by states as neutral, however friendly, adjudicator aware of their domestic context. That may explain the trend to appoint ICJ judges mainly as presidents, members of annulment committees and arbitrators for the respondent, described further below.

Another type, or rather a general trait of ICJ judges repeatedly involved in ISDS is an ICJ judge who had a vast majority of appointments during or after the respective ICJ term. As noted above, only a small number of ICJ judges in far fewer cases (37 out of 218) were appointed before their ICJ term. Moreover, 21 of these appointments concern James Crawford, the only person in the dataset who had more than a few appointments, the majority of which occurred before his ICJ term. His respective popularity in the field can be explained both by his status of eminent international jurist

94 According to UNCTAD Investment Disputes Navigator, around 24% of known investment treaty disputes involve post-Communist states as respondents (289 of 1190).

95 Dezalay & Garth, *supra* note 26, at 3–15.

96 *Id.* at 297; in a quoted interview, when asked about non-Western arbitrators, a respondent pointed out to several ICJ judges.

due to his work on the ILC Draft Articles on State Responsibility[97] as well as his work as a counsel in investment disputes.[98] These findings suggest that the ICJ appointment provides an individual with a 'prestige boost' and that this is a relevant factor behind appointment in ISDS, which in turn benefits from the involvement of such a respectable adjudicator.

International arbitration as a profession is usually construed as comprising two groups: arbitration professionals and international law academics.[99] While it might seem that ICJ judges belong predominantly to the latter, actually several, both from Western and non-Western countries, were established also in arbitration market, domestic or international, before their respective ICJ term. Among them we can note Judges Bedjaoui, Bola Ajibola, Crawford, Greenwood, Jiménez de Aréchaga and Mbaye. Interestingly, Judges Bola Ajibola, Jiménez de Aréchaga and several other ICJ judges, just like numerous prominent international lawyers and arbitrators, are or were also members of the World Bank Administrative Tribunal.[100] It is worth emphasizing that the ICSID is also a World Bank institution. It might also be that their professional background as international arbitration lawyer explains the frequent appointments of certain ICJ judges, particularly Judges Crawford and Greenwood.

As noted before, ICJ judges may be involved in ISDS as neutral international dispute professionals or as 'local universalists', translating between general international law and particular local context. This function matches the role in which they are typically appointed: in arbitration cases as presidents or arbitrators for the respondent and in annulment proceedings as presidents or committee members. The data shows a strong tendency to have ICJ judges, especially the Westerners, as presidents of their respective tribunals or committees, as half of appointments are presidential (91 in cases and 18 in annulment proceedings). Some individuals, both of few and numerous appointments, have a strong focus on that role, just to mention Judges Greenwood (23 out of 28), Guillaume (13 out of 14), Higgins (three out of three), Keith (two out of two) or Simma (17 out of 23). That trend emphasizes the significant prestige of the ICJ status and its relevance for the role of the president in ISDS, whose power and prestige is greater than that of wing arbitrators.[101] It appears from the aggregate data that ICJ judges are very often appointed particularly for that most prestigious (and influential) role.

As a wing arbitrator, an ICJ judge has been appointed respectively 54 times arbitrator for the respondent and 22 times arbitrator for the claimant. That may suggest the perception of ICJ judges as more 'state-friendly', in particular that two thirds of the claimant appointments account for one particular individual – Judge Schwebel (14 times). Besides 18 presidential appointments to

97 James Crawford, *The ILC Articles on State Responsibility of Internationally Wrongful Acts, with Commentaries* (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

98 Langford et al., *supra* note 52, at 315–20.

99 Dezalay & Garth, *supra* note 26, at 34–40; T. Schultz & R. Kovacs, *The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth,* 28 Arb. Int'l 161, 170–71 (2012); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System,* 107 American J. Int'l L. 45, 54–55 (2013).

100 Ridi, *supra* note 59, at 235–37.

101 Langford et al., *supra* note 52, at 304.

annulment committees, an ICJ judge was appointed 30 times as an annulment committee member, in several cases already chaired by another ICJ judge. Indeed, as noted before, ICJ judges participated in roughly one third of annulment proceedings (40 out of 133), including the first few as well as the most recent and pending cases.[102] As noted above, the ICSID tended to select annulment committee members from a narrow group of individuals, apparently including several ICJ judges.[103] The strong representation of ICJ judges in annulment proceedings suggest the importance of their role in maintaining consistency and coherence of ISDS jurisprudence particularly at the annulment stage which is virtually the only mode of appealing from otherwise inconsistent outcomes in ISDS. Selecting international judges to review arbitration awards makes sense if the institutions which appoint them are preoccupied with jurisprudential correctness. Indeed, as we will see below, the arbitration institutions appoint ICJ judges no less often than the parties.

3.5. Institutional preferences

A very important role in appointing is played not only by the parties and/or their arbitral appointees, as it is traditionally in arbitration, but also by arbitral institutions and other appointing authorities, as applicable. It may happen (and indeed often does happen in investment arbitration) that the parties or co-arbitrators cannot agree on the president of the tribunal. It is no surprise in the face of substantial importance of president selection to the course and outcome of the proceedings. At times, also wing arbitrators have to be nominated by someone else than a party to the dispute – an appointing authority. That role is usually taken by the respective arbitral institution (ICSID, PCA, ICC etc.) or, rarely, an individual respectable in the field, indicated in turn by the underlying instrument of the dispute (treaty or contract) or arbitral rules or by another authority appointing the appointing authority. Even in cases where formally the president was appointed by the parties or their appointed arbitrators, arbitral institutions often play an informal, but significant, role in selecting the president by, for example, presenting lists of eligible individuals to the parties. It should be no surprise that often among these individuals appear again ICJ judges, especially presidents and vice-presidents of the Court.[104] That demonstrates yet again the interrelation of ICJ judges and ISDS and explains ICJ judges' appointments in ISDS – though a sitting ICJ judge is seldom appointed by another one.

Interestingly, ICJ judges are appointed presidents of arbitral tribunals quite often by the decision of the parties (28 times), party-appointed co-arbitrators (20 times) and by arbitral institutions (33 times). Some ICJ judges demonstrate strong presidential profiles and a tendency to be appointed mainly by arbitral institutions instead of the parties or co-arbitrators. For example, Gilbert Guillaume, a former ICJ President, has been appointed president 13 times (out of 14 total appointments), 10 times by the ICSID.[105] Similarly, all of four presidential appointments of Judge Donoghue were

102 International Centre for Settlement of Investment Disputes, *The ICSID Caseload Statistics,* https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

103 Peterson, *supra* note 46.

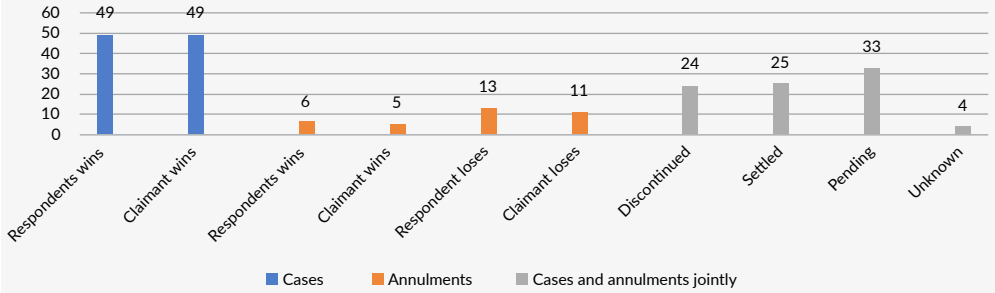
104 While this aspect of ICJ judges as appointing authorities in investment arbitration is outside the scope of this article, the conducted data search identified at least thirteen cases in which ICJ judges appeared as appointing authorities.

obtained from arbitral institutions. Judge Sepúlveda-Amor was appointed president six out of seven times by arbitral institutions. Thus, it can be discerned that some ICJ judges enter the ISDS mainly through the party appointment, while others are involved mainly or even only through the institutional framework. Arguably, ICJ judge status serves these institutions as evidence of fulfilling requirements for an international arbitrator and guarantees both neutrality as well as sufficient knowledge of international law, required by the ICJ Statute. It is not surprising then that such individuals are shortlisted by arbitral institutions as suitable arbitrators.

3.6. Balanced outcomes of ISDS disputes decided by ICJ judges

A review of the outcomes of the analyzed cases does not confirm the assumption of a more 'state-friendly' approach taken by tribunals or committees with an ICJ judge. A general overview of concluded investment treaty disputes by the UNCTAD shows that respondent states prevail slightly more often (37%) than investor claimants (28%) while another substantial part of cases is settled or discontinued for other reasons (32%).[106] In comparison, the outcomes of both cases and annulment proceedings decided by ICJ judges are strikingly balanced. In arbitration proceedings involving ICJ judges, claimants and respondents won (i.e., in case of the former, both jurisdiction and state liability were established, or, in the case of the latter, either jurisdiction or state liability were not found) exactly the same number of times (49 each – 23%). Analogously, proceedings were settled 25 times (22 cases and three annulments) and discontinued 24 times (15 cases and nine annulments). A further 33 proceedings (31 cases and two annulments – 15%) are pending. Thirty-three annulment proceedings were concluded. In the latter, 11 times annulment was granted at least in part and 22 times denied. The balance is also in annulment outcomes: claimants and respondents succeeded respectively five and six times and were denied respectively 11 and 13 times.[107]

Graph 6: outcomes of ISDS disputes involving ICJ judges as adjudicators



105 Puig, *supra* note 11, at 404.

106 UNCTAD, *International Dispute Settlement Navigator* (data as of Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited May 19, 2022); Langford at al., *supra* note 52, at 308.

107 While thirty-three annulment proceedings have been concluded, they involve in total sixteen annulment applications by claimant and nineteen by respondent as in two cases. Klöckner v. Cameroon, ICSID Case No. ARB2/81/2; Continental Casualty v. Argentina, ICSID Case No. ARB/03/9). Both parties sought annulment, and all these applications were dismissed.

No individual ICJ judge demonstrated any particular preference or a 'success ratio' in the data on the outcomes, even if a given judge showed a strong preference in appointments in particular roles. It could only be noted that six out of ten tribunals involving Judge Sepúlveda-Amor (also six out of seven tribunals chaired by him) decided in favor of the respondent while six out of ten tribunals involving Judge Guillaume (five out of nine tribunals chaired by him) decided in favor of the claimant. Among other ICJ judges who had more than six appointments, none had more than 50% of particular outcomes. Due to the small numbers of appointments, no correlation between the ICJ status of an individual or her individual preferences and the case outcome can be found.

Thus, the outcome balance is not tilted towards respondent states as one might have expected despite the visible skew in the pattern of appointments. The 'state-friendly' paradigm of the ICJ judges as ISDS adjudicators is thus not confirmed in the outcomes. If we split the numbers between positions in the tribunal, the only interesting pattern is that most of the pending cases (23) involve ICJ judges as presidents, which may suggest a trend to move from appointing them party arbitrators to appointing them as presidents. It should be reiterated here that most probably this would nevertheless apply to former ICJ judges or arbitrators appointed before becoming an ICJ judge only as, from 2018 on, sitting ICJ judges are now excluded from appointments. To sum up, the data does not suggest that appointing an ICJ judge has visible or direct influence on the outcome of the proceedings.

The picture might have been different if we had examined detailed legal reasoning of particular decisions. As states tend to be repeat players more often than investors in ISDS, they might benefit in the long run from a more 'state-friendly' reasoning in future disputes even if they lose a particular case. That, however, requires further qualitative analysis beyond the scope of this article.

3.7. Summary of data analysis

Several takeaways can be taken from the data analysis. First, ICJ judges' appointments in ISDS are substantial both quantitatively and qualitatively – they were adjudicators in numerous and important cases. Second, these appointments are not coincidental – their vast majority concern ICJ judges during or after their term, suggesting that ICJ judge status provides a 'prestige boost' to one's investment arbitration career, on the one hand, and to the ISDS on the other. Third, the historical trend of appointing ICJ judges increased along general increase of investment cases and aligns with general demographic of the arbitral profession, being predominantly male and Western (with a strong dominance of the Anglosphere). Fourth, what is particularly interesting, is that ICJ judges tend to be appointed in particular roles, mainly as presidents but also as arbitrators for the respondent and annulment committee members. Fifth, several types of ICJ judges appointed to arbitration are present, including a few repeat players, numerous 'one time players' and 'local universalists' – particularly from non-Western countries – with a strong geographical focus of appointments. Sixth, ICJ judges are not necessarily typical international legal scholars but already established international disputes professionals, thus bridging the two main professional groups of international arbitration. Seventh and final, despite significant imbalance in appointment patterns, the outcomes of cases involving ICJ members are strikingly balanced and do not differ substantially from the general population of ISDS decisions. These takeaways invite some normative considerations in the wake of substantive limitation of involving active ICJ members in adjudicating investment disputes.

4. Conclusion – implications of excluding ICJ judges from ISDS decision making

As the quantitative analysis demonstrates, numerous ICJ judges' appointments to ISDS occurred during their respective terms. Most probably, the 2018 decision would lead to a substantial decrease of these appointments. Since then, only one sitting ICJ judge has accepted a new arbitral appointment, but he resigned immediately. While active ICJ judges are still involved in ongoing ISDS cases, they are highly unlikely to be appointed, in particular as arbitrators, in future investment disputes, at least during their respective terms.

More often, recent cases involve former ICJ judges. Even though that is less problematic from the point of view of the IISD critique, functionally it is very similar to the involvement of active judges. The decrease of appointments may apply, to a certain extent, also to former ICJ judges despite the fact that the prohibition of the 2018 decision does not apply to them. That is consistent with the observed appointments of former ICJ judges after the 2018 decision: four in 2019, seven in 2020, two in 2021 and only one in 2022 (as of May).

The fate of hypothetical future ICJ judges appointed to the Court during sitting at arbitral tribunal or annulment committees is uncertain. Historically, ICJ judges have seldom resigned from their ISDS appointments, and not once has a resignation been directly related to their appointment to the Court. No resignations after the 2018 decision suggest that an arbitrator (or annulment committee member) would carry on with appointment after being appointed to the ICJ. The practice on that matter is yet to emerge.

Nevertheless, the gap after the ICJ judges is significant both quantitatively and qualitatively, due to the reasons discussed in section 2. In effect, the available arbitral and annulment committee positions are most probably to be filled with individuals from different professional groups associated with international arbitration. Whether these will be arbitration professionals or public international law scholars, remains to be seen. Puig suggests the former are more likely to get appointments.[108] The review of replacements of ICJ judges as adjudicators in ISDS confirms that prediction: in 10 out of 14 cases, including six out of seven in the recent six years, an ICJ judge was replaced by a professional arbitrator.

The source of filling the gap after ICJ judges in arbitral appointments may have implications for the perceived legitimacy of ISDS, especially given that very often ICJ judges served as presidents. If the professional arbitrators and 'arbitral technocrats' continue to be appointed, that may foster the private international paradigm in investment disputes. Arguably, this may further fuel the critique of ISDS. On the other hand, it has to be emphasized that a quantitative analysis of outcomes of the cases involving ICJ judges does not demonstrate any skew in favor of states. Whether there is some qualitative difference in legal reasoning by ICJ judges in ISDS remains to be analyzed further.[109] A research on ICJ citations suggests that this might be the case and thus, a decreased role of ICJ judges may lead to a lesser reliance on ICJ precedents in ISDS.[110] That, in turn, poses important normative questions.

108 Puig, *supra* note 11, at 419–21.

109 Roberts, *supra* note 99, at 53–55; Ridi, *supra* note 59, at 247.

110 Charlotin, *supra* note 12, at 213–14.

The question of the legitimacy of ISDS and the implications of limiting the ICJ involvement for the legitimacy concerns remains open. While the 2018 decision solved a legitimacy issue for the ICJ, it closed an important way for ISDS to engage with the Court and, consequently, with general public international law. The avoided legitimacy cost on the part of the ICJ might have been a larger legitimacy cost for ISDS. Arguably, the disappearance of ICJ judges from the field limits the ways to foster consistency and coherence, both internal and external, of investment decisions as well as their general perception, even though ICJ judges themselves were 'double-hatting', challenged or even disqualified as arbitrators.

As argued above, involving a professional judge of a permanent international court might have several functions in a decentralized framework of *ad hoc* arbitral tribunals. The most important function seems to be the broad legal expertise in general international law matters which may appear in investment disputes. But also less legal traits cannot be ignored. The substantial prestige of the Court and its judges plays a role in such a socially contextualized field as international arbitration. The clout of ICJ judges adds to the clout of the tribunal and thus the persuasiveness and the legitimacy of its decision. While the same observation may apply to former ICJ judges and judges of other courts and tribunals, a significant part of these international dispute professionals will be barred from participation in the field at least until their respective term ends.

Excluding the ICJ judges may slow down the process of judicialization of international arbitration although the process is fueled not only by the personal involvement of judges. As noted above, this process is variously perceived. The absence of ICJ judges may be considered a negative development as arguably it weakens attempts to ensure consistency and coherence of investment arbitration jurisprudence both internally and externally – i.e., with general international law. From another perspective, it may lead to return to the paradigmatic *ad hoc* character of international arbitration and distinguish it from other forms of international dispute settlement.

Paradoxically, while the composition of the ICJ is not representative for the global population, despite the fact that its members are selected by the UN General Assembly, the involvement of ICJ judges was one of the factors for inclusiveness and diversity in international arbitration. Several of the few international arbitrators outside the Western world are or were in fact ICJ judges. Arguably, that status was a significant element of their social capital to make it possible to enter the field. Despite ongoing efforts to ensure gender, racial and ethnic equality in international arbitration profession, particularly in arbitral appointments, there is still a long way to go. As we may note from the replacement of ICJ judges, regardless their geographical background, all but one of 14 replacements were Westerners and only four were female. Thus, the involvement of ICJ judges overall, although perhaps unsatisfactorily, fostered geographical diversity among ISDS decision makers. The question remains, where to find non-Western international adjudicators of similar knowledge and prestige if not at international courts.

To sum up, the multi-faceted involvement of ICJ judges as adjudicators in ISDS is, or rather was, quantitively and qualitatively, significant. Their involvement encompasses several functions, including enhanced perceived legitimacy of the tribunal, its decisions and the whole field. As currently ISDS is facing a backlash as well as being subject to a multi-faceted reform debate, excluding ICJ judges from it may in fact exacerbate the legitimacy challenge rather than mitigate it.

Promoting African States as Seats of International Arbitration

*Stanley U. Nweke-Eze**

Abstract

As home to many countries that make up the fastest growing economies in the world, Africa remains a central hub for foreign investment. The volume of investments witnessed in Africa, therefore, opens a floodgate of disputes. When these disputes occur, parties often resort to arbitration as their preferred mechanism for resolution because it offers some benefits over litigation, including flexibility, confidentiality, and easier international enforceability of final decisions. While it would ordinarily be expected that parties to such arbitration proceedings will choose African States as their seats of arbitration, foreign countries are, instead, adopted as the preferred choice. This paper seeks to explore the reasons why African States are ignored as seats of arbitration, particularly in relation to Africa-related disputes, and proffers practical solutions on the way forward.

Keywords: Arbitration, African States, Disputes, Seat of Arbitration

I. Introduction

The proliferation of cross-border trade and commerce in Africa, influenced by the expansion and globalization of foreign investment due to the continent's natural resources and infrastructure needs, has resulted in the formation of complex, contractual relationships within the African continent.[1] These relationships come with cultural, economic, political, and legal risks, ultimately leading to disputes. Contracting parties have discretion to choose the mechanism for settling such Africa-related disputes,[2] and one increasingly popular mechanism is arbitration.

Arbitration is a system for the resolution of disputes which is based on the agreement of contracting parties to submit any dispute that arises in their relationship to an arbitral tribunal for resolution. It

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1 Foreign direct investment to African countries hit a record $83 billion in 2021, according to UNCTAD's World Investment Report 2022. UNCTAD, *World Investment Report 2022,* UNCTAD (June 9, 2021), https://unctad.org/webflyer/world-investment-report-2022.

2 For the purpose of this paper, Africa-related disputes mean disputes that involve either an African party, or disputes that arise with respect to a subject matter to be executed in an African state. Thus, Africa-related dispute may be observed in three structures of contractual relationships; (a) a dispute between two African parties, (b) a dispute between a foreign party and an African party, and (c) a dispute between two foreign parties with respect to a subject matter related to African projects, contract, or other investments.

is fast becoming a popular choice because many commercial parties are drawn to the confidentiality that it offers, the ability to enforce the final decision, and flexibility, particularly the opportunity to choose the arbitrator(s), procedural rules, and seat of arbitration. The seat of arbitration is particularly relevant because it has significant implications in the arbitral process. It determines the court that will supervise the arbitration in relation to set aside proceedings or issuance of interim measures, and the law and procedure of the arbitration, which could ultimately become relevant in the enforcement of arbitral awards. It is different from the venue of arbitration which is the physical place where hearings are conducted and could be in a location different from the seat of arbitration or even virtually. Overall, the choice of the seat of arbitration is crucial for commercial parties, specifically those involved in Africa-related disputes.

Despite the increase in the use of arbitration for the settlement of Africa-related disputes, African States do not enjoy a corresponding increase as the preferred seat for such arbitration proceedings. Instead, most commercial parties involved in Africa-related disputes choose a foreign country as their preferred seat of arbitration. Using the ICC International Court of Arbitration as an example, the institution's 2016 Dispute Resolution Statistics, which also sets out the parties' choice of arbitral seats, reported that there was a 50% increase in the number of parties from North and sub-Saharan Africa in the 966 new cases administered by the ICC in 2016. However, only 6 African cities (one arbitration in Morocco, Nigeria, South Africa, Tanzania, Egypt, and two arbitrations in Algeria) were chosen by the parties as the place for arbitration, out of 966 new cases that were seated across 106 cities in 60 countries around the world.[3] In 2020, about 949 new filings were made at the ICC and were seated in 113 different cities in 65 countries across the world. A total of 171 parties came from 35 African countries. However, only 10 arbitrations were seated in Africa: Algeria, Benin, Egypt (two cases), Kenya, Mozambique, Nigeria, South Africa (two cases), and Tanzania.[4]

This paper seeks to investigate the reasons discouraging commercial parties from choosing African States as seats of arbitration *(section II),* before proposing ways for possible improvements *(section III)* and offering concluding thoughts *(section IV).*

II. The prognosis

By way of background, the 2021 Queen Mary University and White & Case international arbitration survey report noted that the five most preferred seats for arbitration are London, Singapore, Hong Kong, Paris and Geneva.[5] In the report, respondents indicated that *"greater support for arbitration by local courts and judiciary", "increased neutrality and impartiality of the local legal system", and "better*

3 Herbert Smith Freehills, *2016 ICC Dispute Resolution Statistics: Record Year for the ICC* (Sept. 15, 2017), https://hsfnotes.com/arbitration/2017/09/15/2016-icc-dispute-resolution-statistics-record-year-for-the-icc/; International Chamber of Commerce, *Full 2016 ICC Dispute Resolution Statistics published in Court Bulletin* (Aug. 31, 2017), https://iccwbo.org/media-wall/news-speeches/full-2016-icc-dispute-resolution-statistics-published-court-bulletin/.

4 ICC, *ICC Announces Record 2020 Caseloads in Arbitration and ADR* (Jan. 12, 2021), https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/.

5 Abby Cohen Smutny, International Arbitration Survey Report on Adapting Arbitration to a Changing World 2 (White & Case, 2021), https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final-v2.pdf.

track record in enforcing agreements to arbitrate and arbitral awards" are important adaptations that would improve other arbitral seats outside the most preferred seats, including African States.[6] Within the African context specifically, the 2020 Arbitration in Africa survey report, which assesses the top African arbitral centres and seats, found that the top five African countries chosen by respondents as their preferred seat of arbitration are South Africa, Nigeria, Egypt, Rwanda, and Cote d'Ivoire.[7] The report also noted that arbitration friendly laws and jurisdictions, political stability and security, access to effective technology and facilities, and availability of expertise in arbitration, among others, are key considerations.[8] Correspondingly, the challenges faced by the respondents while arbitrating in Africa include unclear text of local arbitration laws, issues with enforcement of the award, too frequent recourse to courts during arbitral proceedings, and the length of proceedings.[9] The foregoing factors provide insight into why African seats are not the popular choice for commercial parties, even in relation to Africa-related disputes, and are discussed in turns below.

1. Hostile attitude from national courts

Some African national courts do not encourage contracting parties that have elected to settle their disputes by arbitration to respect their contractual bargain. They are, instead, quick to assume substantive jurisdiction in relation to those disputes, even though the arbitration agreement is valid and the dispute in question is arbitrable under national law. Even in instances where the parties have commenced the arbitral process, challenges with the national courts continue to affect the progress of such proceedings. For example, there are instances where some judges, with limited subject-matter expertise, take the view that the arbitral process is a threat which seeks to overshadow the judicial functions of the courts. In the South African case of *Telcordia Technologies Inc v. Telkom SA Limited,* for example, the High Court set aside an interim arbitration award, removed the arbitrator, and ordered that the dispute be heard afresh before three South African judges.[10] In the old Nigerian case of *Sonnar (Nig.) Limited & Another v. Partenreedri M.S. Nordwind & Another,* there was a valid arbitration agreement, and the dispute was one of a commercial nature, arbitrable under Nigerian law. Nevertheless, the court challenged the arbitration agreement holding that "[c]*ourts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws. Our Courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the Courts will only give effect to their intention as expressed in and by the contract that should generally be understood to mean and imply a contract which does not rob the Court of its*

6 *Id.*

7 Emilia Onyema, 2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats 19–21 (SOAS University of London, 2020), https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf.

8 *Id.*

9 *Id.*

10 Telecordia Tech. Inc. v. Telkom SA Ltd., 458 F.4d 172 (2006). It was on further appeal that the appellate court held as follows: "[t]*he High Court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th century . . . ." See also* W.G. Schulze, *Of Arbitration, Politics and the Price of Neglect – South African International Arbitration Legislation Continues to Lag Behind: Bidoli v Bidoli,* 23 SA Merc. L. J. 291, 294–97 (2011); R. Baboolal-Frank, *Judicial Hostility towards International Arbitration Disputes in South Africa: Case Reflections,* 2019 SA Merc. L. J. 365 (2019).

jurisdiction."[11] *In another South African case of Bidoli v. Bidoli & Another,* a consent award was published by an arbitral tribunal following a settlement agreement concluded between parties. The award was, however, declared void by the High Court based on unsatisfactory grounds, a decision that was later overturned by the appellate court.[12]

In other cases, the nebulous ground of public policy is relied on as the basis for refusing enforcement of arbitral awards.[13] In the Egyptian case of *Court of Cassation, Challenge No. 282 of 89 JY,* for instance, the Egyptian Court of Cassation rejected, in part, the enforcement of an award of the London Court of International Arbitration (LCIA) which ordered the appellant to pay compensation with an interest rate of 8% and a compounded post-award interest rate of 4%. The Court instead ordered that the interest rate should be reduced to 5% per annum on the basis that the percentage is considered a rule of public policy that cannot be contravened.[14]

The foregoing approaches toward the enforcement of arbitration agreements and awards could, ultimately, lead to reluctance in the promotion of arbitration by such courts and, in turn, stifle the growth of arbitration, particularly in instances where the arbitral process requires the support of the courts such as the issuance of provisional reliefs and enforcement of arbitral awards.

2. Corruption

Corruption, due to weak institutions, remains prevalent in some African States. The latest Corruption Perception Index published by Transparency International, which ranks countries ranging from 0 (highly corrupt) to 100 (not corrupt) and where some African States are negatively ranked, corroborates this fact.[15] In Ghana, for instance, it has been reported that corruption is a

11 Sonnar Nig. Ltd. & Anor. v. Partenreedri M.S. Nordwind & Anor. (1987) LPELR-3494(SC). Notwithstanding the foregoing, Nigerian Courts are now much more receptive towards respecting arbitration agreements. See The Vessel MT. Sea Tiger v. A.S.M. (HK) Ltd (2020) 14 NWLR (Pt. 1745) 418, for example, where the Nigerian Court of Appeal held that *"where a party to an arbitration agreement opts for and insists on the right to arbitration before a trial court, the court will hold the parties to the agreement to their intention expressed clearly in the arbitration clause(s) which bind(s) them." See also Onward Enterprises Ltd. v. MV "Matrix" & Ors (2008) LPELR-4789(CA) where the Nigerian Court of Appeal held that "It is a basic principle of law that where parties have agreed to submit all their disputes under a valid contract to the exclusive jurisdiction of foreign Arbitration panel, the regular Courts ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them."*

12 *Bidoli v. Bidoli (2982 of 2008)* [2010] ZAWCHC 39; R. Baboolal-Frank, *Judicial Hostility towards International Arbitration Disputes in South Africa: Case Reflections,* 2019 SA Merc. L. J. 365 (2019).

13 Article V(2)(b), New York Convention. In the Mauritian case of *State Trading Corporation v. Betamax Limited,* for instance, the Mauritian Supreme Court considered a contract of affreightment to have been illegally awarded due to the failure to obtain the approval of the Central Procurement Board as provided in the procurement rules of the Mauritian Public Procurement Act 2006. Consequently, the Court, in adopting a broad interpretation of public policy, held that the failure to obtain approval was illegal and conflicts with the public policy of Mauritius and, therefore, set aside the final award. See State Trading Corp. v. Betamax Ltd., 2019 SCJ 154; A. Abdallah & A. Esmail, *Challenges with Recognition and Enforcement of Arbitral Awards in Africa,* IBA Arbitration News (Nov. 24, 2021), https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa#_ednref7.

14 Court of Cassation, Challenge No. 282 JY 89 (Oct. 9, 2020); *see also* A. Abdallah & A. Esmail, *supra* note 13.

15 Trading Economics, *Africa's Corruption Index,* Transparency International (last visited Aug. 15, 2022), https://tradingeconomics.com/country-list/corruption-index?continent=africa ("The Corruption Perceptions Index (CPI) is published annually by the Transparency International, a non-governmental organization.").

problem in the country's judiciary.[16] An example that took the world by storm was the Ghanaian judicial scandal when a documentary implicated 180 judicial officials, 34 judges, as well as several prosecutors and state counsel who were accused of soliciting and accepting bribes in exchange for favourable judgments between 2013 and 2014.[17] In Nigeria, a recent report entitled *'Nigeria Corruption Index: Report of a Pilot Survey'* given by the Independent Corrupt Practices and Other Related Offences Commission, indicated that there was clear evidence to suggest that an estimated NGN 9.4 billion was exchanged in a bribe-for-judgment scheme in Nigeria's judiciary between 2018 and 2020.[18]

In Kenya, similar corruption reports and scandals have arisen, and the judiciary is said to be one of the most corrupt institutions in the country. Transparency International has also rated the country's courts as Kenya's *"most bribery-prone institution".*[19] Similarly, it has been reported that the Tanzanian judicial system is subject to executive influence and corruption, particularly the lower courts where judicial officials are known to accept bribes.[20] For instance, the Prevention and Combating of Corruption Bureau arrested a magistrate in 2013 for soliciting and receiving bribes from a relative of an accused person in order to influence the court's decision on the case.[21] Without a doubt, this corruption perception could discourage parties from choosing some African jurisdictions as their preferred choice of seat due to the fear of ill-motivated decisions in arbitration-related proceedings.

3. Incessant delays

Incessant delays in the disposition of cases in African courts is another factor that discourages reliance on African States as seats of arbitration. In some African countries, cases are known to linger on for many years. Dilapidated infrastructure, lack of adequately trained judicial employees, resource constraints, and general poor maintenance and administration of cases contribute to consequent backlogs and congestion in some African courts. Judges are, for instance, assigned huge numbers of cases even though most of them rely on the manual system of working, such as recording the details of proceedings in long hand and adopting archaic methods of filing court processes, due to the absence of modern technological resources such as stenographers and e-filing machines.

16 K. Rahman, *Overview of Corruption and Anti-corruption in Ghana,* Anti-Corruption Resource Centre and Transparency International (Sept. 11, 2018), https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana-2018-update.pdf; Ruth Green, *Ghana Gets Tough on Judicial Corruption,* IBA Arbitration News (Jan. 12, 2016) https://www.ibanet.org/article/2c8eb0c5-3ba2-4619-a7ac-b5c2d117633d.

17 BBC News, *Accused Ghana Judges Shown Bribe Videos,* BBC (Sept. 10, 2015), https://www.bbc.com/news/world-africa-34210925; *see also* Rahman, *supra* note 16.

18 Kunle Sanni, *At least N9.4bn paid as bribe for justice in Nigeria in two years — ICPC Report,* Premium Times (Dec. 26, 2020), https://www.premiumtimesng.com/news/headlines/433257-at-least-n9-4bn-paid-as-bribe-for-justice-in-nigeria-in-two-years-icpc-report.html.

19 The Economist, *How Kenyan Courts Benefit the Mighty and Punish the Needy,* The Economist (June 2, 2022), https://www.economist.com/middle-east-and-africa/2022/06/02/how-kenyan-courts-benefit-the-mighty-and-punish-the-needy.

20 Gan Integrity, *Tanzania Risk Report* (last updated Nov. 4, 2020), https://www.ganintegrity.com/country-profiles/tanzania/.

21 Kizito Makoye, *How Bribery Cripples Justice in Tanzania Courts,* Thomson Reuters Foundation (Nov. 27, 2012), https://news.trust.org/item/20121127153900-uc80o/.

Unnecessary and incessant adjournments also play a huge role in such delays. Two recent survey reports on arbitration-related cases in Nigeria, for instance, noted that most arbitration cases in Nigeria's appellate courts take above 5 to be finally settled on the average.[22]

Sadly, these factors cumulate in cases on the enforcement of arbitral awards or provisional measures taking months or years to be finally determined, given that unsuccessful parties are keen to appeal the decision of lower courts all the way to the final appellate court, sometimes just to frustrate the successful party.[23] The facts above could, indeed, pose as deterrence in choosing such African States as seats of arbitration.

4. Inadequate legal framework

The legal framework for arbitration in Africa is a mix of ancient and modern laws. Although there are some new or prospective arbitration laws,[24] a few others are outdated and are hardly amended to reflect recent global trends that aid the effective conduct of arbitral proceedings, including third-party funding, emergency arbitration, and virtual hearings. The Botswana Arbitration Act 1959 has, for instance, been described in the following words: "[i]*t is not suited for domestic, let alone international arbitration. The courts' powers of assistance and supervision are overwhelmingly excessive, and the arbitrators have too many powers to the detriment of the parties. It restricts itself to the enforcement of awards and makes no provision for recognition, a prerequisite for the enforcement of foreign awards."*[25] Another case in point is Section 48 (e) of the Sudanese Arbitration Act 2016 which provides, among other conditions, that *"no execution of the award of a foreign arbitration tribunal shall be made before the Sudanese courts, save after verifying the satisfaction that the award does not include what is inconsistent with public order, or morals in Sudan."*[26] In summary, a court may refuse an award if it is inconsistent with morals in Sudan. However, the Act does not explicitly define what 'moral' entails, thus, casting uncertainty as to when courts may deny or set aside an award.[27]

Also, the Egyptian Ministry of Justice, through the controversial Minister of Justice Decree No. 8310/2008 as amended by Decree No. 6570/2009, made some provisions regarding the deposit of

22 Victor Igwe et al., Templars Arbitration Report on Nigeria (TARN) 2021 5 (Templars, 2021), https://www.templars-law.com/knowledge-centre/templars-arbitration-report-on-nigeria-2021/#:~:text=TARN%20is%20a%20review%20of,interest%20on%20arbitration%20in%20Nigeria; *see also* Broderick Bozimo & Company, Analysis of Arbitration Related Decisions in Nigeria 2021 4–5 (Broderick Bozimo & Company, 2021), https://broderickbozimo.com/wp-content/uploads/2021/10/BBaC-Analysis-of-Arbitration-Related-Decisions-in-Nigeria.pdf.

23 For example, it has been observed that the decision of the Kenyan Court of Appeal in *Kenfit Ltd. v. Consolata Fathers* (2015) eKLR where it was held that, *"partial awards are not recognisable and enforceable if the arbitrator has reserved the issue of costs for later determination. This tends to cause delays in the recognition of awards, therefore prolonging the realisation and implementation of the award." See* A. Abdallah & A. Esmail, *supra* note 13.

24 *See, e.g.,* the Nigerian Arbitration and Mediation Act 2023 (AMA), the Tanzania Arbitration Act 2020, and the South African International Arbitration Act of 2017.

25 R.J.V. Cole, *Botswana's Arbitration Legislation: The Path for Future Reform,* 5(6) Bots. L. J. 87 (2007) https://journals.co.za/doi/pdf/10.10520/AJA18172733_210; Botswana Arbitration Act of 1959 (Chapter 06:01, 1959).

26 Salah A. Jebarah, *An Overview of the Attitude of Sudanese Public Policy towards International Commercial Arbitration*, Africa Arbitration Blog (Mar. 8, 2022), https://africaarbitration.org/2022/03/18/an-overview-of-the-attitude-of-sudanese-public-policy-towards-international-commercial-arbitration-by-dr-salah-abdelkadir-jebarah-wolverhampton-university/.

27 *Id.*

awards for enforcement in Egypt.[28] These regulations provide that the initial deposit of an award for enforcement is subject to approval by the Technical Office for Arbitration at the Ministry of Justice. Aside from the need to obtain this approval, the same may be withheld if the Office takes the view that the award contradicts Egyptian public policy, or concerns title to real property, and family/personal status, among others.[29]

In addition, contemporary jurisprudence on arbitration is missing in a few African countries, and some other countries are not parties to internationally recognized conventions, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)—which ensures the enforcement of arbitral awards worldwide,[30] the UNCITRAL Model Law 1985, as amended in 2006—which seeks to assist countries in modernizing their laws on arbitration,[31] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (ICSID Convention)—which provides a framework for the settlement of investor-State disputes.[32]

Overall, there is no doubt that in considering a proposed seat of arbitration, parties will consider the legal framework for arbitration in the relevant jurisdictions, including how such framework supports the recognition and enforcement of arbitral awards. Uncertainty in the legal framework for arbitration—particularly where local arbitration laws are out of touch with present day reality—could, therefore, make their jurisdictions less attractive for contractual parties, especially when compared with their foreign counterparts.

5. Political instability

Political upheavals and security challenges—due to terrorism, religious extremism, and election-related violence arising from bad leadership, poor standard of living, and economic instability—which are prevalent in a few African States,[33] discourage commercial parties from choosing such jurisdictions as seats of arbitration. For instance, the 2018 Political Risk Map was published by a consultancy firm, Marsh, following research on global political environments. This research revealed that Africa has the most unstable political environment in the world. On a scale of 1 to 100,

28 Khaled El Shalakany, *Arbitration Procedures and Practice in Egypt: Overview,* Practical Law (July 1, 2015).

29 *Id.*

30 Namibia, The Gambia, Chad, Somalia, and South Sudan are examples of African countries that are not signatories to the New York Convention. See New York Convention, *Contracting States* (last visited Aug. 15, 2022) https://www.newyorkconvention.org/contracting-states.

31 Malawi, South Africa, Botswana, Libya, Sudan, and Namibia are examples of countries in Africa that have not adopted the UNCITRAL Model Law. *See* UNCITRAL Model Law on International Commercial Trade Law, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Aug. 15, 2022).

32 Countries such as Eritrea, Equatorial Guinea, Libya, and South Africa have not signed or ratified the ICSID Convention to date, while Ethiopia, Guinea-Bissau, and Namibia are examples of countries that have signed the ICSID Convention but have not ratified it. See ICSID, *Database of ICSID Member States* (last visited Aug. 15, 2022), https://icsid.worldbank.org/about/member-states/database-of-member-states.

33 The Global Economy, *Political Stability – Country Rankings* (last visited Aug. 15, 2022), https://www.theglobaleconomy.com/rankings/wb_political_stability/ (site data obtained from The World Bank), with countries like Somalia, Central African Republic, Mali, Libya, and Nigeria all making the list of top ten most politically unstable country in the world.

wherein any score less than 49 is considered unstable, only 6 countries in Africa registered a short-term political risk index of more than 50, classifying the rest of the continent as highly politically unstable.[34]

Although the seat of arbitration differs from the venue of arbitration, political instability, economic meltdown, and security challenges could ultimately disrupt the ability of national courts, which play a supervisory role in the arbitral proceedings, to act in a satisfactory manner. Overall, these factors deplete the interest of commercial parties in selecting African States as seat of arbitration. The next section considers some practical ways to tackle the foregoing challenges.

III. The way forward

Given that party autonomy allows contracting parties to select their preferred choice of seat, targeted and positive actions are required to sway such parties towards selecting African States as the preferred seats of arbitration, especially in relation to Africa-related disputes. For instance, there is an urgent need for countries that have not adopted the UNCITRAL Model Law, New York Convention, and ICSID Convention to do so to signal that they are arbitration-friendly jurisdictions. It is also necessary to reform all outdated African laws on arbitration by either modifying or entirely replacing them in order to account for principles that are generally accepted to be vital in the arbitral process, including provisions to promote third-party funding, expand the scope of arbitrable disputes, limit unnecessary interference of national courts by restricting or clearly defining the scope of grounds for non-enforceability of arbitral awards, particularly with respect to public policy, provide a fast-track procedure for disposing of arbitration disputes referred to court, and stipulate a specified time for appeal. It is encouraging that there is arbitration reform going on in the continent. Indeed, a few African countries are already taking steps towards reforming the applicable legal framework for arbitration. For instance, the Sierra Leone's parliament recently passed the Arbitration Bill 2022 into law and the Nigerian Arbitration and Mediation Act has come into force. Also, Angola recently became the 165th Signatory to the ICSID Convention earlier this year and Malawi ratified the New York Convention in March 2021 which came into force on 2 June 2021. These efforts must be encouraged and there is a need for other African countries with unsatisfactory arbitration laws to follow these positive examples to promote their countries as a hub for arbitration.

Since the judiciary and lawyers have a huge role to play in encouraging arbitration in the continent, African judges and lawyers, as well as staff of African arbitral institutions, need to be thoroughly trained in the practice and procedure of arbitration. This step could help the actors in the arbitral process, particularly judges and lawyers, to show better support to the arbitration process by enforcing arbitration agreements when they are valid, putting aside all forms of delay and guerrilla tactics in the conduct of arbitral proceedings, and shunning all forms of corrupt practices. Specialized arbitration courts, characterized by judicial officials who are trained in arbitration proceedings, could also mitigate the issue of delays due to a backlog of cases and encourage timely and competent

34 Consultancy.africa, *Botswana, Morocco and Ghana are the Most Politically Stable Countries in* Africa, Consultancy Africa (Apr. 9, 2018), https://www.consultancy.africa/news/513/botswana-morocco-and-ghana-are-the-most-politically-stable-countries-in-africa.

rules on arbitration-related issues. Indeed, these steps will eradicate any perceived hostility that national courts have towards arbitration, mitigate against any inherent fear that local courts in Africa will interfere with arbitration proceedings or prevent the enforcement of arbitration awards, and ultimately coat contracting parties with confidence to choose African States as seats of arbitration.

In addition, awareness should be created to promote African arbitration centres, including the Cairo Regional Centre for International Commercial Arbitration, the Lagos Chamber of Commerce International Arbitration Centre, the Regional Centre for International Commercial Arbitration, the Centre for Conciliation & Arbitration of Tunis, Lagos Court of Arbitration, Mauritius Chamber of Commerce and Industry Arbitration and Mediation Centre, Nairobi Centre for International Arbitration, Kigali International Arbitration Centre, and Arbitration Centre of Guinée. Publicity around the competence and availability of these centres can enjoin parties to choose African States as the seats of arbitration. These institutions should also be encouraged to join arbitration-related litigation as amicus in order to provide input to the judges on technical arbitration issues, thus building capacity within the judicial framework. Overall, such promotions can be achieved by African law firms and arbitral institutions seeking collaborations with their international counterparts in different activities such as hosting joint annual conferences and jointly sponsoring trainings on arbitration. These would, indeed, serve as a good marketing tool for African States to achieve market presence and gain international recognition and acceptability as seats of arbitration.

Furthermore, African governments need to ensure that the African arbitration centres possess and continue to possess the relevant infrastructure that is required for the conduct of arbitration proceedings as well as competent and dedicated professionals to administer commercial disputes. This would, in turn, crystallize direct actions to improve the awareness of the suitability of African States as seats of arbitration. It is also important to educate African government representatives and commercial entities that arbitration is not just a dispute resolution mechanism but also a source of business with potential for inflows into the economy, with African arbitrators, arbitral institutions, local lawyers, as well as conference centres and hotels set to benefit. Therefore, African States should be chosen, as much as practicable, as the seat, or at the very least, venue of arbitration proceedings in relation to Africa-related disputes. It is also important to appoint African nationals as arbitration counsel and arbitrators as a way of promoting Africa's expertise in international arbitration. Such insistence will draw foreign investors to the continent and may, over time, build confidence in and encourage the acceptance of African States as seats of arbitration.

Lastly, economic, social, and political challenges must be addressed by governments to shun the negative perception that arbitration proceedings in Africa will be affected by such instabilities. Again, government support is required in appointing suitably qualified judges and providing high quality infrastructure that will ensure that the arbitral process is run efficiently and the battle against procedural delay is won once and for all. Further, adopting a clear federal policy that favours arbitration and independent courts will go a long way in fuelling the popularity of African States as competent seats for arbitration. These will, without a doubt, signal to commercial parties, including foreign investors, that African States have stable legal and political frameworks for the administration of arbitration proceedings.

IV. Conclusion

As arbitration continues to grow in popularity and maintain its position as the preferred dispute resolution mechanism for Africa-related disputes, it is important to get rid of all obstacles that could jeopardize the conduct of arbitration proceedings in the continent. That is the best way to reassure commercial parties that African States can be trusted as seats of arbitration. Every participant in the arbitral process—African arbitral centres, national courts, judges, and local practitioners—as well as governments, have a role to play in improving African States as seats of arbitration, particularly in relation to Africa-related cases. Indeed, there are numerous reasons why African States would be the natural option for the settlement of Africa-related disputes. For example, choosing an African State as the seat of arbitration can make the enforcement of any final award easier where the relevant assets are in the same African State. It could also promote the advancement of African practitioners, arbitrators and institutions who would, in return, offer cultural perspectives in understanding the crux of the dispute. Therefore, if the steps discussed in section III above are adopted, they will enhance the perception of African States as arbitration-friendly jurisdictions and, in turn, provide significant opportunities for arbitration practitioners in Africa and increase the inflow of trade and investment.

Prospects and Pitfalls of BITs, and the Quest for a Multilateral Framework in Africa

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Abstract

Bilateral Investment Treaties (BITs) are the main regulatory frameworks for Foreign Direct Investment (FDI) in Africa. Their effectiveness has been questioned because they seem to overcompensate and empower foreign investors to effectively override legitimate state expectations and concerns. This paper demonstrates that the normative underpinnings of most BITs appear unsuitable for the promotion of modern sustainable investment and development in Africa. The paper argues that the divergent states' interests and other complexities surrounding the security of investment are better resolved via a regional multilateral platform where states can negotiate around these concerns. The African Continental Free Trade Area Agreement (AfCFTA) has offered African states the opportunity to produce such a modern regional multilateral (plurilateral) investment framework that strikes an appropriate balance between the protection of states' interests, investment security, and sustainability considerations. Besides, the establishment of one of the biggest regional markets with a consolidated and less fragmented investment framework could provide the 'quantum leap' for reordering the existing power asymmetry in the international investment regime in Africa.

I. Introduction

The underlying structure of international investment law (IIL) points to an unstable and fragmented framework. They are fragmented because of how the legal norms are interpreted and applied by different actors in practice.[1] An analysis of the ordering paradigm of the IIL questions the legitimacy of the investment regime if there is any regime in the first place, and the disparate patchworks of treatymaking and dispute settlement mechanisms without linkages to a holistic structure.[2] The paradigm presents itself in the form of bilateralism and multilateralism. While bilateralism focuses on quid pro quo relations between pairs of states, multilateralism refers to the structure of international legal relations that are universal amongst several actors.[3] A cursory look at the

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1 Stephen Schill, *Ordering Paradigms in International Investment Law-Bilateralism-Multilaterislism-Multilateralization, in* The Foundations Of International Investment Law: Bringing Theory Into Practice 109 (Zachary Douglas, Joost Pauwelyn & Jorge E. Vinuales eds., 2014).

2 *Id.*

3 *Id.* at 110.

investment regime presents a "lateralism paradox".[4] The regime is populated by bilateral investment treaties (BITs).[5] While states appear to agree on certain provisions at the bilateral level they often disagree on almost identical provisions at the multilateral level.[6]

The IIL regimes are evident in the network of treaties and non-treaty sources that give rise to the regimes.[7] Although the dominant investment protection rules can be found in bilateral and multilateral treaties, customary international law remains important in contemporary investment law, thereby assuming a source of IIL.[8] Its relevance can be identified in the Amoco Case following the dispute between Iran and the US wherein the court stated that "the rule of customary law may be useful in order to fill in possible lacunae to the treaty, to ascertain the meaning of undefined terms in the text, or more generally, to aid the interpretation and implementation of its provisions".[9] Furthermore, customary international laws are considered where a BIT fails to cover the full spectrum of foreign investment protection, and in the total absence of a BIT.[10]

Nonetheless, BITs are identified as the predominant source of foreign investment law.[11] In some cases, BITs incorporate other general sources of international law, for example, general principles of law; human rights treaties such as the International Covenant on Civil and Political Rights; and the Vienna Convention on the Law of Treaties which provides the rules on treaty interpretation.[12] The International Centre for Settlement of Disputes (ICSID) Convention is also considered a source of law where state parties to a BIT agree to settle disputes through the ICSID.[13]

The common reason developing countries sign BITs is the belief that the treaties are means of foreign investment promotion, and consequently will bring an increased amount of capital, and technological development to their territories.[14] However, developing countries are more involved in bilateral negotiations where they have little leverage of gaining concessions. Engagements with these BITs have seen the liberalisation of investment controls and the reduction of policy space.[15]

4 Jean- Frederic Morin & Gilbert Gagne, *What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?,* 36(1) Int'l J. Pol. Econ. 53 (2007).

5 Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,* 38(4) Va. J. Int'l L. 640 (1998).

6 Morin & Gagne, *supra* note 4, at 54.

7 Jose E. Alvarez, *Beware! Boundary Crossings'- A Critical Appraisal of Public Law Approaches to International Investment Law,* 17 J. World Inv. & Trade 172 (2016).

8 Patrick Dumberry, The Formation and Identification of Customary International Law 2 (Cambridge University Press, 2016).

9 *Id.*

10 *Id.*

11 *See generally* Guzman, *supra* note 5.

12 Alvarez, *supra* note 7, at 173.

13 Mohammad Hamdy, *Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties,* 51(2) Geo. J. Int'l L. 263 (2020).

14 Jeswald Salacuse, *The Treatification of International Investment Law,* 13(1) L. & Bus. Rev. Americas 158 (2007).

15 Peter Chowla, *Comparing Naughty BITs: Assessing the Developmental Impact of Variation in Bilateral Investment Treaties* 2 (Dev. Stud. Inst., Working Paper No. 05-67, 2005).

Legal claims brought against governments by foreign investors under BITs leading to the imposition of million-dollar fines against states have led to concerns that BITs restrict the policy space of host states.[16] Substantive provisions and standards in BITs constitute the yardstick against which state conducts are measured in order to determine their legality or otherwise.[17] A strong argument can be made that these standards grant unfettered discretion to arbitrators to make decisions that have far-reaching effects on a state's ability to make laws for her sovereigns.[18] Therefore, to obviate the issue of policy space constraint; two options present themselves: a more pragmatic and strategic approach to bilateral treaty-making or a multilateral framework on investment. Given the political economy of bilateral negotiations, a multilateral rule on investment appears to be more promising if the retention of policy space must materialise.[19]

African states negotiate international investment agreements (IIAs), most especially BITs to improve their investment climate,[20] and because of the perception that their legal systems do not provide the frameworks and institutions that are necessary to attract and simultaneously retain foreign investments and integrate their economies into the global market.[21] Hence, investment treaties were developed to respond to the need and interests of foreign investors and the desire of host states to attract foreign investments.[22] Nevertheless, the role of BITs in generating the much desired foreign investment for greater economic development and transformation of the African economy remains vague. It appears that both FDI and BITs have failed to achieve the intended purposes in Sub-Saharan Africa. FDI will only promote meaningful development if the economic growth it fosters is sustainable, as many periods of economic expansion have diminished much of the gains achieved.[23] In addition, African BITs have failed to convince foreign investors because these BITs rarely deviate from a standard model that has developed over time.[24]

Debates around the usefulness of BITs in generating much-desired investments have led to the questioning of the legitimacy of the international investment regime by legal scholars.[25] The

16 Julia Calvert, *Constructing Investors Rights? Why some states (fail to) Terminate Bilateral Investment Treaties,* 25(1) Rev. Int'l Pol. Econ. 75 (2018).

17 Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Law-making,* 12(5) Ger. L. J. 1093 (2011).

18 Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions,* 78(5) Modern L. Rev. 793–94 (2015).

19 *See generally* Chowla, *supra* note 15.

20 Laura Paez, *Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area,* 18(3) J. World Inv. & Trade 380 (2017).

21 Schill Stephan, The Multilateralization of International Investment Law 5 (Cambridge University Press, 2009).

22 *Id.*

23 Alec R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa,* 59(4) Emory L. J. 920 (2010).

24 *Id.*

25 David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?,* 2(2) J. Int'l Disp. Settlement 471–95 (2011); Charles N. Brower & Stephan Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,* 9 Chi. J. Int'l L. 471–98 (2009); Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach,* 52 Va. J. Int'l L. 57–100 (2011).

dilemma surrounding the practicalities of investment laws is further entrenched in the bias against foreign investments laws as serving the imperialist interests of multinational corporations to the detriment of host states, and that contrary to the economic developments it advocates, the investment regime entrenches the interest of the foreign investors, mainly.[26] Also, there are concerns that African arbitrators are underrepresented at the Investor-State Dispute Settlement (ISDS) platforms, and more contemporaneously, marginalised in the ongoing ISDS reform process.[27] Critical issues surrounding this concern are found from scholarships which opine that Africans are important actors in the establishment of ICSID, albeit without its complexities. Contributions to the ISDS have emerged from the routine casting of African countries as respondents, wherein the determination of substantive issues, awards or procedural orders reinforces the ICSID, and investment rules, thereby showcasing African states as reverse contributors, a not-so-positive attribute.[28] This is because African states accepted ICSID to attract foreign investments to aid their ailing economies and also affirm their sovereign status in the wake of the post-colonial era.[29] Thus, any substantive contribution to the investment landscape is derived from being disputants. For, example, in the 2022 ICSID Caseload Statistics, Sub-Saharan African states were parties in 15% (131) of ICSID cases, thereby driving jurisprudence and advancing substantive concepts in international investment law.[30]

There has been a growing literature on the harmonisation of investment laws in Africa, and the usefulness of such a regional multilateral framework, especially in the light of the recently formed African Continental Free Trade Area. This paper seeks to contribute to the body of literature through an examination of the extant investment protection frameworks in Africa. It seeks to demonstrate that the normative underpinnings of most bilateral investment treaties appear unsuitable for the promotion of modern sustainable investment and development in Africa. The paper argues that a regional integration arrangement which sees the introduction of a plurilateral (or regional multilateral) investment treaty that is designed to balance the needs and interests of African states and foreign investors will foster economic and non-economic developments for the continent. It is the contribution of this article that a regional market, bolstered by a harmonized continental legal instrument will be helpful in creating a consistent goal in attracting more capital for Africa's economic transformation and development

26 Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law,* 53 Case W. Res. J. Int'l L. 9 (2021).

27 *Id.* at 10.

28 Olabisi D Akinkugbe, *Reverse Contributors? African State Parties, ICSID and the Development of International Investment* Law, 43(2) ICSID Rev. 436 (2019).

29 *Id.* at 438; It is posited that BITs are not the sole determinants of FDI in developing countries, there are other important economic determinants of FDI, if BIT plays any role, it is to strengthen the policy and institutional framework determinant of a country, which in itself is a dependent variable of a country. UNCTAD, *The Role of International Investment Agreement in Attracting FDI to Developing Countries,* UNCTAD Series on International Investment Policies (2009), https://unctad.org/system/files/official-document/diaeia20095_en.pdf.

30 World Bank Group, *The ICSID Caseload – Statistics* (last visited Sept. 20, 2022), https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf.

This paper is divided into five parts. Part II discusses the failure of multilateral frameworks and the growth of BITs. Part III examines the regulatory frameworks for investment in Africa, the perceived imbalance in these frameworks and the response of some African states. Part IV considers how African states can find the right balance through a common market and harmonised plurilateral investment law and policy. Part V concludes the paper.

II. The Failure of Multilateralism and the Growth of Bilateralism

Bilateralism and multilateralism are harmonious means of international cooperation. The dissimilarity between both forms of international corporation points to the number of contracting parties. From a purely formal perspective, bilateralism functions on a dyadic basis while multilateralism concerns "the practice of coordinating national policies in groups of three or more states".[31] With respect to the nature of substantive obligations, unlike bilateralism which in some cases involves the imposition of unilateral principles by one hegemon on another state, multilateralism defines principles without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.[32] Their main characteristics are based on the application of generalised and non-discriminatory rules to all contracting parties.[33] Expanding this conceptual distinction, we consider a multilateral agreement to be based on general obligations that apply to many states across the globe, while bilateral agreements apply only to particular states.[34] Yet, there is a specie of multilateral agreements which are negotiated by a much less number of states with certain geopolitical interests. These are often referred to as plurilateral agreements. Unlike monetary and trade relations, there is a dearth of holistic multilateral rules on foreign direct investment.[35] The closest multilateral protection of FDI can be found in the WTO rules for FDI- the Agreement on Trade-Related Investment Measures (TRIMs), which was negotiated and signed by WTO members in 1995[36] and the investment protection under GATS (Mode 3).

Thus, foreign investment law is a clear case of an international regime that is established as a result of a patchwork of bilateral, plurilateral, multilateral rules and free trade agreements with investment chapters; and they are all geared towards the protection of foreign investments even though their scope, content and interpretation may differ.[37] In some cases, rulemaking has taken place on all levels most of the time, while in some, the focus has shifted between different levels, for instance, the focus of activity moving from the plurilateral to the regional and up to the multilateral and then back down again to the regional or bilateral. [38]

31 Stephan, *supra* note 21, at 9.

32 *Id.*

33 *Id.*

34 Alexander Thompson & Daniel Verdier, *Multilateralism, Bilateralism, and Regime Design,* 58 Int'l Stud. Q. 15 (2014).

35 Helen V. Milner, *The Global Economy, FDI and the Regime for Investment,* 66(1) World Pol. 3–4 (2014).

36 Hung-Gay Fung et al., China and the Challenge of Economic Globalisation 121 (Routledge, 2005).

37 Stephen Woolcock, *Making Multi-Level Rules Work: Trade and Investment Rules in Regional and Bilateral Agreements, in Multilateralism, Regionalism* and Bilateralism in Trade and Investment 38 (Philippe de Lambarde ed., 2006).

38 *Id.*

The foundation of modern international investment law can be traced back to the period when European empires started trading with and doing business with local communities in Asia, Africa and Latin America.[39] Considering that these continents did not become independent from their colonial rulers until the early 20th century, it is not surprising that much of the early development of the principles of foreign investment law dealt mainly with investment protection and protection of aliens on the basis of state responsibility and diplomatic protection of citizens abroad.[40] Sovereign European states sought to impose and advance the interests of their nationals in other countries through the negotiation of commercial and trading rights for their nationals. During this period, treaties served the dual purpose of establishing mutual economic relationships amongst nations and as instruments of economic domination between colonial masters and their colonies.[41] Although, the agreements presented themselves as being based on principles of equality and mutuality, in fact, they favoured Europeans.[42]

The shift in global power after the First World War meant that the Western powers, in this case, the European states, encountered more difficulties in trying to impose their views on the appropriate standards for the treatment of foreign investors.[43] Since force and gunboat diplomacy could not be used in the absence of direct colonial rule, multilateral agreement on investment was considered an option, but repeated attempts by Western states (within the League of Nations) to negotiate it failed due to stiff opposition from developing countries.[44]

The attempt to propose a multilateral investment treaty was launched at the Bretton Woods conference, where the Havana Charter was proposed to help rebuild the post-war economies through foreign investments.[45] Plans by the United States to initiate an investment chapter that will protect foreign investments from nationalisation and discrimination met pushback from developing countries who sought the maintenance of their regulatory rights. The failure of the United States to achieve its aim led to the abandonment of the Havana Charter.[46]

Another attempt after the Second World War to push for a multilateral investment treaty at the World Trade Organisation level by the United States failed because the scope of the General Agreement on Trade and Tariff's (GATT) Trade-Related Investment Measures (TRIMs) could not

39 Nida Mahmood, *Democratizing Investment Laws: Ensuring 'Minimum Host Standards' for Host States,* 14(1) J. World Inv. & Trade 80 (2013).

40 *Id.*

41 Dominic N Dagbanja, *The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective,* 60(1) J. African L. 65 (2016).

42 *Id.*

43 Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Qualitative Analysis,* 30(1) N. Western J. Int'l L. & Bus. 103 (2010).

44 *Id.* at 104.

45 M. A. Forere, *New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?,* 21 PELJ 6 (2018).

46 *Id.*

be broadened and was not comprehensive enough to cover all areas of investment.[47] Thus, falling short of the United States' expectation, as they had pushed for a comprehensive agreement on investment. The TRIMs majorly have nothing to do with investment protection and is only limited to measures which violate national treatment and qualitative restriction of the GATT.[48] Although these rules prohibit the discriminatory treatment of FDI, they are however regarded as weak.[49] Developing states feared that the TRIMs would undermine their ability to structure their economies as they wish, thereby disrupting their sovereignty.[50] They also feared that the restrictions on TRIMs will not adequately protect them from the activities of foreign investors that they perceived as restrictive or invasive. This fear is entrenched in the belief that foreign investors are able to engage in activities that are inimical to a host state's interest which may manifest in lower efficiency, monopoly of profits and may be barriers to other potential competitors.[51] Hence, the perception by developing countries that TRIMs would likely undermine their sovereignty, and the inability to agree on a holistic FDI agreement signified the unrecognised significance of the regulation, and the necessity of FDI regulation in the first place.[52]

The most recent attempt to draft a multilateral investment agreement (MAI) has failed woefully, most notably the draft multilateral agreement on investment, which was negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD) in 1998.[53] The OECD was given the mandate to provide a multilateral framework for international investments. Preceding this mandate were long years of tedious preparatory works undertaken most especially by the OECD's Committee for International Investments and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT).[54] It was therefore hoped that an MAI would consolidate all that had been cumulatively achieved so far on foreign investment laws in one single document.[55]

The MAI was designed as a panacea to the ills of global investment and to make the world a more liberalised and open marketplace. Between 1995 to 1998, an MAI was under negotiation amongst the OECD- constituents of thirty of the world's most developed countries.[56] Nine developing countries joined in the negotiation with a view to becoming founding members of MAI. However, negotiations ended abruptly in the face of objections from different stakeholders and primarily

47 *Id.*

48 *Id.*

49 Milner, *supra* note 35, at 3.

50 Scott S. Quillin, *The World Trade Organisation and Its Protection of Foreign Direct Investment: The Efficacy of the Agreement on Trade-Related Investment Measures,* 28 Okla. City Univ. L. Rev. 880 (2003).

51 *Id.*

52 *Id.*

53 Valentine Nde Fru, The International Law on Foreign Investments and Host Economies in Sub-Saharan Africa 45 (LIT Verlag Munster, 2011).

54 *Id.*

55 *Id.*

56 Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations,* 39(2) Colum. J. Transnational L. 484 (2001).

because of critical differences between the negotiating partners.[57] Between 1997 and 1998, it was the subject of intense public debate in many parts of the world; It had strong advocates as well as strong critics. A panellist at a law symposium introduced it as an example of 'multilateral sovereignty' to achieve commonly held goals of economic integration.[58] While its critics referred to it as a 'slow motion *coup d' etat',* a bill of rights and threat to sovereignty, because it empowers foreign investors to challenge the law-making authority of nation states and subnational governments. [59]

Also, the scope of the MAI was a matter of concern. It included real estate investments and rights under statute and contract and also sought to cover all stages of the investment cycle.[60] This meant that there was a likelihood that feasibility studies or obtaining a licence to initiate an activity could easily be caught by the definition. All parties could incur liability or obligations to each other under the MAI provisions.[61] Also, the inclusion of portfolio investments under its scope was another area of concern as they raised entirely different issues from those relating to foreign direct investment. The inclusion of portfolio investment within the scope of the MAI would have precluded a host state from taking appropriate action to control the destabilising effects of rapid flows of capital in a crisis. A far-reaching ban on performance requirements was considered problematic for developing countries. It would have erected legal obstacles in the way of a host state which wanted to enhance the rights of its indigenous people.[62] Indeed, the MAI was far-reaching in every aspect. In the end, negotiations for the MAI were jettisoned mainly because they were considered over-ambitious in their proposal. [63]

Despite a growing interest in MAI in academia and policy circles, the future of MAI remains uncertain.[64] Another attempt to address this issue under the WTO auspices failed again when the so-called 'Singapore issue' of investment was taken off the negotiating agenda of the Doha Round in the summer of 2004.[65]

Following the initial failures in the development of a multilateral agreement on investment, the United States expanded its Friendship, Commerce and Navigation treaties. Even though the treaty had no central effect on the treatment of foreign investments in developing countries, it did provide inspiration for European states to develop legally binding standards for investment abroad.[66] West Germany in 1959 entered into a BIT (the first of its kind) with Pakistan in order to protect the

57 *Id.*

58 Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment,* 31(3) Cornell Int'l L. J. 493 (1998).

59 *Id.*

60 Nil Lante Wallace-Bruce, *The Multilateral Agreement on Investment: An Indecent Proposal and not the Lessons of History,* 34(2) Compar. & Int'l L. J. S. Africa 214–15 (2001).

61 *Id.* at 214–17.

62 *Id.*

63 Nil, *supra* note 60, at 210.

64 Zdenek Drabek, *A Multilateral Agreement on Investment. Convincing the Sceptics* 4 (WTO Staff, Working Paper No. ERAD-98-05, 1998), https://states.econstor.eu/bitstream/10419/90669/2/776116495.pdf.

65 Anne van Aaken, *Perils of Success? The Case of International Investment Protection,* 9(1) European Bus. Org. L. Rev. 4 (2008).

66 Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Qualitative Analysis,* 30(1) N. W. J. Int'l L. & Bus. 103 (2010).

investments of its nationals abroad, having lost all of its investment after the defeat in the Second World War.[67] Since then, many countries from the global north have followed suit. At present, the report from UNCTAD suggests that 2861 BITs have been signed globally out of which 2219 are still in force.[68] BITs ultimately became the most dominant regulatory framework for the regulation of cross-border investments because of the inability of states to successfully negotiate multilateral investment treaties.[69]

African countries have keyed into BITs, and they are now the most used means of investment protection and promotion.[70] These treaties have not been balanced due to the asymmetry of powers between developed and developing countries.[71] Asymmetry in this sense equates to the contracting position of the parties which are usually, a strong developed country and a weak developing country wherein powers from the developed countries are fully exerted.[72]

III. The Regulatory Framework on Investment in Africa

BITs are the means of investment protection and promotion in Africa.[73] African countries sign BITs based on the perception that they are an integral part of the development strategy that Africa so desires.[74] An objective of many states in negotiating BITs is for the development of positive rights and protections for foreign investment and the development of international law on investment as a whole. Thus, the meteoric rise of BITs may be seen as a response to the demands of a new global economy.[75]

BITs contain substantive investment rights such as the fair and equitable treatment (FET) standard, the full protection and security standard, the national treatment and most-favoured nation treatment standard, provisions against uncompensated expropriation and provisions for the transfer of capital.[76] Given that a large majority of African states have ratified the Washington 1965

67 Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Direct Investment in Developing Countries,* 24(3) Int'l Law. 657 (1990).

68 *See* UNCTAD, *Investment Policy Hub* (last visited Sept. 15, 20022), https://investmentpolicy.unctad.org/international-investment-agreements.

69 Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties,* 66(47) World Pol. 50 (2014).

70 Won Kidane, *China's Bilateral Investment Treaties with African states in Comparative Context,* 49(1) Cornell Int'l L. J. 143 (2016).

71 *Id.*

72 A. Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties,* 66(47) World Pol. 61–62 (2014).

73 Mosoti Victor, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between,* 26(1) Nw. J. Int'l L. & Bus. 102 (2005).

74 Rukia Baruti, *Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC,* 18(3) J. World Inv. & Trade 494 (2017).

75 Kelley, *supra* note 56, at 490.

76 Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries,* 33(10) World Dev. 1570 (2005); Jennifer L. Tobin & Marc L. Busch, *A BIT is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements,* 62(1) World Pol. 4 (2010).

Convention, recourse is made to ICSID as an option for investor-state arbitration.[77] Although most BITs have rules which are very similar, they have been interpreted differently when they are determined by investment arbitration.[78] The consequent rise in investment dispute arbitration has made clear the binding nature of BITs compared to other international obligations, [79]thus, goading all countries to be more concerned about the extent of their BIT obligations.[80] The surge in investment cases, wherein host states are routinely sued as a respondent shows the effect of an unequal BIT regime where the benefits of compliance are doubtful.[81]

A glimpse into the panes of history points toward the fact that the primary purpose of investment treaties has long been for the protection of investments from developed countries who are majorly capital-exporting states.[82] The European nations during the historic moments (after the treaties of Westphalia of 1648) had less 'equal bargaining power' and sought to secure minimum standards of treatment for their citizens engaged in investment activities within the region.[83] These capital-exporting states subsequently undertook the effort to create an international investment regime because they believed that the prevailing investment regime at the end of World War II failed to adequately protect the foreign investments of their nationals from expropriation by host countries.[84] It has also been argued that there is a plausibility that the conception of international standards of treatment of foreign investments was intended to serve the interests of the states that had the capacity to expand overseas trade.[85] Thus, there were advocates for a standard of treatment of foreign capital that was higher than domestic treatment due to the fear that domestic legal systems were incapable of investment protection.[86]

It is not surprising that many BITs signed by African countries are lopsided. This reflects the bargaining power of parties. Most African states do not have the technology and technical know-how to develop their resources. They lack the financial muscle to pursue their economic, infrastructural, and other developmental goals. They mainly rely on the patronage of investors from capital-exporting countries. It is natural for foreign investors to leverage their bargaining power to push

77 Makane Moise Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law,* 34(2) ICSID Rev. 459 (2019).

78 Emmanuel Laryea, *Evolution of International Investment Law and Implications for Africa, in* Natural Resource Investment and Africa's Development 307 (Edward Elgar & Francis N. Botchway ed., 2011).

79 Jarrod Wong, *Umbrella Clause in Bilateral Investment Treaties Clauses: of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries,* 14(1) Geo. Mason L. Rev. 136 (2006).

80 Laryea, *infra* note 87, at 307.

81 Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration,* 47(4) Va. J. Int'l L. 955 (2007).

82 Julie Kim, *Balancing Regulatory Interest through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements,* 50(2) Geo. Wash. L. Rev. 289 (2017).

83 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code,* 50(3) Geo. Wash. Int'l L. Rev. 523 (2018).

84 Jeswald Salacuse, *The Emerging Global Regime for Investment,* 51(2) Harv. Int'l L. J. 436–37 (2010).

85 *Id.*

86 *Id;* Salacuse, *supra* note 67, at 659–60.

favourable terms in the BITs at the expense of the host countries. This trend also features in some south-south BITs. For instance, the Mauritius - South Africa BIT represents standard traditional BITs.[87] In such BITs, pertinent issues that are germane to the socio-economic development of African states are either not addressed or the powers of the host countries to regulate them are curtailed. These issues include corruption and transparency, sustainable development, corporate social responsibility, health and environmental issues, labour standards, and regulatory autonomy/ policy space. On the other hand, these BITs have standard terms that give maximum protection to foreign investment, repatriation of funds and subjecting African states to the jurisdiction of ICSID for dispute settlement. Many African states sign these BITs on 'take it or leave it' basis.

As a response to investment and development concerns and the need to balance the interests of the host states and foreign investors, some states have terminated their agreements[88], refused to ratify BITs[89] and awards or even pay compensation[90], while other states have focused on mitigating uncertainty in the investor-state dispute settlement scheme (ISDS) by changing treaty-drafting practices in the negotiation.[91] For instance, South Africa has passed the South African Protection of Investment Act,[92] which fundamentally reformulates standards of protection and also introduced a rule of exhaustion of local remedies, making international investment arbitration a last resort. And, in the event that parties have to resort to international arbitration, South Africa has jettisoned the investor-state dispute settlement mechanism and introduced a state-state settlement mechanism.[93] In addition, some regional economic blocs[94] have also signed investment agreements which either shall apply uniformly within the bloc or serve as a model law for host countries within the bloc.[95]

The efficacy of these different approaches is open to question. The complexities of investment regulation in the continent have led to an investment climate that is unpredictable, as investors

87 UNCTAD, *Mauritius – South Africa BIT (1998)* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/2527/mauritius---south-africa-bit-1998-.

88 Indonesia has terminated most of its BITs; David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?,* 7(1) Asia J. Int'l L. 125–26 (2017).

89 Nancy A. Welsh et al., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties,* 45 Wash. Univ. J. L. & Pol. 121 (2014).

90 Bernado Sepulveda-Amor & Merryl Lawry-White, *State Responsibility and the Enforcement of Arbitral Awards,* 33(1) Arb. Int'l 51 (2017). Argentina is known to have failed to compensate ICSID award creditors; Moshe Hirsch, *Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach,* 19 J. Int'l Econ. L. 682 (2016).

91 South Africa's investment policy reforms were engineered by exposure to international arbitration following claims by European investors over "black economic empowerment" requirements in the mining sector. This brought about the re-evaluation of its approach to BITs; Yoram Z. Haftel & Alexander Thompson, *Why do states Renegotiate Investment Agreements? The Impact of Arbitration*, 13(1) Rev. Int'l Orgs. 30 (2018).

92 *See* Republic of South Africa, *Protection of Investment Act No. 22 of 2015,* (Dec. 15, 2015), https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf.

93 Tarcisio Gazzini, *Travelling the National Route: South Africa's Protection of Investment Act 2015,* 26(2) African J. Int'l & Compar. L. 248 (2018).

94 Notably, including the Southern African Development Community (SADC), Economic Community of West African States (ECOWAS) and Common Market for Eastern and Southern Africa (COMESA).

95 For instance, see the Investment Agreement for the COMESA Common Investment Area 2007, SADC Protocol on Finance and Investment (2006), and ECOWAS Common Investment Code (2018).

have to deal with how to navigate between multiplicities of national laws and courts.[96] Perhaps, the conclusion of multilateral investment treaties will offer balanced investment relations between both developed and developing countries since such treaties will involve many actors in the investment arena which may constitute a check on the disproportionate incentives offered to, and advocated by the more powerful states.[97] As shown in the preceding section, the reality is that such a multilateral framework may not be feasible in the foreseeable future. Therefore, Africa needs to work out a framework that works for Africa.

IV. Balancing the Interests: The Role of a Common Market and Harmonised Investment Law

a. Regional Economic Integration in Africa: A Necessity for a Regional Multilateral Framework

Paradigms have changed in the global economy and the concept of a new geography of investment is generating important discussions in the global market as developing countries are now becoming major players in the investment landscape. The centre-periphery relationship between the North and South- a hallmark of the old geography of trade and investment is now being replaced by economic relations between developing countries.[98] This new trade relations are viewed as mutually beneficial and bound to yield huge development for all participants. It is not surprising that December 19 is now recognised by the United Nations as a day for South-South Cooperation.[99] However, most South-South BITs are modelled after the traditional BITs which were introduced and applied by the developed countries. And as shown in earlier discussions, capital-exporting and importing states operate from different perspectives.[100] Thus, African countries must contemplate a treaty that balances the interests of the contracting parties, the investors, and the public.

African states foster investment relationships with other developing states through the conclusion of South-South treaties and with industrialised countries through the conclusion of North-South treaties.[101] The contents of both types of treaties are cognisant of the economic and socio-political realities of many African countries, and the nature of the relationship between state parties to treaties in most cases, define the parameters of transnational capital's operation, rights and obligations, albeit to a limited extent.[102] States' oscillating position as capital importers or exporters might influence their choices as they make investments and this also explains the ambivalence and inconsistency in their relationship with other states and investors through investment treaties.[103]

96 Malebakeng Agnes Forere, *Move Away from BITs Framework: A Need for Multilateral Investment Treaty?,* (World Trade Institute, Working Paper No. 15/2017), https://states.wti.org/media/filer_public/eb/4a/eb4ae7db-3f2b-483d-9151-0ae41bdaf2a0/working_paper_no_15_2017_forere.pdf.

97 Eustace Chikere Azubuike, *The Place of Treaties in International Agreement,* 13 Ann. Surv. Int'l & Compar. L. 173 (2013).

98 Uche Ewelukwa, *South-South Trade & Investment: The Good, the Bad and the Ugly-African Perspectives,* 20(2) Minn. J. Int'l L. 522 (2011).

99 *Id.*

100 *Id.* at 521.

101 Ibironke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples,* 21 African J. Int'l & Compar. L. 179 (2013).

102 *Id.*

103 *Id.*

Developed and developing countries operate from different perspectives: developed countries wish to protect their citizens' investment; while developing countries who are usually import-dependent seek to attract investments and maintain regulatory autonomy. Thus, in the absence of a multilateral investment framework, the international investment regime has developed unsystematically.[104] One may then wonder if the South-South legal instruments are structured to regulate foreign investors and safeguard the public interest in Africa.

The paradigm shift in the investment geography demands a nuanced approach to reflect development-oriented and people-centred economic arrangements and not a model of the relationship in the investment agreements Africa has always had with the rest of the world. Some authors have discussed the feasibility of an alternative to the current network of investment treaties and some scholars who are in support of an MAI have argued that mega-regional international investment agreements are necessary to address key substantive challenges and will eventually serve as a foundation for a more coherent and harmonized system of international investment law.[105] Advocates for a multilateral framework on investment postulate that it will provide a more secure and predictable framework for long-term cross-border investment.[106] However, critics of the treaty argue that there is no evidence to suggest such a treaty will improve capital flows and that the disparities in the economies in African states make BITs and regional agreements more suitable.[107] Often cited is the fact that homogenous countries such as OECD countries could not conclude a multilateral investment treaty.[108] Although these arguments are valid, one may consider that, since developing countries tend to sign treaties that are not actively negotiated, there are likely to bear unrestrained demands from home countries who may impose extreme investment standards.[109] More so, modern economies are now interdependent and it appears that only multilateral institutions and rules can adequately regulate investment activities.

African investment law is one of a wide variety lacking coordination and clarity in some cases even though it is intended to assure each country of the largest volume of foreign investments possible. [110] The economic benefits and incentives that are granted by African investment laws to (foreign) enterprises highlight the competitive and inimical nature of African investment laws. African countries are almost at similar stages of under-development and the fact that foreign resources are finite does not serve the interest of the host states concerned or sub-regional and regional economic development.[111] This is because countries that are too focused on enabling foreign investments may

104 Silvia Karina Fiezzoni, *Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries,* 7(4) Frontiers L. China 526 (2012).

105 Facundo Calvo, *The Most Feasible Way Towards a Multilateral Investment Treaty,* 3(1) European Inv. L. & Arb. Rev. 62 (2018).

106 Paul Kuruck, *Investment Issues in the West Africa-European Union Economic Partnership Agreement Negotiations: Is a Harmonised Regional Investment Framework the Answer?,* 20(3) African J. Int'l & Compar. L. 456 (2012).

107 *Id.*

108 Forere, *supra* note 45, at 5.

109 *Id.*

110 A. M. Akiwumi, *Plea for the Harmonization of African Investment Laws,* 19(1&2) J. African L. 135 (1975).

111 *Id.* at 138.

become too dependent on them at the expense of more national economic development, inter-African economic cooperation and multinational African enterprise.[112] Developing countries when united as a group stand to benefit more from foreign investors as host states. By this, developing countries as a group have sufficient material power in the use of their resources when they work collectively than when they compete with one another,[113] as there are studies that show a strong link between regional integration and capital mobility in the context of developed countries.[114]

Contemporary international cooperation has changed the way states interact and it has disrupted the traditional understanding of states and borders. This new trend limits unilateralism while fostering mutual cooperation and ensuring that all parties fully meet their obligations under international accords.[115] Where economic opportunities and political stability exist, there is a natural tendency to depart from unilateralism and embrace multilateralism. [116] Unilateralism in this sense, is an obstacle to international cooperation and the rule of law because it is a state's conduct that considers only that state's own interests in the international community.[117] Taking a cue from Europe, the European Union is pushing to eliminate intra-EU investment treaties and establish a permanent investor-state court in its free trade agreement. Legal agreements have also emerged from these prisms. The Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) are all endeavours geared towards multi-regionalism.[118] It is posited that these regional arrangements can spur and solidify the quest for multilateral rules on investment in the long run.

Africa has however not been left out in this global trend of regional integration. As far back as 1980, the Organisation of African Unity had a blueprint for the progressive development of Africa- the Lagos Action Plan for the Economic Development of Africa 1980-2000. However, the first concrete step towards integration was taken in 1991 when African states adopted the treaty establishing the African Economic Community (AEC) (Abuja Treaty) which later came into force in 1994. [119] This treaty has been regarded as one of the most ambitious efforts to create an economically integrated Africa.[120] In the Abuja Treaty, six regional economic communities were perceived as the main

112 *Id.*

113 Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,* 38 Va. J. Int'l L. 643 (1998).

114 Saten Kumar et al., *Does Economic Integration Stimulate Capital Mobility? An Analysis of Four Regional Economic Communities in Africa,* 29 J. Int'l Fin. Mkts., Insts. & Money 34 (2014).

115 Ali Z. Marossi & Marisa R. Bassett, Economic Sanctions Under International Law 166–67 (Springer, 2015).

116 *Id.*

117 *Id.*

118 Odysseas G. Repousis, *Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism,* 52(3) Tex. Int'l L. J. 315–16 (2017).

119 Chukwuma Okoli & A. Yekini, *Nigeria and AfCFTA: What Role has Private International Law to Play?,* ConflictofLaws.net (Nov. 18, 2020), https://conflictoflaws.net/2020/nigeria-and-afcfta-what-role-has-private-international-law-to-play/.

120 *Id.*

building blocks for such a continent-wide integration initiative.[121] The intent to form continent-wide unity continues unabated as shown in the Sirte Declaration of September 1999 and that of Lomé held in July 2000, which were aimed at a speedy implementation and concretisation of the Abuja treaty.[122] It was in furtherance of the objectives of this treaty that the Agreement Establishing the African Continental Free Trade Area (AfCFTA) was concluded in 2018.[123] As of today, the African Union (AU) recognises eight regional and sub-regional arrangements even though they have overlapping memberships. These regional bodies are: the Community of Sahel-African States; Common Market for Eastern and Southern Africa (COMESA), East African Community, Economic Community of Central African States, Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development, Southern Africa Development Community, and the Arab Maghreb Union.[124]

The pursuit of the Abuja Treaty objectives and the examination of the prospects of a regional investment code for long-term economic growth has been vigorously pursued by the sub-regional bodies. For instance, Article 3 of the Revised ECOWAS treaty provides as one of its objectives, the promotion of cooperation and integration of an economic union in West Africa in order to improve the standard of living of its people and the development of the African continent.[125] The treaty requires free trade, movement of persons, a customs union and a common market as necessary in the actualisation of its objectives. Indeed, treaties have emerged from the aspirations of these regional economic communities (RECs) as a result of concerns over the legitimacy of international investment law and investor-state arbitration in the middle and late 2000s, and to enhance economic growth. These treaties are: the Protocol on Finance and Investment of the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa Investment Agreement (CCIA Agreement), and the Supplementary Act on Investment of the Economic Community of West African states.[126] Take the CCIA Agreement as a case study, it aims to foster foreign investments within economically viable states and also introduce a more liberal and transparent investment environment. The drafters anticipate that the treaty will establish a closer customs union and the formulation of a common market amongst COMESA members.[127] It introduced significant innovations with respect to arbitral procedures available to states so as to strike a balance between the rights and obligations of parties in proceedings. The CCIA Agreement further reiterates its underlying objectives by providing that treaties should be drafted having

121 Alemayehu Geda & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA,* 17(3) J. African Econ. 358 (2007).

122 *Id.*

123 *See* African Union, Preamble to the Agreement Establishing the African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (last visited Sept. 15, 2022).

124 Charles Chernor Jalloh, Regional Integration in Africa, 7 African J. Legal Stud. 2 (2014).

125 Paul Kuruck, *Investment Issues in the West Africa-European Union Economic Partnership Agreement Negotiations: Is a Harmonised Regional Investment Framework the Answer?,* 20(3) African J. Int'l & Compar. L. 464 (2012).

126 Paolo Vargiu & Francesco Seatzu, *Africanizing Bilateral Investment Treaties (BITS): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment,* 30(2) Conn. J. Int'l L. 148 (2015).

127 *Id.*

taken into consideration the realities of poor countries and the peculiar conditions which have an impact on the approaches generally adopted to international commercial arbitration in the African continent.[128]

A transformation of the African economies will involve a shift in the factors of production and other resources from low to high productivity activities across all sectors of the economy. Regional integration can contribute to this transformation agenda in many ways. Given the small and fragmented size of African economies, domestic manufacturing enterprises cannot exploit the advantages of scale and that has a negative impact on their competitiveness in global markets.[129] Although there is significant evidence to show that countries benefit from an open and integrated approach to participation in the global economy, there are also known factors that could hamper the actualisation of these ideals.

There are some complicated issues which militate against a successful economic integration, all of which revolve around political, social, economic, territorial and religious differences amongst and within African states. There are legitimate concerns about weak economic structures among African states, differing macro-economic policies, low levels of intra-African trade and uneven economic strengths.[130] Many of the Sub-Saharan African economies are small and fragmented,[131] and as such economic integration may likely polarise benefits towards some countries at the expense of others.[132] For some countries, economic liberalization may be unwelcomed if they see no potential economic gains, because economic integration comes with an implied cost of sovereignty diminution.[133] Also, African states have struggled with being able to materially diversify their economic structures. Commercial patterns tend to favour the production and export of raw materials in exchange for imports of finished goods. The patterns show a trend toward South-North flows over intra-continental flows, thus, running the risk of 'Dutch Disease'.[134] To overcome the constraints of fragmentation in order to effectively participate in a global economy, regional integration holds the promise of increasing the size of the markets to achieve the critical mass that can enable diversification and stimulate greater competition to spur productivity.[135]

Thus, the first step in striking a balance between the interests of African states and foreign investors is the strengthening of African countries' bargaining positions. For African countries to improve

128 *Id.*

129 Patrick N. Osakwe & Karl Wohmuth, *Towards Transformative Regional Integration in Africa, in* Africa's Progress in Regional and Global Economic Integration-Towards Transformative Regional Integration in Africa 4 (Achim Gutowski et al. eds., 2016).

130 Babatunde Fagbayibo, *Exploring Legal Imperatives of Regional Integration in Africa,* 45(1) Compar. & Int'l L. J. 67 (2012).

131 Michael Takudzwa Pasara, *An Overview of the Obstacles to the African Economic Integration Process in View of the African Continental Free Trade Area,* 12(1) Africa Rev. 1 (2020).

132 *Id.*

133 *Id.* at 4.

134 Hasan Tuluy, *Regional Economic Integration in Africa,* 8(3) Glob. J. Emerging Mkt. Economies 336–37 (2016).

135 *Id.* at 338.

their competitive positions, regional economic integration becomes a necessity. Many African countries are spectators in the South-South trade and investment relationship.[136] The countries at most risk are the resource-poor low-income developing countries in the continent which risk being marginalised within the South-South economic framework. Egypt, South Africa, Nigeria, Angola, Morocco, Ethiopia and Sudan have cumulatively accounted for countries that are major capital exporting while other countries appear to be left behind.[137] Regional integration is known to enable portfolio risk diversification and capital mobility. If capital mobility is high, then there is the likelihood that countries cannot pursue independent monetary policies. In the context of advanced countries, evidence points to a strong relationship between regional integration and capital mobility.[138] In addition, in the North-South framework, African most African countries including the major economies mentioned above may become vulnerable when negotiating with capital-exporting countries from the global north.

Besides bolstering Africa's bargaining positions, regional integration through the respective regional blocs and investment frameworks are a stepping stone to achieving a continental market with harmonised investment laws and policies as presented in the next section. Thus, if regional integration is well pursued and these countries negotiate as a bloc, the size of their market and the harmonisation of their investment regime can deliver optimum results and they may be able to effectively negotiate around their national/regional interests and policies.

b. The Imperative for a Holistic Investment Framework

Multilateralism in investment law is desirable, as harmonisation of laws will complement other positive trends in FDI flows to Africa.[139] Harmonised laws are likely to create predictability and promote cross-border transactions (between and outside Africa), private sector development and regional integration. An inter treaty consistency amongst South-South BITs is desirable as a streamlined treaty landscape with predictable and consistent treaty commitment across boards will facilitate a country's compliance with international obligations rather than a patchwork of possible conflicting commitments.[140]

A holistic-themed African regional investment treaty can potentially work effectively where there is a regional integration arrangement. Regional economic integration in this instance is the unification of different economies of states in order to promote and facilitate the free movement of goods within the countries.[141] The cross-border flow of private capital is one of the main pilots of the

136 Uche Ewelukwa, *South-South Trade & Investment: The Good, the Bad and the Ugly-African Perspectives,* 20(2) Minn. J. Int'l L. 551 (2011).

137 *Id.*

138 Kumar et al., *supra* note 114, at 34.

139 Adesegin A. Akin-Olugbade, *The African Development Bank's Contribution in the Harmonization of Investment Laws in. Africa and Prospects for Future Harmonization of Such Laws,* 101 American Soc. Int'l L. Proc. 451 (2007).

140 Wolfgang Alschner & Dimitry Skougarevskiy, *Rule-takers or rule-makers? A new look at African bilateral investment treaty practice* 5 (World Trade Institute, Working Paper No. 7, 2016).

141 Martha Belete Hailu, *Regional Economic Integration in Africa: Challenges and Prospects,* 8(2) Mizan L. Rev. 300 (2014).

global economy in the twenty-first century. African countries are active participants in the global regime that protects and regulates the flow of FDI, contributing to the regime mostly as recipients of capital.[142] The North-South treaties have dominated the legal aspects of the investment regime while the South-South investment treaties have proliferated with African countries participating actively in the rapid conclusion of these treaties.[143] Thus, the argument advanced in this paper is that a unified regional or plurilateral agreement on investment will likely increase the transparency of government policies and create a level playing field for Africans and hopefully liberalise the pathways to FDI. The potential for advanced economic growth may well be found in regional integration as most African countries are small, thus, their individual bargaining power and economic feasibility in the global sphere are much limited.[144] The regional framework offers an opportunity for African states, irrespective of their size, to advance their common interests and balance the same with those of investors, and deliver a template of investment laws and policy that can regulate both intra-African investments and those from outside Africa.

Harmonization of laws is particularly important in order to promote cross-border transactions, regional integration and private-sector development.[145] Issues such as fragmented markets, small market sizes, and heterogenous regulatory environments can be overcome by harmonization and integration of regional agreements, while regional cooperation can prevent any race to the bottom in investment incentives.[146] A plurilateral investment code or treaty will definitely assist in simplifying investment rules and regulations thereby creating a more conducive environment for investment. It is believed that establishing a continental law would solve the problem of capital controls and liquidity problems that may arise when foreign investments flow into Africa, therefore raising low intra-African investment.[147]

It is important to note that the size of the market is not entirely a decisive factor for a foreign investor as he has to take into consideration different permutations. Policy credibility also influences the decision of foreign investors to invest in a country. Improving the economic ecosystem or providing incentives may not be enough to gain investor confidence if the country has a history of bad policies. A positive action in this regard will require 'policy harmonization which entails replacement of national policies with common policy and coordination of national polices'.[148] Countries must be unanimous on essential economic points. Therefore, signing a regional integration agreement serves to gain the trust of investors as the agreement will consolidate the efforts in the reforms made under

142 Odumosu-Ayanu, *supra* note 101, at 172.

143 *Id.*

144 Alemayehu Geda & Edris Hussein Seid, *The Potential for Internal Trade and Regional Integration in Africa,* 2 J. African Trade 20 (2015).

145 Adesegun A. Akin Olugbade, *Investment Law, Dispute Resolution, and the Development Promise: Back to the Future, in* Proceedings of the Annual Meeting 451 (American Soc'y of Int'l L., 2007).

146 Addis Ababa, *Investment Policies and Bilateral Investment Treaties in Africa-Implications for Regional Integration,* UN Econ. Commission for Africa (Aug. 2008), https://states.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf.

147 *Id.*

148 Hailu, *supra* note 141, at 300, 307.

the regional agreement.

The non-ratification and implementation of existing agreements among African countries[149] is also a serious source of concern. It is therefore important that legal imperatives are taken into consideration so as to ensure the even distribution of the benefits of integration. The nexus between concepts of democratic governance and the effective operationalisation of integration initiatives cannot be overstated. Both go hand in hand. Thus, constitutionalism in African states must develop to minimise the undue attachment to national sovereignty. Integrational goals must be incorporated into the national development policy of all states and there must be a synergy between regional and national institutions.[150] African integration should promote adherence to democratic principles at the national level and also aim to create common standards based on state practices. This is because, without commitment to constitutional development at the national level, it is unrealistic to expect an effective transnational promotion and monitoring of democratic norms and standards.[151]

c. The Pan African Investment Code - A Step Towards the Right Direction?

The Pan African Investment Code (PAIC) is the codification of the continent's first model investment treaty. Though not officially adopted, the code represents an African Consensus on the shaping of international investment law.[152] The code has been drafted from the perspective of developing countries and least developed countries with a focus on sustainable development government goals.[153] It contains innovative features, specifically tailored to address Africa's needs and challenges, which presumably makes it a unique legal instrument. The development of PAIC was a response to the earlier mode of investment regulation which was considered unfavourable to Africa's developmental challenges.[154]

The investment regime espoused in PAIC is in tandem with the current global initiatives and the new generation of international investment agreements aimed at balancing the rights and obligations of host states and investors alike.[155] Though not a conventional investment treaty practice, it is a viable mechanism for striking an appropriate balance between investment protection and corporate responsibility in host states.[156] While this is a laudable innovation, this code presents some challenges to the actualisation of an effective multilateral framework in Africa. The choice of a soft law instrument will increase the fragmentation of the investment law regime in Africa and

149 Yoram Z. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries,* 17(2) Rev. Int'l Pol. Economy 348 (2010).

150 Fagbayibo, *supra* note 130, at 68.

151 *Id.* at 69.

152 Makana Moise Mbengue & Stefanie Schacherer, *The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime,* 18(3) J. World Inv. & Trade 415 (2017).

153 Erik Denters & Tarcision Gazzini, *The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment,* 18(3) J. World Inv. & Trade 452 (2017).

154 *See generally* Mbengue & Schacherer, *supra* note 152.

155 *Id.*

156 *Id.*

in turn, impair one of the code's core objectives. It is a mere code and therefore not binding, only adding to a myriad of existing rules. It will also reduce the effectiveness of numerous substantive provisions of the current text, including but not limited to the ISDS which gives host states the discretion to implement the ISDS, thus, offering a middle-ground solution to African states that are either pro-ISDS or anti-ISDS.[157] Also, the exclusion of the controversial fair and equitable treatment provision in the code will probably be re-introduced in new bilateral investment treaties negotiated by African countries.[158]

The appropriateness of a legal structure to order intra-African economic relations have not been meaningfully debated. The code appears to proffer old solutions to a new problem. Much of its contribution is influenced by the experiences of states as recipients of investments and not as exporters of capital.[159] The code's restriction of foreign investors' rights with the aim of preserving host states' regulatory space would have been a desirable solution to the perceived one-sidedness of the investment protection regime because of the advantaged position occupied by foreign investors from the North. But as long as the objective of the code is to encourage intra-African investment, denying itself of some of the incentives Africa historically accorded to the foreign investor from the North may be depriving oneself of benefits for the perceived wrongs of another.[160] The over-appreciation of regulatory space in the intra-African investment context assumes that the challenges of regulating intra-African investments are similar to the regulation from outside the region.[161] Also, the lack of well-developed and efficient institutional arrangements to facilitate and consolidate the harmonization of business laws in Africa and the difficulty of enforcing laws across legal boundaries in the absence of continent-wide supra-national enforcement or interpretation mechanisms[162] is enough to scuttle the aims of the PAIC.

Beyond the PAIC, it is believed that the African Continental Free Trade Agreement (AfCFTA) will play an important role in navigating the continent towards economic development as it offers prospects of regional integration.[163] The AfCFTA could provide a legal premise to rewrite the rules of investment so as to encapsulate the peculiarities of the African states.[164] It is argued that the AfCFTA will build resilient economies by reducing excessive reliance on external funding, creating more value for local economies and invariably increasing potential for exports.[165] Advocates for

157 *Id.*

158 Mouhamadou Madana Kane, *The Pan-African Investment Code: A Good First Step, but Much is Needed,* Columbia Academic Commons (2018), https://academiccommons.columbia.edu/doi/10.7916/D8H14HXV.

159 Kidane, *supra* note 83, at 571.

160 *Id.* at 571.

161 *Id.* at 571–72.

162 Akin-Olugbade, *supra* note 139, at 451.

163 African Union, *African Continental Free Trade Agreement* (Part II, Article 3) (adopted Mar. 21, 2018, entered into force May 30, 2019) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

164 Katrin Kuhlmann & Akinyi Lisa Agutu, The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development, 51 Georgetown J. Int'l L. 784 (2020).

165 *See* African Union, *supra* note 163, at Part II, Article 3.

the treaty have argued that the institution of this regional trade agreement has the potential of increasing the value of FDIs in African countries.[166] Though there exists literature supporting the claim that regional trade agreements lead to increased extra-regional FDIs, the situation is more ambiguous in the case of intra-regional FDIs.[167] An important cause of this ambiguity lies in the fact that multinational firms are more concerned with cost advantages and the enjoyment of economies of scale rather than merely jumping tariff barriers.[168] According to Te Velde and Benzemer, though membership of a region is not significantly related to inward FDI, it could nonetheless be crucial in attracting more FDIs where there exists a sufficient number and level of trade and investment provisions covering critical issues such as: the description of the treatment of foreign firms and significant trade preferences.[169] Thus, the AfCFTA must consider such elements in order to attract good investments by providing a level playing ground for both potential investors and state interests. While the AfCFTA primarily addresses trade concerns, its Investment Protocol attempts to regulate intra-African investment relationships, which appears promising as AU member states may have to obviate the need to conclude new BITs once they come into force.[170] The AfCFTA Investment Protocol's pillars are investment promotion and facilitation; investment protection; investor's obligations and state commitments.[171] They stipulate requirements in investment protection and the upholding of state commitment to avoid the 'race to the bottom' approach to regulatory issues.[172] Indeed, AfCFTA offers African states the opportunity to produce a modern regional multilateral investment framework cemented by regional integration, and a golden opportunity to harmonise and coordinate investment policymaking. Moreover, the establishment of a consolidated and less fragmented investment framework could provide the 'quantum leap' for Africa while ensuring a balance between investment protection and the right of African states to regulate their public interests.[173]

The investment protocol (which is yet to be implemented) if well-established will go a long way towards winning the trust of investors by guaranteeing legal certainty on investments. It is anticipated that it will draw inspiration from the PAIC and the existing Regional Economic Cooperation (REC) treaties already in place. For Prudence Sebahizi, Chief Technical Advisor and Head of the Continental Free Trade Area (CFTA) Unit of the AU stated that; 'PAIC will inspire the drafters and negotiators of the AfCFTA Investment Protocol'.[174] PAIC provides for significant protections for

166 Dirk Willem Te Velde & Dirk Benzemer, *Regional Integration and Foreign Direct Investment in developing countries,* 15(2) Transnational Corps. 41–70 (2006).

167 *Id.*

168 Dirk Willem Te Velde, *Investment: Definitions and Economic Effects, in* AFCFTA INVESTMENT NEGOTIATIONS: NOTES ON CONCEPTS 13 (Max Mendez-Parra & Addis Ababa eds., May 2020).

169 *Id.*

170 Kuhlmann & Agutu, *supra* note 164, at 785.

171 Te Velde, *supra* note 168.

172 *Id.*

173 Hamed El-Kady, *The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?,* Kluwer Arb. Blog (Sept. 24, 2020), https://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/.

174 Hogan Lovells, *Report on the African Continental Free Trade Agreement 2019: Implications for the Continent,* Hogan Lovells (London, Nov. 2019), https://states.hoganlovells.com/en/knowledge/topic-centers/~/media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx.

the state as well as for investors, a characteristic of modern trends in global investments, set to be emulated in the Investment Protocol.[175]

The widely clamoured Sustainable Development Goals (SDGs) have been incorporated over the years in investment treaties. Considering recent trends across the continent in the increased incorporation of Sustainable Development provisions in BITs such as the Morocco – Nigeria BIT and the SADC's Model BIT that associates Investment to Sustainable Development, it is expected that the AfCFTA will contain similar provisions.[176] With regards to the scope of the Investment Protocol, the definitions of the terms 'investor' and 'investment' will play a major role in determining the level of security accorded to investors. PAIC defines an investor as; 'any national, company or enterprise of a Member state or a national, company or enterprise from any other country that has invested or has made investments in a Member state', and an investment as a company or enterprise 'established, acquired or expanded' by an investor.[177] The AfCFTA is predicted not to drift too far away from these definitions, and by so doing, accords no preferential treatment to African investors.[178]

VI. Conclusion

Africa's regional agreements discussed in this article are not linear, however, they make good arguments for the facilitation of holistic investment rules at a multilateral level. In order to have a sustainable development of its economies, Africa has to devise ways of engaging and benefiting from the global capitalist system.[179] In addition to regional integration, a multilateral approach to investment making can facilitate a global approach to capital flows issues by taking into account country-specific macroeconomic and financial stability considerations in determining the appropriate policy response and the most important path to capital account liberalization. Such can only be effective when all African states have a unified commitment. Beyond a large market and rich natural resources, global standard practices and democratic norms must be adhered to. The continent's untapped development potential can only be reached through a strong political will to design and implement policies. Although the AfCFTA is expected to build on the considerable successes already achieved by Africa's regional economic communities; however, it fails to clarify how the overlapping treaty and investment regimes will be reconciled and harmonized. More so, it appears to be majorly premised on trade concerns. International Investment Law needs to envelop the broader developmental aspirations of Africans without losing focus on the practicalities and underpinnings of foreign investment.

175 *Id.* at 9.

176 *Id.* at 16.

177 African Union Commission, *Draft Pan-African Investment Code,* Art. 4 (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

178 Kuhlmann & Agutu*, supra* note 164, at 786.

179 Samuel Oloruntoba, Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations 192 (Palgrave Macmillan, 2016).

Rethinking the Pharmaceutical Knowledge-Economy: Patents, the TRIPS Agreement, and Skewed Utilitarianism in the Evolving Ideological Paradigms

Morris K. Odeh

Abstract

The TRIPS Agreement introduced a unique globalized pharmaceutical patent economy. This article examines the social costs of this patent regime in low-income countries and makes three contributions. Firstly, it highlights how, in the early development of the patent system, nations perceived patents as privileges and displayed considerable reluctance in protecting pharmaceutical products and processes. This allowed net importers of technologies to replicate foreign innovations without the constraints of IP rights, and in some cases, invalidate unnecessary patents. However, this took a different turn towards the tail end of the 20th century when the patent norms and rules were harmonized and globalized. Secondly, the article argues that the new regime is rooted in what can be termed 'skewed utilitarianism,' as patent rights appear extensive while collective rights are undervalued, seemingly favouring specific stakeholders and neglecting distributional consequences for others. The new regime shields the patent system from principles of social justice and leads to adverse outcomes for vulnerable and impoverished populations. Lastly, the paper introduces a three-tier integrated framework as part of the reevaluation of the global patent dynamics. The framework involves an appreciation of the IP norm-making process, democratizing the norm-making process to allow broader representation, and centering 'flexibility' in the policymaking process.

1. Introduction

The high prices of life-saving medicines and vaccines have long been one of the key areas for contesting the scope and normative foundations of intellectual property (IP) rules, especially pharmaceutical patents and trade secrets. Scholars and stakeholders debate the tensions associated with the manufacturing and protection of these medicines and vaccines, on the one hand, and distribution and access to the medications, on the other hand.[1] For instance, patent rules were blamed for the high cost of antiretroviral (ART) drugs during the peak of the HIV/AIDS crisis in the late 1990s and early 2000s. Critics argue that these rules limited generic companies from producing

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1 *See* Brook K. Baker & Rachel D. Thrasher, *From Business as Usual to Health for the Future: Challenging the Intellectual Property Regime to Address COVID-19 and Future Pandemics,* 41(1) Boston Univ. Int'l L. J. 1–46 (2023).

generic versions of ART at a lower price for low-income countries.[2] ART was sold for $10,000 to $15,000 when it could have been sold for as little as $100.[3] The recent COVID-19 pandemic and the devastating vaccine shortages/inequities experienced by low-income countries during this period reignited discussions about the impact of IP rules on access to medicines. In fact, in March 2020, several countries, led by South Africa and India, proposed a temporary waiver of the IP rights under the World Trade Organization (WTO)'s 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, given the urgent need for 'unimpeded and timely access to affordable medical products including diagnostic kits, vaccines, medicines, personal protective equipment, and ventilators.'[4] Although the vast majority of medicines on the World Health Organization (WHO)'s model list of essential medicines are off-patent, potential generic producers might still be dissuaded by trade secrets and secondary patents covering non-active and supplementary components of these medicines.[5]

Patents and trade secrets hold particular significance in the pharmaceutical sector due to the high costs associated with drug development, the necessity of conducting expensive and complex clinical trials to secure regulatory approval, and the high rate of research failures while developing breakthrough drugs.[6] Meanwhile, there is the general ease of replicating such new drugs and the associated processes, although, in the case of biologics, it may be difficult (not impossible) to replicate them without access to the know how due its inherent variability.[7]

The prevailing ideology is that without these IP protective measures to deter competition and allow investors to internalize the positive externalities of their medical innovations, it might discourage investments in research and development (R&D) within the industry.[8] So, to allow inventors to recover their R&D investments, they are granted these state-backed, time-limited monopoly rights. The expectation is that the promise of supra-competitive pricing during the monopoly period will encourage companies to make significant investments in R&D for inventions that hold societal value. Some scholars view these monopolies as the most effective approach for addressing market failures related to knowledge goods, often classified as 'public goods.'[9]

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2 *See* William W. Fisher III & Cyril P. Rigamonti, *The South Africa AIDs Controversy: A Case Study in Patent Law and Policy,* Harvard Law School (Feb. 5, 2005), https://cyber.harvard.edu/people/tfisher/South%20Africa.pdf; Fernando Pascual, *Intellectual property rights, market competition and access to affordable antiretrovirals,* 19(3) Antiviral Therapy 57–67 (2014 Supp.).

3 *See* Médecins Sans Frontières, Untangling the Web of Antiretroviral Price Reductions 2 (18th ed., July 2016), https://msfaccess.org/untangling-web-antiretroviral-price-reductions-18th-edition.

4 World Trade Organization (WTO) Council for Trade-Related Aspects of Intellectual Property Rights (2020); Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa. IP/C/W/669.

5 Julia Belluz, *The absurdity high cost of insulin, explained,* Vox (Nov. 7, 2019), https://www.vox.com/2019/4/3/18293950/why-is-insulin-so-expensive.

6 C. Scott Hemphill & Bhaven N. Sampat, *When do generics challenge drug patents?,* 8(4) J. Empirical Legal Stud. 613–49 (2011).

7 Arnold G. Vulto & Orlando A. Jaquez, *The process defines the product: what really matters in biosimilar design and production?,* 56(Suppl. 4) Rheumatology J. (Oxford University Press, 2017).

8 Harold Demsetz, Towards a Theory of Property Rights, 57 American Econ. Rev. 347, 347–48 (1967).

9 William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 22–23 (Cambridge, MA and London: Belknap Press/Harvard University Press, 2003).

However, the growing prices of medicines and the limited ability of generic manufacturers to access the relevant technologies to produce cheaper equivalents of the originators' medicines, alongside their detrimental toll on human health, have raised critical concerns about the applicability and scope of the patent system within the pharmaceutical sector.[10] Notably, Olga Gurgula pointed out that 'Pharmaceutical companies have been increasingly engaging in strategic patenting to delay or even block generic competition…the patent system is used strategically to artificially block generic competition and prevent a timely arrival of cheaper generic versions.'[11] Therefore, key questions have emerged as subjects of this debate: Are the existing minimum universal patent principles suitable? Is the IP system undermining the industrialization of low-income countries? Should a nation's development status be a fundamental criterion for determining the scope of its patent system? Is it appropriate to link the patent system with other fields like trade and investment regimes? Do the social benefits of the patent system outweigh the social costs? Where should the norms and principles of the patent system be established? These are primarily conceptual considerations that warrant careful examination.

This article attempts to answer some of these questions within the conceptual framework of the historical evolution of the patent system, the social welfare costs of the globalized pharmaceutical patent regime, the influence of privilege and power in perpetuating this system, and the potential for reimagining the model to serve the needs of low-income countries more effectively. Here, low-income countries represent both 'low-income economies' and 'lower-middle-income economies' as defined by the World Bank based on their respective Gross National Incomes (GNI).[12] The term 'low-income countries' is used in this article either independently or within the broader context of developing countries where necessary.

Consequently, this article makes three contributions. Firstly, it highlights how, in the early development of the patent system, nations perceived patents as privileges and displayed considerable reluctance in protecting pharmaceutical products and processes. This allowed net importers of technologies to replicate foreign innovations without the constraints of IP rights, and in some cases, invalidate unnecessary patents. This regime offers insights into contemporary debates about the effectiveness and reform of the current globalized knowledge economy. Secondly, it argues that the evolution and globalization of the patent system are rooted in what can be termed 'skewed utilitarianism.' This perspective highlights that patent rights appear extensive while collective rights are undervalued, seemingly favouring specific stakeholders and neglecting distributional consequences for others, shielding the patent system from principles of social justice, and leading to adverse outcomes for vulnerable and impoverished populations. Lastly, the paper introduces a three-

10 European Commission, *Executive summary of the Pharmaceutical Sector Inquiry Report,* European Union (Aug. 7, 2009), https://op.europa.eu/en/publication-detail/-/publication/a0b3a03c-2806-4894-8755-ee8e7c5e1e7e/language-en.

11 Olga Gurgula, *Strategic Patenting by Pharmaceutical Companies – Should Competition Law Intervene?,* 51(9) IIC Int. Rev. Ind. Prop. Copyright L. 1062–85 (2015)

12 World Bank, *World Bank Country and Lending Groups* (last visited Apr. 21, 2024), https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups#:~:text=For%20the%20current%202024%20fiscal,those%20with%20a%20GNI%20per.

tier integrated framework as part of the reevaluation of the global patent dynamics. This framework involves an appreciation of the IP norm-making process, democratizing the norm-making process to allow broader representation, and centring 'flexibility' in the policy-making process.

This article is divided into three parts, with this introduction being the first. The second part examines the historical ideological paradigms of the patent system, highlighting the strategic instrumentalism and public interest understanding associated with the early conceptualization of the proprietary regime. The second part discusses how the patent rules were linked with the international trade regime and globalized without regard to the domestic realities of poor nations. The result is a system that favours nations with the technological capacity to produce and distribute inventions and puts developing nations, struggling with industrialization, at a position of dependency. Furthermore, it analyzes how the normative undertaking of the patent system can be reconceptualized to democratize the IP norm-making process and center the interests of developing countries. It advocates for extending the same liberties that industrialized nations enjoyed when they were at their development stages to developing countries. The conclusion summarizes the findings and conclusion.

II. The Historical Ideological Paradigms of the Patent System

Patents are government grants that provide inventors with exclusive rights to their inventions within specific territories for a limited duration. To secure a patent, applicants need to generally demonstrate the novelty, inventiveness, and utility of their creation, and once granted, a patent remains in force for at least twenty years from the date of application based on the TRIPS Agreement. During the period in which a patent is valid within a particular country, the owner of the patent holds exclusive rights to manufacture and sell products that incorporate the protected knowledge in that country.

The modern patent system began in the pre-industrial era.[13] However, other aspects of the history of the patent system are contentious regarding when, where, and how it started, with discussions typically divided between Western and non-Western cultures. An in-depth analysis of these debates is beyond the scope of this work. It suffices for this work to state that the Western historical account generally traces the origins of the patent system to England and Venice, while non-Western perspectives are associated with ancient civilizations of the Andaman, Kai, and Koryak cultures found in Southeast Asia and North America.[14] Each perspective offers a unique view of ownership, protection, and management of pre-industrial knowledge. My focus, however, is on how patent ownership was theorized historically in Western culture.

The Western historical account traces the origin of patent rights to the Venetian Republic, an Italian peninsula, which was considered one of the most technologically advanced and commercially

13 Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization,* 5 J. Hist. Int'l L. 413 (2003); Joel Mokyr, *Intellectual Property Rights, the Industrial Revolution, and the Beginnings of Modern Economic Growth,* 99(2) American Econ. Rev. Papers & Proc. 349–55 (2009)..

14 The western account has been dominant over the years. Anthropologist Lowie has suggested that the dominance is due to a rationalistic bias that earlier historians held toward non-western civilizations. *See* Robert H. Lowie, Primitive Society 235–36 (New York, Bonie and Liveright, 1920).

sophisticated city-states in Europe in the 15th century.[15] Venice leaders were interested in attracting and retaining the best artisans and inventors 'from diverse parts.'[16] So, in 1443, the Venice government began to issue ad hoc patents to inventors, which were later formalized under the Venetian Statute on March 19, 1474. The statute granted inventors a ten-year monopoly on their 'works and devices' in return for disclosing the invention publicly,[17] and imposed penalties for unauthorized use or infringement of patent grants.[18] Christopher May described the Venetian Statute as 'the first formal quasi-patent system … [f]or the first time a legal and institutional form of intellectual property rights (although the term itself is of somewhat later vintage) established the 'ownership' of knowledge, and was explicitly utilized to promote innovation.[19]

The well-structured nature of the Venetian patent system distinguishes it from other historical accounts.[20] Venice was the first city to consistently apply specific regulations in granting patents instead of issuing random, isolated monopolies.[21] Venetian authorities were clearly concerned with the management of the city's economy and recognized the importance of technological innovation to its success.[22] Eventually, the success of the Venetian Patent system in promoting domestic innovation and economic growth helped to spread the idea of patent protection to other countries in Europe and beyond.[23]

In terms of balancing individual and collective rights, the Venetian patent system considered patents as privileges, not legal entitlements.[24] The patent statute recognized a state-sanctioned public domain and provided a limited patent term. Inventors had a limited term to produce and sell their inventions, after which the knowledge and technologies became available to the public. There was also a fundamental working requirement, patent grants were forfeited by failure to use them within a certain term.[25] The State also had the power to grant compulsory licenses to pursue social objectives, such as addressing public health challenges.[26]

Furthermore, the practical administration of the patent system was also influenced by public interest considerations; the majority of patents recorded in the Venetian State, whether significant or not,

15 Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization,* 5 J. Hist. Int'l L. 413 (2003).

16 *See* E. Kaufer, The Economics of the Patent System 5–6 (Chur: Harwood Academic Publishers, 1980); J. Phillips, *The English Patent as a Reward for Invention: The Importation of an Idea,* 3(1) J. of Legal Hist. 71–79 (1982).

17 *Id.*

18 Moureen Coulter, Property in Ideas: The Patent Question in Mid-Victorian Britain 7 (Missouri: The Thomas Jefferson University Press, 1991).

19 Christopher May, *The Hypocrisy of Forgetfulness: The Contemporary Significance of Early Innovations in Intellectual Property,* 14(1) Rev. Int'l Pol. Econ. 1, 3 (Feb. 2007).

20 Christopher May, *The Venetian Movement: new technologies, legal innovation, and the institutional origins of intellectual property, in* David Vaver, Intellectual Property Rights: Critical Concepts in Law (Vol. 3, London & New York: Routledge, 2006).

21 Giulio Mandich, *Venetian patents (1450–1550),* 30(3) J. Pat. Off. Soc'y 166–224 (2002).

22 May, *supra* note 19, at 4.

23 *Id.*

24 Harold Wegner, Patent Harmonization 4 (Sweet & Maxwell eds., 1993).

25 Mandich, *supra* note 21, at 166–224.

26 *Id.* at 166–224.

were related to the city's specific needs, with social concerns being the guiding principle.[27] From 1490 to 1550, more than 120 privileges were granted, primarily for socially beneficial mechanical devices such as pumps, water mills, and dredging machines.[28]

The instrumental policy of the Venetian patent system was also set out in the preamble of the Venetian Patent statute, providing that the purpose of the patent system was to recognize devices with great utility and benefit to the Commonwealth.[29] With patents, the people of Venice hoped that 'more men would then apply their genius, would discover, and would build devices of great utility to the commonwealth.'[30] Thus, patents were conceptualized as strategic instruments to further domestic technological and economic development.

The English historical account, which is the second Western account, dates to the mid-14th century when the British Crown began issuing letters of patent to foreign inventors to encourage them to bring their trades to England. [31] It started with King Edward II granting patents to John Kempe, the Flemish weaver, in 1331 to incentivize his immigration to England.[32] At this time, England was behind technologically compared to other European regions, like France and the Netherlands.[33] So, the patent system was a medium adopted by the Crown to industrialize England by encouraging technology transfer from foreign countries and promoting local knowledge and skills dissemination.[34] Robert Merges, Peter Mennell and Mark Lemley describe this early patent system as rooted in a utilitarian theory called 'strategic international trade policy,' which seeks to lure skilled and entrepreneurial Europeans to establish their businesses in England and transfer their trade and skills to domestic apprentices.[35] This implies that the exclusive rights granted through these patents were conceptualized through a public interest lens.

When deciding whom to grant letters of patent to, the Crown took into consideration the social value of the invention as well as the amount of effort the inventor had invested in developing the product.[36] The patent system was later extended to cover domestic inventions with the issuance of letters of patent to John of Utynam for stained glass manufacturing in 1449.[37]

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27 Fernand Braudel, Civilisation and Capitalism, 15th – 18th Century 433–34 (Vol. I, London: Collins, 1981).

28 *Id.*

29 Mandich, *supra* note 21, at 166–224, 176.

30 F.D. Prager, *Patent Law of Venice,* in Giulio Mandich, *Venetian patents (1450-1550),* 30 J. Pat. Off. Soc'y 166, 176–77 (2002).

31 J. Gordon, Patent Law Reform, 55 J. Soc'y Arts 26 (1906).

32 *See* E. Wyndham Hulme, *The History of the Patent System under the Prerogative and at Common Law,* 46 L. Q. Rev. 141–54 (1896); P. David, *Intellectual property institutions and the panda's thumb: patents, copyrights, and trade secrets in economic theory and history, in* Global dimensions of Intellectual Property Protection in Science and Technology 45 (Mitchel B. Wallerstein, Mary E. Mogee, & Robin A. Schoen, eds., 1993).

33 *See* W.R. Cornish, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 111 (4th ed., London: Sweet & Maxwell, 1999).

34 Peter Drahos, A philosophy of Intellectual Property 30 (Routledge, 2016).

35 Robert Merges et al., Intellectual Property in the New Technological Age 125 (2nd ed., New York: Aspen Law & Business, 2000).

36 Simon Lester & Huan Zhu, *Rethinking the Length of Patent Terms,* 34 American Univ. Int'l L. Rev. 788 (2019).

37 *See* Wertheimer, Albert, & Thomas Santella, *The History and Economics of Pharmaceutical Patents, in* Irina Farquhar, Kent Summers, & Alan Sorkin, The Value of Innovation: Impact on Health, Life Quality, Safety, and Regulatory Research 102 (Bingley, UK: Emerald Group Publishing Limited, 2008); Lynn White Jr., *Jacopo Acontio as an Engineer,* 72 American Hist. Rev. 432 (1967).

When successive English Sovereigns persisted in arbitrarily granting patents and creating unjustifiable monopolies, the parliament had to step in and pass the *Statute of Monopolies* in 1623 to reinforce the public interest objectives of the patent system. This event, as Thomas Nachbar rightly pointed out, was a '…revolution in the role of political accountability in the administration of economic regulation.'[38] The intervention was necessary as the Sovereigns turned the patent system into a convenient source of revenue, resulting in unwarranted monopolies that undermined free trade and the mercantile economic order.[39] The Statute of Monopolies declared all monopolies in England to be contrary to the law of the realm and so void.[40] It however exempted patents from the ban, recognizing the positive impact that patents could have on society, such as the promotion of technology transfer and domestic innovation. To this end, the Statute empowered the Crown to grant patents to the 'true and first inventor' of a 'method of manufacture' up to fourteen years of exclusive rights, as long as the rights were in line with the law, did not cause a disruption in trade, were not harmful to the state by raising the prices of commodities at home, hurt trade, or generally inconvenient.[41] The Statute made it clear that the patents were granted to inventors as a privilege, not as a natural right that would allow for strong IP protections.

These historical accounts share a common ideological agenda of public interest-based utilitarianism. Patent rights were mainly conceptualized as privileges with specific public benefit goals rather than strong legal entitlements or property rights as we have them today. These goals included attracting skilled artisans into national territories, promoting technology transfer, enhancing local expertise, and fostering innovations.[42] These norms of the patent system extended to the 18th and 19th countries. As you will see in the next section, some countries abandoned their patent systems for not living up to these ideals. Monopolies were generally viewed unfavourably during this time and considered a 'bad odour,' except for the special case of the patent, which was seen as a means of incentivizing technological advancement.[43] In that sense, the 'embarrassment of an exclusive patent' and the 'monopolies of invention' could only be justified as a special legal privilege that served the 'benefit of society.'[44] This was the popular normative sentiment during the first half of the 19th century, particularly in the context of the pharmaceutical knowledge economy.

a. Pharmaceutical Patent Rights, Public Interests and Patent Abolition in the 19th Century

After the early beginnings of the patent system, the idea of patenting intangible assets spread throughout Europe and North America in the 19th century.[45] It was a period of somewhat chaotic

38 Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation,* 91(6) Va. L. Rev. 1313, 1374 (2005).

39 Peter Drahos, A philosophy of Intellectual Property 29 (Routledge, 2016).

40 Statute of Monopolies 1623, §§ 1, 6.

41 *Id.*

42 Paul David, *The Evolution of Intellectual Property Institutions, in* Economics in a Changiing World 134 (A. Aganbegyan, O. Bogomolov & M. Kaiser, eds., 1994).

43 Lawrence M. Friedman, A History of American Law 255– 57, 435–38 (2nd ed., New York: Simon & Schuster, 1985).

44 Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* The Writings of Thomas Jefferson 326, 334–35 (Andrew A. Lipscomb ed., 1903); *see also* Graham v. John Deere Co., 383 U.S. 1, 7–11 (1966).

45 F. Machlup & E. Penrose, *The Patent Controversy in the Nineteenth Century,* 10(1) J. Econ. Hist. 1, 3 (1950).

growth with much cross-pollination of laws between states.[46] Nonetheless, countries still had the liberty to structure their patent policy to support their domestic socio-economic interests. For example, the US enacted its first federal patent law in 1790.[47]

Recognizing that foreign patents had the potential to limit domestic technological development, the US prohibited foreigners from filing patents in the country for forty-six years. When the restriction on foreigners was eventually lifted in 1836, the patent fees for foreigners were approximately tenfold higher than those for American citizens, with an additional charge of 65% for British nationals. The discrimination was eventually abolished in 1861 and replaced with inter-country reciprocity.[48]

At this time, the US was a net importer of technology, so it apparently wanted to have the liberty to copy foreign technologies to support its industrialization strategy.[49] Even in the publishing industry, the US publishing industry thrived in the nineteenth century by copying and publishing the 'unauthorized' work of European authors. It only started recognizing non-US authors in 1891.[50] Indeed, a 1986 study for the US Congress admitted that 'when the United States was a relatively young and developing country it refused to respect international intellectual property rights because it was freely entitled to foreign works to further its social and economic development.'[51] The US sought to make foreign technologies freely available to its inventors and entrepreneurs to boost its technological capacity. Granting patents on foreign technologies would frustrate that goal. The irony however is that the US is now the primary advocate for stronger patent regimes for foreign technologies worldwide regardless of the development statuses of different countries,[52] privileging the commodification of knowledge and market-oriented ideological paradigms over access to knowledge and technologies.

The legislative liberty of domestic policymakers before and during the early parts of the 19th century resulted in significant divergences and variations between national laws.[53] Some countries, like the US, awarded a seventeen-year patent term, while others, like Germany and France, granted patents

46 *See* Graham Dutfield et al., Dutfield and Suthersanen on Global Intellectual Property Law 147 (2nd ed. Cheltenham, UK: Edward Elgar Publishing Limited, 2020).

47 *See generally* Z.B. Khan, Intellectual Property and Economic Development: Lessons from American and European History (London: Commission on Intellectual Property Rights, 2002); E.C. Walterscheid, The Nature of the Intellectual Property Clause: A Study in Historical Perspective 310 (Hein ed., 2002).

48 Markedly, the U.S. became the first country not to recognize patents for the importation of trades or inventions, requiring that the inventor had to be the first inventor. Evans v. Eaton, 16 U.S. (3 Wheat) 454 (1836) (noting that the discovery must not only be useful, but new; it must not have been known or used before in any part of the world).

49 *Id.*

50 May, *supra* note 19, at 4.

51 U.S. Congress Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information 230 (1987).

52 Peter Gakunu, *Intellectual Property: Perspective of the Developing World,* 19(2) Ge. J. Int'l Competition L. 358–65 (Special Trade Conference Issue, 1989).

53 Graham Dutfield & Uma Suthersanen, Global Intellectual Property Law 23 (Cheltenham, UK: Edward Elgar Publishing Limited, 2020).

for fifteen years, and Great Britain issued patents for fourteen years.[54] Others, like the Netherlands, provided initial terms of five, ten, or fifteen years depending on the nature of the invention.[55] There were also differences in the patent filing processes, the types of inventions eligible for protection, and the exceptions created. For example, in the US and Great Britain, there were no explicit exceptions, while in others, like France and Germany, there were exceptions for certain classes of inventions, such as medicines and foods.[56] There were also disparities in the management of patented products or processes. In some places, like the US, patent holders were under no obligation to commercialize their inventions or even to use them, while in other countries, rival manufacturers could apply for a compulsory license if the patent holder refused to work on the invention or license it willingly.[57]

In the second half of the 19th century, there was serious discontent with the entire patent system for impeding free trade and competition. The discontent was mainly structured around the fact that 'a genius' does not need patent monetary incentives to create new products.[58] This widespread dissatisfaction became increasingly strong, leading to calls for a revision of the patent law or its abolition altogether.[59] In particular, the German parliament criticized the patent system as being 'injurious to the common welfare.'[60] Also, leading economists in Switzerland characterized the patent system as 'pernicious and indefensible.'[61] Similar opinions emanated from the Netherlands and Japan.[62] In particular, the Dutch Society for the Promotion of Industry, having the mandate to promote trade, industry, and social welfare, criticized the patent system for restricting industries and obstructing competition, describing patent rights as 'remnants of historical errors' and called for a repeal of the Netherlands' *Patent Act* of 1817.[63] The anti-patent movement found additional support in the example of Switzerland, a country without a patent system, nonetheless had a thriving innovation industry.[64]

54 *Id.*

55 Act Concerning the Grant of Exclusive Rights to Inventions and Improvements of Objects of Art and Industry, Stb.1817, 6 (Neth.) [the Patent Act of 1817], arts. 3–4.

56 Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting,* 5(5) J. World Intell. Prop. 765 at 766, 767 (2002).

57 *Id.* at 765.

58 Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law – The British Experience, 1760-1911 131–32 (Cambridge: Cambridge University Press, 1999); Fritz Machlup & Edith Penrose, The Patent Controversy in the Nineteenth Century, 10 J. Econ. Hist. 1, 5 (1950).

59 *See generally* Robert Andrew Macfie, Recent Discussions on the Abolition of Patents for Inventions in the United Kingdom, France, Germany, and the Netherlands (London, Longmans et al. 1869) (examining the anti-patent movement in Europe in those days); Mark Janis, Patent Abolitionism, 17 Berkeley Tech. L. J. 899, 925 (2002) (providing a historical overview of the 19th-century patent abolitionist movement in England); Stef Van Gompel, *Patent Abolition: A Real-Life Historical Case Study,* 34(4) Am. U. Int'l Law Rev. 878–919 (2019) (discussing the abolition of the patent law in the Netherlands).

60 Eric Schiff, Industrialization Without National Patents – The Netherlands, 1869-1912, Switzerland, 1850-1907 21 (New Jersey: Princeton University Press, 1971).

61 *See* Fritz Machlup & Edith Penrose, *The Patent Controversy in the 19th Century,* 10 J. Econ. Hist. 1–29 (1950).

62 Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization,* 5 J. Hist. Int'l L. 407, 420 (2003).

63 *See* J.C. Faber van Riemsdyk et al., *Report on the Examination of Objections Facing Industry in the Law on Patents,* 17 J. Promotion Indus. 282 (1854), *in* Stef Van Gompel, *Patent Abolition: A Real-Life Historical Case Study,* 34(4) Am. U. Int'l L. Rev. 878–919, 891 (2019).

64 *See, e.g.,* Eric Schiff, Industrialization Without National Patents – The Netherlands, 1869-1912, Switzerland, 1850-1907 14 (New Jersey: Princeton University Press, 1971).

Domestic policymakers began to give attention to this anti-patent movement. The question of whether patent law should be reformed or abolished was consistently raised during legislative hearings and deliberations. For instance, the Netherlands and Japanese governments abolished their patents in 1869 and 1873, respectively.[65] In particular, the Dutch Patent Abolition Bill stated that patents should be abolished as they 'supported neither the true interests of industries nor the public interest.'[66] These abolitions resulted in the governments stopping the grant of new patents while phasing out existing patents. This anti-patent movement, backed by the normative framework of free-trade ideology and economic utilitarianism, was so strong in Europe, and it was anticipated that other countries would follow the Netherlands' abolition policy.[67] The US House of Representatives passed a bill to repeal the patent system, the bill was narrowly voted down in the Senate by a handful of votes.[68]

However, the trend was halted in 1873 due to intense lobbying by IP-driven industries as well as the first 'Great Economic Depression' in Europe and North America that lasted from 1873 to 1878/9.[69] The ideology of the anti-patent advocates was weakened by the financial crisis, and eventually, Japan and the Netherlands re-enacted their patent laws in 1885 and 1912, respectively.[70] On the other hand, Switzerland enacted their first patent statute in 1887, although provided strong compulsory licensing and government use provisions.[71] It also expressly excluded pharmaceutical products, chemicals and textile dyes from patent protection.[72] Similarly, the German *Patent Act* of 1877 prohibited patenting medicines, food articles, and chemical products. Instead, they only allowed the patenting of methods or processes that led to drugs.[73]

As seen above, the notable normative development during this period was the considerable freedom that domestic policymakers enjoyed in shaping their patent policies. Switzerland, the

65 F. Dessemontet, Intellectual Property Law in Switzerland 23 (The Hague, London and Bern: Kluwer Law International, 2000); Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization,* 5 J. Hist. Int'l L. 407, 420 (2003).

66 Patent Abolition Bill, 708 (preamble).

67 Stef Van Gompel, *Patent Abolition: A Real-Life Historical Case Study,* 34(4) Am. U. Int'l L. Rev. 878–919, 918 (2019).

68 Buce William Bugbee, *The Early American Law of Intellectual Property: The Historical Foundations of the United States Patent and Copyright Systems* 109 (Unpublished Doctoral Thesis) (Ann Arbor, Michigan: University of Michigan Press., 1961).

69 Ikechi Mgbeoji, The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization, 5 J. Hist. Int'l L. 407, 420 (2003); Elmus Wicker, Banking panics of the Gilded Age (Cambridge, UK: Cambridge University Press, 2000).

70 F. Dessemontet, Intellectual Property Law in Switzerland 23 (The Hague, London and Bern: Kluwer Law International, 2000).

71 *Id.*

72 Report of UK Commission on Intellectual Property Rights (CIPR), Integrating Intellectual Property rights and Development Policy (Sept. 2002), http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf; Eric Schiff, Industrialization Without National Patents – The Netherlands, 1869-1912, Switzerland, 1850-1907 34 (New Jersey: Princeton University Press, 1971); J. H. Reichman & C Hasenzahl, *Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA* (Geneva, Switzerland, International Centre for Trade and Sustainable Development (ICTSD, 2003).

73 *See also* Carsten Burhop, *Pharmaceutical Research in Wilhelmine Germany: The Case of E. Merck,* 83(3) Bus. Hist. Rev. 475–503 (2009).

Netherlands, and Japan refused to grant patents for a considerable amount of time, and the US did not recognize foreign technologies for over six decades. Italy engaged in 'knock-off' productions until 1978.[74] None of these actions attracted immediate foreign sanctions. The only constraint was the existence of bilateral treaties between countries, which were based on the principle of reciprocity.[75] The treaties provided that a country would safeguard the works of foreign inventors if the other nation agreed to protect its own.[76] This broad parliamentary liberty also extended to the recognition of pharmaceutical products and processes.

Early pharmaceutical firms were not dependent on IP rights to fund their R&D due to moral and cultural concerns. Medical patents and trade secrecy within the pharmaceutical industry were viewed as highly unethical by most physicians, pharmacists, and drug manufacturers at the time.[77] For instance, top US universities such as Harvard, Johns Hopkins, and Columbia had formal policies against medical patents.[78] The few who patented their medicines were condemned by the medical community as quacks and violators of the spirit and ethics of scientific medicines.[79] This ideology divided the pharmaceutical industry into two main sections: those within the ethical section who avoided patent protection and secrecy over their medical products and processes, and the so-called unethical section, who kept their manufacturing processes confidential and patented their goods.[80]

Pharmaceutical patents were rarely granted anywhere before the 1970s.[81] Even after England and the US patent laws endorsed protecting new medicines in the late 1700s, medical patenting did not become popular.[82] In 1960, only the UK and the USA permitted patents on pharmaceutical products. In the early 1970s, West Germany permitted drug patents. Japan didn't start awarding pharmaceutical patents until 1976. Belgium, the Netherlands, Italy, Sweden, and Switzerland embraced it in the late 1970s, followed by Canada, Denmark, and Austria in the 1980s. In the early 1990s, countries like Australia, Greece, Ireland, New Zealand, Norway, Portugal, Spain, and post-Communist countries in East Europe and Central Asia also joined the trend.[83] Finland was the last Western European country to allow pharmaceutical patents in 1995.[84] At this time, the pharmaceutical industry and technical capacity of these countries had relatively matured.

74 Mgbeoji, Ikechi, TRIPS and TRIPS Plus Impacts in Africa 264 (2007).

75 S. Ladas, Patents, Trademarks, and Related Rights: National and International Protection 43, 54–55 (Vol. 1, Cambridge: Harvard University Press, 1975).

76 *Id.*

77 Joseph Gabriel, Medical Monopoly 2 (Chicago: The University of Chicago Press, 2020).

78 Peter Lee, *Patents and the University,* 63(1) Duke L. J. 1–87 (2013).

79 Joseph Gabriel, Medical Monopoly 2 (Chicago: The University of Chicago Press, 2020).

80 *Id.*

81 Kenneth C. Shadlen, Bhaven N. Sampat & Amy Kapczynski, *Patents, trade and medicines: past, present and future,* 27(1) Rev. Int'l Pol. Econ. 75, 78–79 (2020).

82 *See* Holger P. Hestermeyer, Human Rights in the WTO: The Case of TRIPS and Access to Medicines 28, 37 (Oxford: Oxford University Press, 2007); Carlos Correa, Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement 271 (Oxford: Oxford University Press, 2007).

83 M. Liu & S. La Croix, *A cross-country index of intellectual property rights in pharmaceutical inventions,* 44(1) Rsch. Pol'y 206–216 (2015); S. La Croix & M. Liu, *The effect of GDP growth on pharmaceutical patent protection,* 1945–2005, 52(3) Brussels Econ. Rev. 355–75 (2009).

84 *Id.*

The initial exclusion of pharmaceutical products from the patent system was a deliberate utilitarian policy adopted by most nations. The high value and importance of medicines made it socially and morally unacceptable to subject them to the indiscriminate or expansive control of private corporations.[85] Even the *Paris Convention for the Protection of Industrial Property* ('the Paris Convention') of 1883, which harmonized the procedures relating to the registration and treatment of foreign patents, did not obligate signatory nations to protect either product or process patents for new drugs.[86]

However, by the outbreak of World War I, the 'ethical' segment of the pharmaceutical industry in Western countries began to cautiously embrace patenting as a vital tool to defend their scientific innovations and a convenient means of furthering their corporate growth. Given this transformation, the Western pharmaceutical industry emerged that is highly dependent on IP rights.[87] Medical patenting was no longer considered a form of quackery but a legitimate part of scientific drug development and corporate capitalism.[88]

b. The Global South and Pharmaceutical Patenting

Countries in the global south, despite the international trend, were still hesitant to embrace full medical patenting. Kenneth Shadlen et al note that '[h]istorically most developing countries did not allow patents on pharmaceutical products. Patent offices existed, and patents were available for machinery and electronics and many other areas, but not drugs. This prohibition reflected a calculation that the costs of having private rights of exclusion over these sorts of inventions would outweigh the benefits.'[89] The primary objective of this policy was to make cheaper generic medicines more readily available and limit private monopoly over essential drugs.[90] For instance, after India's independence, it repealed the Indian Patent Law of 1856 and replaced it with the Patent Act of 1970, which excluded pharmaceutical products from patent protection.[91] Patent protection for pharmaceutical processes under this new Indian law was only granted for seven years, compared to fourteen years for other forms of inventions.[92] Similarly, in the 1960s-70s, South Korea, Brazil, Argentina, Mexico, and Andrean Pact countries all enacted laws that weakened patent protection for medicines.[93]

85 Report of UK Commission on Intellectual Property Rights (CIPR), Integrating Intellectual Property rights and Development Policy (2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

86 *See* Holger P. Hestermeyer, Human Rights in the WTO: The Case of TRIPS and Access to *Medicines* 28, 37 (Oxford: Oxford University Press, 2007); Carlos Correa, Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement 271 (Oxford: Oxford University Press, 2007).

87 Joseph Gabriel, Medical Monopoly 3 (Chicago: The University of Chicago Press, 2020).

88 *Id.* at 195–237.

89 Kenneth C. Shadlen, Bhaven N. Sampat & Amy Kapczynski, *Patents, trade and medicines: past, present and future,* 27(1) Rev. Int'l Pol. Econ. 75 (2020).

90 Laurence R. Helfer, *Pharmaceutical Patents and the Human Right to Health, in* Transnational Legal Orders 320 (Terence C. Halliday & Gregory Shaffer eds., Cambridge University Press, 2014).

91 The Patents Act, 1970 (Act No. 39).

92 J.O. Lanjouw, *The Introduction of Pharmaceutical Product Patents in India: Heartless Exploitation of the Poor and Suffering?* (3 Nat'l Bureau Econ. Rsch., Working Paper No. 6366, 1998).

93 *See generally* G. Gereffi, The Pharmaceutical Industry and Dependency in the Third World (Princeton University Press, 1983).

Indeed, during this period, generic drug companies in these countries were able to copy patented medicines and compete with Western pharmaceutical companies and alliances in the global pharmaceutical market.[94] The liberty to imitate and reverse engineer allowed indigenous firms to absorb innovation and knowledge generated abroad and industrialize.[95] By the 1990s, Indian generic manufacturers were offering some of the lowest prices globally.[96]

Not surprisingly, this approach was met with strong opposition from multinational drug manufacturing companies domiciled in Western nations. They framed their objection in both moral and economic terms.[97] The companies complained that the unrestricted copying of patented medicines was a deplorable form of modern-day 'piracy' and a disadvantage for Western economies.[98] The U.S. government, in particular, initiated a national strategy called the 'Special 301' procedure, which empowered the U.S. Trade Representative to investigate countries with insufficient IP protection and impose trade sanctions against them if they fail to remedy the problem.[99]

Between the 1970s and early 1990s, the U.S. employed Special 301 against over a dozen countries, successfully pressuring governments to implement IP reforms that benefited foreign IP industries, including American-based pharmaceutical companies.[100] Notably, the US listed India under the 'Priority Watch List' on its 2014 edition of the Special 301 Report because the India Patent Act excluded new forms of known drugs from patent protection (section 3(d)) and introduced local working requirements (section 84(1)(c)).[101]

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94 *Id;* Report of UK Commission on Intellectual Property Rights (CIPR), Integrating Intellectual Property rights and Development Policy 20 (2002), http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf; Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development,* 38(3) Econ. & Pol. Wk. 209–225, 216 (Jan. 18, 2003); Amy Kapczynski, *Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector,* 97(6) Cal. L. Rev. 1571, 1578 (2009).

95 Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development,* 38:3 Econ. & Pol. Wk. 209– 225, 216 (Jan. 18, 2003).

96 S. Chaudhuri, The WTO and India's Pharmaceutical Industry: Patent Protection, TRIPS and Developing Countries 54 (OUP, 2005).

97 Laurence R. Helfer, *Pharmaceutical Patents and the Human Right to Health, in* Transnational Legal Orders 314 (Terence C. Halliday & Gregory Shaffer eds., Cambridge University Press, 2014).

98 Carolyn Deere, The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries (Oxford: Oxford University Press, 2009).

99 *See* Trade Act of 1974, § 301; M. Blakeney, Trade Related Aspects of Intellectual Property Rights (London: Sweet & Maxwell, 1996); Myles Getlan, TRIPS and Future of Section 301: A Comparative Study in Trade Dispute Resolution, 34 Columbia J. Transnat'l L. 173, 179 (1995).

100 Paul Katzenberger & Annette Kur, *TRIPs and Intellectual Property, in* From GATT to TRIPs: The Agreement on Trade-Related Aspects of Intellectual Property Rights (Friedrich Karl Beier and Gerhard Schricker eds., New York: Weinheim, 1996); A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?,* 90 American J. Int'l L. 675–689 (1996).

101 USTR, *USTR Releases Annual Special 301 Report on Intellectual Property Rights,* Office of the USTR (Apr. 2014), https://ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf.

The U.S., along with other major economies (such as European countries, Japan, and Canada), started pushing for IP protection to become part of the 1986 Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations.[102] The GATT negotiations aimed to enact a better multilateral trading system concerning trading in tangible goods. At that time, the US was the 'single most influential player' in the GATT's forum,[103] the U.S. and its allies included IP rights as a subject of the trade negotiations.[104] The negotiations concluded on April 15, 1994, with the signing of the TRIPS Agreement by over a hundred countries. The Agreement became one of the constitutive documents of the new WTO, binding on all its members.[105] Among several notable provisions, the TRIPS Agreement made it compulsory for all WTO members to grant patent protection on both products and processes, marking the beginning of pharmaceutical patents for most developing countries, including low-income countries not within the category of 'Least Developed Countries', which were granted transitionary grace.[106]

However, this new paradigm, as elaborated upon in greater detail below, is arguably based on a 'skewed utilitarian' that highlights relatively strong and enforceable private property rights while not adequately addressing important collective rights concerns. The result of this imbalance is a disproportionate impact on low-income groups, as access to the pharmaceutical knowledge economy largely hinges on the ability and willingness to pay and market transactions, featuring dominant corporate players, who are seizing every opportunity to expand their private rights.

III. Epistemological Reconstitution of the IP Norm-Making Process

As noted in the preceding section, patent rights were historically viewed as special privileges and strategic domestic instruments. This normative approach created a legal regime that allowed state actors to tailor their patent policies to suit their level of development, which resulted in nationalistic strategies such as refusal to recognize foreign technologies, weakening domestic IP regimes, dismissing international cooperation on uniform patent rules, issuing compulsory licenses for nonworking patents, and disregarding pharmaceutical patents.[107] Some countries, such as the Netherlands, Japan, and Switzerland, even rejected patent legal systems at different times based on domestic values and public interest.

102 For the history of this, *see* Peter Drahos, *Global property rights in information: the story of TRIPS at the GATT,* 13 Prometheus 6–19 (1995); Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development,* 1999 Intell. Prop. & Hum. Rts. Q. 13–41, 20 (1999).

103 Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting,* 5(5) J. World Intell. Prop. 765, 768 (2002).

104 Peter Drahos, *The universality of intellectual property rights: origins and development,* 1999 Intell. Prop. & Hum. Rts. Q. 13, 21 (1999).

105 The only way a state can become or remain a member of the WTO multilateral trading regime is to agree to be bound by the TRIPS Agreement. *See* World Trade Organization (WTO), *Members and Observers,* WTO (Jan. 6, 2022), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; Peter Drahos, *The Universality of Intellectual Property Rights: Origins And Development,* 1999 Intell. Prop. & Hum.Rts. Q. 14, 21 (1999).

106 Kenneth C. Shadlen, Bhaven N. Sampat & Amy Kapczynski, *Patents, trade and medicines: past, present and future,* 27(1) Rev. Int'l Pol. Econ. 75 (2020).

107 Keith Maskus & Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods,* 7(2) J. Int'l Econ. L. 290 (2004).

However, the 20th and 21st centuries, which is the focus of this section, witnessed a 'tectonic shift' in the scope and nature of patent rights, with the emergence of the TRIPs Agreement. IP rights began to be conceptualized as private property rights and market-based tools, not privileges. The TRIPS Agreement represents a 'dramatic shift away from the traditional view that intellectual property law primarily serves the interest of national cultures, values, and politics.'[108] The transformation led to an expansion of patent rights, with the U.S., the European Union, and IP-driven businesses exerting significant influence over international IP norm-setting. This new era also introduced quasi-patent protections for pharmaceuticals such as data exclusivity provision, linkage regulations, and investor-state arbitration.[109]

In this section, I analyze the evolution and operationalization of this new system, how it created a new paradigm in the pharmaceutical knowledge economy that is utilitarianly lop-sided, and three key factors (understanding the IP norm-making process, democratizing the process, and recognizing 'flexibility' as a vital IP issue) that can serve as a basis to reconstitute the IP norm-making process. Although the prevalent policy framework is based on utilitarianism (i.e., the maximization of social welfare), the operationalization of the framework appears as 'skewed utilitarianism.' The new regime emphasizes the benefits of incentivizing innovation without catering to the distributional consequences on the poor and low-income groups. Thus, raising concerns about the need to renegotiate and reevaluate the patent policy to achieve the promised optimal utility of the patent system.

a. The TRIPS Agreement and the New Pharmaceutical Knowledge-Economy

The TRIPS Agreement broadened the scope of patentable subject matter to include matters, such as pharmaceutical products, that had been previously excluded from national IP laws on account of moral, societal, or public health concerns.[110] The traditional justification for this new knowledge economy is utilitarianism. Jeremy Bentham, the main proponent of this concept, believed that laws should be enacted in a way that maximizes the greatest happiness for the greatest number of people.[111] Regarding the patent legal regime, it aims to incentivize the development of new inventions for the benefit of the greatest number of people (i.e., maximization of social welfare).[112]

Law and Economics scholars have provided a conceptual framework for this normative perspective. They argue that to achieve this surplus, there is a need to address a market failure problem,[113] which

108 Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things,* 21 Mich. J. Int'l L. 333 (2000).

109 James Gathii & Cynthia Ho, *Regime shifting of IP lawmaking and enforcement from the WTO to the international investment regime,* 18 Minn. J. L. Sci. & Tech 427 (2017).

110 The TRIPS Agreement, art. 27.1.

111 John Stuart Mill, Utilitarianism 8 (7th ed., London: Longmans, Green & Co, 1879); Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 1–5 (Oxford, UK: Clarendon Press, 1823).

112 Please note that some commentators have tried to differentiate the economic norm of 'wealth maximization' from the concept of utilitarianism. *See* Richard A. Posner, *Utilitarianism, Economics and Legal Theory,* 8 J. Legal Stud. 103, 111 (1979).

113 Harold Demsetz, *Towards a Theory of Property Rights,* 57 American Econ. Rev. 347–48 (1967); William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 22–23 (Belknap Press & Harvard University Press, 2003).

is the inability of the competitive market to support the maximum production and distribution of public goods, such as IP products and processes, because they are nonrivalrous and nonexcludable.[114] The term 'nonrivalrous' means that the goods can be consumed by more than one person at a time, while 'nonexcludable' suggests that users cannot be easily prevented from free-riding on the good.[115] Thus, the main essence of the patent regime is to ensure the maximum of inventions based on market preferences.

Pharmaceutical products and processes are characterized as 'public goods' which would be underproduced without state intervention in the form of property rights.[116] In other words, companies and investors may be uninterested in investing the necessary resources to generate breakthrough drugs and vaccines if imitators can easily copy their goods and sell them at a marginal cost. Although social costs could arise from granting monopoly power to an inventor, such as deadweight losses and limited access to technologies, advocates of this theory argue that if the beneficial effects outweigh the costs, then it is an efficient outcome.[117] They argue that patents improve dynamic efficiency by stimulating innovation and technological progress, although this comes at the cost of static efficiency due to monopoly pricing.[118]

The underlying assumption of this theory is that market transactions will maximize wealth – a 'rising tide lifts all boats.'[119] Wealth maximization, in this context, refers to the greatest total consumer and producer surplus that can be generated by goods and services in an economy.[120] Adherents of this economic analysis of the law idealize the market order as the best option to promote social welfare.[121] They believe that efficient policies are neutral and that the market is the most efficient mechanism for allocating resources and promoting individual freedom.[122] This analysis assumes that the distributive implications of legal policies do not matter as taxes should offset those consequences. Hence, given that the pharmaceutical industry caters to a global market, worldwide state intervention in the form of property rights is the most efficient means of addressing this market failure problem and securing beneficial progress.[123] This would allow brand-name companies or originators to internalize positive externalities, including those from foreign countries, and prevent generic firms from reverse

114 Paul A. Samuelson, *The Pure Theory of Public Expenditure,* 36 Rev. Econ. & Stat. 387 (1956).

115 *Id.*

116 *Id.*

117 N. Mercuro & S. Medema, Economics and the Law: From Posner to Post-Modernism Chapter One (2nd ed., Princeton University Press, 2006).

118 UK Commission on Intellectual Property Rights, Final Report of the Commission on Intellectual Property: Integrating Intellectual Property Rights and Development Policy Commission on Intellectual Property Rights (2002).

119 *See* Gene Sperling, *How to Refloat These Boats,* Washington Post (Dec. 18, 2005), http://perma.cc/EQ6A-J8X9 (discussing the history of the phrase).

120 Richard A. Posner, The Economics of Justice 60 (Cambridge: Harvard University Press, 1981).

121 *See* Melinda Cooper, Family Values (New York: Zone Books, 2016); Nancy Fraser, *Contradictions of Capitalism and Care,* 100 New Left Rev. 99 (2016).

122 William M. Landes & Richard A. Posner, The Political Economy of Intellectual Property Law 22 (AEI-Brookings Joint Center for Regulatory Studies, 2004).

123 *Id.* at 22–23.

engineering an original drug, replicating it, and selling it at marginal costs, all without incurring the associated R&D expenses.[124]

This normative analysis has its benefits. It appreciates the significant risks and time associated with the development and commercialization of new technologies, particularly in the context of the pharmaceutical industry. It recognizes the importance of new technologies as critical drivers of socio-economic growth and seeks to incentivize their production through monopoly rights and temporarily ward off competitors. However, it tends to overlook the historical evolution of the patent system and the distributional consequences that arise from granting monopoly rights over essential technologies.

The TRIPS Agreement compelled all WTO member countries including low-income countries that do not fall within the bracket of 'Least Developed Countries (LDCs)' to grant patent protection for pharmaceutical products and processes.[125] For industrialized countries, this may not be a problem from the perspective of developing new drugs due to their robust R&D programs and technological capabilities. They can easily build upon existing technologies and create new inventions, benefiting from decades of investment and the global exchange of ideas. In contrast, less developed nations need to rely on foreign technologies to support their generic companies and industrialization efforts.

The new pharmaceutical knowledge economy impedes the capacity of domestic pharmaceutical companies in these non-industrialized nations to utilize patented products and processes. It also limits the flexibility of policymakers in these nations to exclude medicines or chemicals from their patent systems for reasons related to public health or other developmental considerations, a practice that was permissible in the early stages of the patent system's evolution, I examine the issue of TRIPS flexibilities in the next section.

Furthermore, the TRIPS Agreement mandates member states to provide patent protection for a minimum of twenty years from the date of filing without taking into consideration how long it would require for the company to recover their R&D costs and incentivize future innovation, despite the social costs associated with exercising monopolistic patent rights.[126] The perception among the public health community is that a two-decade monopoly period in some cases is excessive even within the pharmaceutical industry and could sustain the high price of drugs artificially for an unnecessarily long period and stifle innovation in new drugs.[127]

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124 *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding,* 83 Tex. L. Rev. 1031 (2005).

125 Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 218–19 (2nd ed., London: Sweet & Maxwell, 2003).

126 *See* TRIPS Agreement, art. 33.

127 Gary Becker, *On Reforming the Patent System,* Becker-Posner Blog (July 21, 2013), http://www.becker-posner-blog.com/2013/07/on-reforming-the-patentsystem-becker.html ("The current patent length of 20 years (longer for drug companies) from the date of filing for a patent can be cut in half without greatly discouraging innovation . . . . Even pharmaceutical and biotech companies, the main examples where patents are clearly necessary to encourage innovation, usually do not need more than about a decade of monopoly power to encourage their very large investments in new drugs."); Brian Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?,* 161 U. Pa. L. Rev. 1309, 1409 (2013) ("In a world in which at least some products

In fact, this 20-year provision was a subject of contention during the negotiation phase of the TRIPS Agreement, with most developing countries advocating for flexible patent terms, determined on a case-by-case basis and guided by national interests.[128] Developed countries, on the other hand, suggested a fixed term of twenty years or higher, with Australia and New Zealand proposing shorter patent terms of fifteen and sixteen years, respectively.[129] After several revisions to the draft, the fixed term of twenty years emerged as the prevailing option.

The length of patent protection is a critical factor in the patent bargain as excessive protection can be equally detrimental as insufficient protection in terms of social costs.[130] Excessive protection extends the period during which access to protected products and processes is restricted. This could potentially lead to preventable deaths. For example, it has been reported that globally at 'least 14 million people lost their lives in two years (2020-2021)' during the COVID-19 pandemic.[131] While some of the deaths were inevitable, there have been reports that many of these deaths could have been prevented if COVID-19 vaccines had been readily available and accessible, particularly in low-income countries, and patent rights delayed the scaling up of manufacturing and distribution of the vaccines.[132]

Furthermore, the TRIPS Agreement provides a strong enforcement regime by linking patent enforcement to the WTO's dispute resolution system. The Agreement established two new institutions to guide adherence to the treaty: the Council for TRIPs, an interstate body responsible for conducting transparent reviews of national implementation measures and providing a forum for members to discuss compliance issues, and a Dispute Settlement Body (DSB) responsible for adjudicating disputes and imposing sanctions on non-compliant

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are out of date by the time they hit store shelves, the last few years of a two-decade-long patent term seem unlikely to incentivize greater innovation."); *Time to Fix Patents,* Economist (Aug. 8, 2015), https://www.economist.com/leaders/2015/08/08/time-to-fix-patents (explaining that pharmaceutical firms could live with shorter patents if the regulatory regime allowed them to bring treatments to market sooner and for less upfront cost).

128 *See* Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights, Communication from Colombia, art. 41, GATT Doc. MTN.GNG/TRIPS/W/2 (Oct. 16, 1991); *see also* Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, art. 4(3), GATT Doc. MTN.GNG/NG11/W/71 (May 14, 1990); Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Communication from Mexico, ¶ 3, GATT Doc. MTN.GNG/NG11/W/60 (Jan. 22, 1990); Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Communication from Brazil, ¶ 21, GATT Doc. MTN.GNG/NG11/W/57 (Dec. 11, 1989); Guidelines for Negotiations that Strike a Balance Between Intellectual Property Rights and Development Objectives, Communication from Peru, ¶ 1.4, GATT Doc. MTN.GNG/NG11/W/45 (Oct. 27, 1989).

129 Standards and Norms for Negotiations on Trade-Related Aspects of Intellectual Property Rights, Communication from Australia, ¶ 1, GATT Doc. MTN.GNG/NG11/W/35 (July 10, 1989); Communication from Switzerland - Draft Amendment art. 231(1); Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, Communication from the European Communities, art. 10(1), GATT Doc. MTN.GNG/NG11/W/68 (Mar. 29, 1990).

130 *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding,* 83 Tex. L. Rev. 1031 (2005).

131 *Analysis finds SA was bullied into one-sided, imperial and immoral Covid-19 vaccine contracts,* Daily Maverick (Sept. 11, 2023), https://www.dailymaverick.co.za/article/2023-09-11-analysis-finds-sa-was-bullied-into-one-sided-imperial-and-immoral-covid-19-vaccine-contracts/.

132 *Id.*

members.[133] This adjudication process involves four main stages: (i) consultation between the parties to find a mutually agreed solution, (ii) adjudication by panels and, if necessary, by the Appellate Body, (iii) adoption of the panel and Appellate Body reports by the DSB, and (iv) implementation of the ruling, which may involve countermeasures if the losing party fails to comply with the ruling.[134]

This adjudication mechanism theoretically restricts the capacity of member States to interpret TRIPS provisions in alignment with their respective local contexts. The adjudicators are likely to be from foreign jurisdictions and may not possess a deep understanding of the local socio-economic and technological factors influencing domestic policy decisions. It essentially deprives local courts, which often incorporate human rights (for example, the right to health and enjoyment of scientific progress) perspective into their adjudication process, of the authority to address disputes arising from the TRIPS Agreement within the context of their local circumstances.

b. TRIPS Flexibilities and 'Inflexibilities' in the Pharmaceutical Industry

The TRIPS Agreement contains certain exceptions to the implementation of the IP regime, commonly referred to as 'flexibilities,' that seek to balance the sharp edges of IP rights and the public interest. In the context of public health, the flexibilities were designed to temper the social welfare costs of patent rights by offering ways to respond to concerns that patents and related pharmaceutical monopoly pricing can limit access to essential medicines.[135] These flexibilities include but are not limited to transition periods for least-developed countries to ease compliance, compulsory licenses and crown use of patented products and processes to promote generic production of health goods, Bolar provisions to ease research and regulatory approvals, limits to the scope of patentability to allow for domestic discretion, international exhaustion of patent rights to enable parallel importation, and the lack of a requirement to apply the principles of TRIPS in areas not covered by the Agreement.[136]

However, Joseph Stiglitz has described the TRIPS flexibilities as 'inflexibilities' due to the challenges that accompany their implementation.[137] The most used, or at least, talked about flexibility is the compulsory licensing tool, which enables state governments to license a patented product or process

133 *See* Communication from Australia—Review of the Implementation of the Agreement Under Article 7I. I, at 2, WTO Doc. IP/C/W/210 (Oct. 3, 2000) ("[M]any WTO Members have undertaken extensive legislative and administrative action to give effect to their obligations under the Agreement. Implementation has been a complex and diverse process in many jurisdictions.").

134 WTO, *The process – Stages in a typical WTO dispute settlement case, in* Dispute Settlement System Training Module (last visited Mar. 23, 2023), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm.

135 World Health Organization, Promoting access to medical technologies and innovation: intersections between public health, intellectual property and trade (Geneva: World Health Organization; 2020); Laurence R. Helfer, *Pharmaceutical Patents and the Human Right to Health, in* Transnational Legal Orders 323 (Terence C. Halliday & Gregory Shaffer eds., 2014); Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 349, 365–66 (2nd ed., London: Sweet & Maxwell, 2003).

136 TRIPS Agreement, arts. 1.1, 8.1, 31 & 66.1; World Trade Organization (WTO), *Members and Observers,* WTO (Jan. 6, 2022), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

137 Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights,* 57(6) Duke L. J. 1693, 1717 (2008).

to a third party without the authorization of the rightsholder so long as they pay the rightsholder adequate compensation.[138] Indeed, the compulsory licensing system can be a valuable tool for domestic policymakers to address national interest issues such as public health emergencies. It can either directly lead to lower prices of drugs or be used to threaten patent holders to lower their prices during negotiations.[139] The TRIPS Agreement generally allows countries to determine the grounds for making such compulsory licenses and the procedures for taking such steps.

The perception in developing countries is that this compulsory license system has been largely ineffective in addressing public health concerns based on the following reasons. Firstly, developed countries usually put pressure on developing countries not to utilize the compulsory license regime. Pharmaceutical companies, with the backing of their host countries, have traditionally opposed indications by developing nations to exploit domestic compulsory licensing provisions.[140] As noted by Graham Dutfield, the US in particular has openly expressed disapproval when developing nations attempt to limit the full enjoyment of patent rights for American businesses, whether through compulsory licensing, parallel importation, or even just indicating the intention to do so.[141] For instance, from 2006 to 2008, Thailand issued compulsory licenses for several patented pharmaceutical products to improve access to drugs for HIV/AIDS, heart disease, and cancer.[142] In response, the US placed Thailand on its Special 301 'Priority Watch List,' which prevented Thai exports from entering the US market duty-free.[143] The European Commission also expressed concerns about the lawfulness of Thailand's compulsory licensing practices, while Western multinational pharmaceutical companies threatened legal action and eventually withdrew a range of essential medicines from the Thai market, without regard for the impact that would have on human lives.[144] Some commentators pointed out that '[a]lthough this vindictive measure was later reversed, Thai patients suffered unnecessary harm at the hands of private foreign actors. They were deprived of access to essential treatments, some of which had no alternative, for the duration of the entire

138 *See* TRIPS Agreement, art. 31. For pharmaceutical products, The World Health Organization (WHO) has developed specific guidelines for calculating adequate remuneration with respect to patented pharmaceuticals. *See also* James Love, *Remuneration guidelines for non-voluntary use of a patent on medical technologies,* World Health Organization (2005), https://apps.who.int/iris/handle/10665/69199.

139 R. Beall & R. Kuhn, *Trends in compulsory licensing of pharmaceuticals since the Doha Declaration: A database analysis,* 9(1) PLoS Medicine 1 (2012); K.B. Son & T.J, Lee, *Compulsory licensing of pharmaceuticals reconsidered: Current situation and implications for access to medicines,* 13(10) Glob. Pub. Health 1430–40 (2018).

140 Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc WT/L/540 (2003) (Decision of the General Council of 30 August 2003) ("WTO General Council Decision of Aug. 30, 2003."). For commentary, *see* Frederick Abbott & Rudolf Van Puymbroeck, Compulsory Licensing for Public Health A Guide and Model Documents for Implementation of the Doha Declaration Paragraph 6 Decision (Washington DC: World Bank, 2012).

141 Graham Dutfield et al., Dutfield and Suthersanen on Global Intellectual Property Law 401 (2nd ed., Edward Elgar Publishing Limited, 2020).

142 Suzanne Zhou, *Challenging the Use of Special 301 against Measures Promoting Access to Medicines: Options Under the WTO Agreements,* 19 J. Int'l Econ. L. 51 (2016); Michael Palmedo, *United States: Unilateral Norm Setting Using Special 301, in* Intellectual Property Law and The Right to Health: A History of Trips and Access to Medicines (Srividhya Ragavan & Amaka Vanni eds., UK: Routledge, 2021).

143 *Id.*

144 Letter from Peter Mandelson, E.U. Trade Commissioner to Krirk-krai Jirapaet, Thai Minister of Commerce (July 10, 2007), https://www.keionline.org/wpcontent/uploads/mandelson07102007.pdf.

dispute.'[145] Several countries, including South Africa, Brazil, Malaysia, and Indonesia, have faced similar backlash from industrialized nations and pharmaceutical in response to their compulsory licensing measures.[146] These retaliatory mechanisms tie the hands of domestic policymakers in utilizing the compulsory licensing system to cater to public health crises even in situations that warrant the same.[147]

Secondly, the issuance of compulsory licenses is usually accompanied by protracted and complicated negotiations. The third-party user of a compulsory license (i.e. the generic company) is required to make efforts to negotiate and obtain authorization from the rightsholder before applying for a compulsory license, except in cases of national emergencies, extreme urgency, public non-commercial use, or judicially or administratively determined anti-competitive remedies.[148] Ordinarily, there is nothing wrong with contacting and discussing with patent holders the impact their invention may have on social welfare but the challenge is that these negotiations can be lengthy and complex, particularly when multiple patented technologies are contained in a product and different companies own these technologies.[149] Even in cases of national emergencies and related circumstances, compulsory licenses have to be granted separately for each technology that makes up the drug. As Ellen't Hoen et al. argued, 'it is not possible to grant blanket compulsory licenses for an entire field of technology or for an overarching purpose such as 'combating a pandemic.'[150] This explains why during the peak of the COVID-19 crisis, developing countries, led by South Africa and India, wanted waiver of certain provisions of the TRIPS Agreement instead of utilizing the existing compulsory license regime.

Additionally, the compulsory licensing regime (pre-2005) was limited to the domestic market and sought to prevent parallel importation. In other words, a compulsory license could only authorize uses that are primarily targeted at supplying a country's population.[151] This means that cheaper generic medicines produced in another state under a compulsory license cannot be exported to another state, making it difficult for WTO members with insufficient domestic manufacturing capacities to use the system effectively. So, if there is no local producer within a country with the

145 Ezinne Miriam Igbokwe & Andrea Tosato, *Access to Medicines and Pharmaceutical Patents: Fulfilling the Promise of TRIPS Article 31bis,* Fac. Scholarship at Penn L. 2802, 2842 (2022).

146 *See generally* Brook K. Baker, *Access to Medicines Activism: Collaboration, Conflicts, and Complementarities, in* Intellectual Property Law and The Right to Health: A History of Trips and Access to Medicines 295 (Srividhya Ragavan & Amaka Vanni eds., UK: Routledge, 2021); South Africa in 1997, Brazil in 2001, Malaysia in 2003, Indonesia in 2004.

147 *Id.*

148 *See* TRIPS Agreement, art. 31; Graham Dutfield et al., Dutfield and Suthersanen on Global Intellectual Property Law 406 (2nd ed., Cheltenham, UK: Edward Elgar Publishing Limited, 2020).

149 Article 31(b) of the TRIPS Agreement; *see* Olga Gurgula, *Compulsory Licensing vs. the IP Waiver: What Is the Best Way to End the COVID-19 Pandemic?,* Policy Brief (Oct. 17, 2021), https://ssrn.com/abstract=3944192.

150 *Id.*

151 *See* TRIPS Agreement, art. 31(f).

necessary infrastructure and know-how to produce a patented product, issuing a compulsory license would be futile.[152] There have been some recent amendments to address this concern, which I will address later.

Another significant drawback of the compulsory license system is that it only applies to existing patents, not patent applications. [153] Article 31 of the TRIPS Agreement, which deals with 'use without authorization of the right holder' is limited to the 'subject matter of a patent.' This limitation creates a gap that can be particularly damaging during public health emergencies. Patent applications can take up to three years in some jurisdictions to be finalized.[154] Waiting for a patent to be granted before applying for a compulsory license can significantly prolong the process of acquiring the license.

Relatedly, trade secrets are not subject to compulsory licensing, and crucial manufacturing processes, or know-how are usually protected under trade secrets. Patent specifications, which are publicly available after 18 months, do not usually contain these trade secret details. This means a compulsory license may not be beneficial to a generic company if they are unable to access the relevant trade secrets or know-how required to reproduce the patented drugs.

Some of these challenges were debated after the explosion of the AIDS crisis in the 2000s, which resulted in significant adjustments to the TRIPS Agreement in 2001, 2003, and 2005. In 2001, the Doha Declaration on the TRIPS Agreement and Public Health recognized the freedom of all WTO members to interpret the provisions of the TRIPS Agreement broadly when public health is at risk. The Declaration expressly mentions that crises 'relating to HIV/AIDS, tuberculosis, malaria and other epidemics can represent a national emergency or other circumstances of extreme urgency' under Article 31 of the Agreement. The Declaration allowed least-developed countries to postpone the implementation of patent protection for pharmaceutical products until January 1, 2016.[155] Later, in November 2015, the Council for TRIPS agreed to extend this implementation deadline to January 1, 2033.[156]

152 Ezinne Miriam Igbokwe & Andrea Tosato, *Access to Medicines and Pharmaceutical Patents: Fulfilling the Promise of TRIPS Article 31bis,* Fac. Scholarship at Penn. L. 2802, 2805 (2022).

153 François Pochart et al., *Compulsory licenses granted by public authorities: an application in the COVID-19 crisis in France?,* Kluwer Patent Blog (Apr. 23, 2020), http://patentblog.kluweriplaw.com/2020/04/23/compulsory-licensesgranted-by-public-authorities-an-application-in-the-COVID-19-crisis-in-france-part-1.

154 Christopher Heer et al., *How Long Does It Take to Get a Patent?,* Heer Law (Dec. 11, 2020), https://www.heerlaw.com/how-long-does-it-take-to-get-a-patent (In Canada, the patent application process takes approximately two and half years.); Noah Adam, *How Long Does it Take to Get a Patent,* Patent Rebel (June 20, 2019), https://patentrebel.com/how-long-does-it-take-to-get-a-patent/ (describing that the patent process typically last for two years in the United States); IP Gateway, *Australia: Patent FAQs* (Jan. 7, 2022), https://ipgateway.com.au/wp-content/uploads/2018/03/IPG-Patent-FAQ-sheet-EMAIL-1.pdf (explaining that it takes approximately four years in Australia); Prasad Karhad, The time required for grant of patent in India, Patent in India (last visited Jan. 7, 2022), https://patentinindia.com/time-to-get-a-patent-in-india/.

155 *Id.*

156 *Id.*

However, the 2001 Declaration failed to address the issue of how countries with inadequate manufacturing capacity could use compulsory licenses (i.e., the domestic use limitation). So, in 2003, the Council for TRIPS made a decision confirming the ability of states to import and export pharmaceutical products in exceptional circumstances, provided that a compulsory license was issued by the exporting member state. Subsequently, a WTO 2005 Ministerial Declaration introduced TRIPS Article 31bis, which permanently incorporated the effects of the 2003 decision. Article 31bis required both the exporting and importing countries to notify WTO about the measure, including the name and expected quantities of the products involved, before the exports occur and prohibited re-exportation of the products.

Since Article 31bis' adoption over 19 years ago, the mechanism has only been successfully used once, in 2007, when Rwanda wanted to import 260,000 packs of a generic version of TriAvir, an AIDS therapy drug, from Canada.[157] Despite the efforts by Médecins Sans Frontières (MSF) and Apotex, a generic pharmaceutical company, it took five years before the export of TriAvir was initiated due to regulatory bottlenecks.[158] Apotex later released a public statement indicating that it would not use the parallel importation flexibility under the TRIPs Agreement again unless the compulsory license processes were reformed.[159]

The grievance expressed by Apotex highlights two other broader problems with the compulsory license system: the lack of political courage/will from domestic policymakers and excessive bureaucracy. Leaving the use of compulsory licenses to the discretion of state governments has exposed the system to both international and domestic politics, even during public health emergencies. If Article 31bis genuinely aims to guarantee sustained access to cost-effective generic medicines for developing nations, the TRIPS Agreement should have either made it compulsory for governments to grant licenses during public health crises or expressly prohibit political pressures that hinder such measures. It should not be left to the will of state actors. Article 31bis should be worded as an enforceable legal right, not a matter of political discretion.

Moreover, the notification provisions of Article 31bis as well as government regulatory approval processes have created excessive procedural complexities for the compulsory licensing system.[160] The importing state must notify the TRIPS Council about its intention to utilize the Article 31bis system, supply evidence of its insufficient manufacturing capacities, and specify the exact quantity of the drugs in question ex-ante. Other requirements include that the exporting state must negotiate

157 World Trade Organization (WTO), *Canada is first to notify compulsory licence to export generic drug,* WTO (Oct. 4, 2007), https://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm.

158 Priti Radhakrishnan & Tahir Amin, *Strengthening Patent Standards: An Alternative Route to Compulsory Licensing For Low And Middle-Income Countries, in* Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing (Carlos M. Correa, ed., 2013); Médecins Sans Frontières, *Neither Expeditious, nor a Solution: the WTO August 30th Decision is Unworkable,* MSF Access Campaign (Aug. 29, 2006), https://msfaccess.org/neitherexpeditious-nor-solution-wto-august-30th-decision-unworkable.

159 Médecins Sans Frontières, *WTO COVID-19 TRIPS Waiver Doctors Without Borders. Canada Briefing Note* (2021), https://www.doctorswithoutborders.ca/wp-content/uploads/2023/02/msf_canada_briefer_on_trips_waiver.pdf.

160 Annex to the TRIPS Agreement, 2(a).

with the rightsholder before issuing an export compulsory license,[161] the license must be highly specific in terms of the affected patented technologies, and the rightsholder must be adequately compensated for the license.[162] Also, the exporting state must inform the TRIPS Council about the proposed license and mark the products manufactured under the license with a special colouring and shaping to differentiate them from the original.[163]

These would require some high degree of coordination among the several parties, including the importing country, exporting country, and pharmaceutical corporations. Some commentators have rightly described these disclosure and coordination obligations as acutely problematic, complex, and unrealistic, particularly for developing WTO members.[164] Satisfying all these obligations and alterations may not only be problematic but also expensive and time-consuming.[165] Understandably, the purpose of these procedural rules is to restrict diversion measures, i.e., to prevent the distribution of products made under a compulsory license to markets with sufficient manufacturing and purchasing power.[166] However, in doing so, these regulations have created difficulties for developing countries that want to import essential medicines and undermined the effectiveness of the Article 31bis regime. The drafters should have just simply prohibited the re-exportation of the specific products to markets where there is adequate domestic manufacturing capacity.

Furthermore, the exporting countries' approval processes can also be problematic. Canada was the first country to domesticate Article 31bis, but it imposed restrictions not demanded by Article 31bis.[167] For instance, it requires that all medicines produced under an export compulsory license must meet Canadian marketing approval standards rather than those of the Importing State, circumscribes the type of pharmaceuticals that can be subjected to such license, and limits the

161 *Id.* at 2(b)ii.

162 *Id.*

163 Annex to the TRIPS Agreement, 2(b)ii.

164 *See generally* Carlos Correa, *Will the Amendment to the TRIPS Agreement Enhance Access to Medicines?,* South Centre Policy Brief No. 57, 59 (2019); Dina Halajian, Inadequacy of TRIPS & the Compulsory License: Why Broad Compulsory Licensing is Not a Viable Solution to the Access to Medicine Program, 38 Brook. J. Int'l L. 1191, 1197–98, 1202–4 (2012); Nicholas G. Vincent, TRIP-Ing up: The Failure of TRIPS Article 31Bis, 24 Gonz. J. Int'l L. 1 (2020).

165 *See generally* Jillian C. Cohen-Kohler et al., *Canada's Implementation of the Paragraph 6 Decision: Is It Sustainable Public Policy?,* 3 Glob. Health 12 (2007) (stating that the negotiation procedural requirement was especially problematic in the Canada-Rwanda compulsory license). *See* Muhammad Z. Abbas & Shamreeza Riaz, WTO Paragraph 6 System for Affordable Access to Medicines: Relief or Regulatory Ritualism, 21 J. World Intell. Prop. 32, 39 (2018).

166 Ezinne Miriam Igbokwe & Andrea Tosato, *Access to Medicines and Pharmaceutical Patents: Fulfilling the Promise of TRIPS Article 31bis,* Fac. Scholarship at Penn. L. 2802, 2850 (2022) ("We share the view that the procedural dimension of the Article 31bis System materially hinders export compulsory licensing. The issue lies with the normative aims that shape this body of rules. This entire procedure is designed primarily to ensure that medicines produced under an ECL are not surreptitiously diverted into more pecunious markets and, to a lesser extent, verify that the Importing State is eligible to use the Article 31bis System. Regrettably, the rules under consideration do not prioritize efficiency, simplicity and expediency for the relevant stakeholders. This is both disappointing and surprising given that the explicit mandate of the Doha Declaration was to create a 'solution' to the difficulties faced by Members with insufficient manufacturing capabilities in the pharmaceutical sector in making effective use of the Article 31 regime for compulsory licensing.").

167 Canadian Patent Act of 1985, R.S.C., §§ 21.01–21.19.

duration of the license to two years.[168] These added restrictions, do not have developing countries in mind, and weaken the utility of the Article 31bis system.

The TRIPS flexibilities have been complicated by the emergence of supplementary protections, commonly referred to as 'TRIPS-plus provisions', which are measures adopted by industrialized nations and pharmaceutical companies outside the WTO TRIPS Agreement to further harmonize patent application procedures, expand the exclusive rights of patent owners, compensate for regulatory delays by delaying the approval, delay the entrance of cheaper generic drugs into the market, require that patents be granted to new uses of existing medicines, and restrict the use of compulsory licenses and discretions of national governments.

These additional exclusive rights are beyond what the WTO requires, undercut the Doha Declaration on Public Health, and further skew the patent balance in favour of corporate interest.[169] Examples of supplementary protections include elements such as data exclusivities, market regulatory protection, patent linkage regulations, trade secrets, secondary patenting, and investment rights.[170] The United States, European Union, and Japan have negotiated a large number of regional and bilateral trade agreements with developing countries, often incorporating IP-related chapters with various TRIPS-plus provisions.[171] These agreements 'remove many of the flexibilities available under TRIPS, subjecting signatory countries' patent systems to stricter provisions.'[172] Consequently, this creates an economic model that empowers certain segments of the global community over others.

c. Low-Income Countries and the Economic Model of the TRIPS Agreement

The TRIPS Agreement and TRIPS-plus provisions are arguably rooted in the normative principle that strong IP rights drive technological growth and innovation as they offset the significant costs, time, and risks associated with introducing new technologies, such as breakthrough drugs, to the market.[173] When the technology is invented, this model also fundamentally assumes that market transactions are the most efficient means of accessing these innovations. Proponents of this approach acknowledge potential social costs, such as higher prices and reduced access, but

168 Paige E. Goodwin, *Right Idea, Wrong Result - Canada's Access to Medicines Regime Notes and Comments,* 34 Am. J. L. & Med. 567 (2008); Mark D. Penner & Prakash Narayanan, *Amendments to the Canadian Patent Act to Address Drug Access: Is Help on the Way?,* 60 Food & Drug L. J. 459 (2005).

169 For details regarding the supplementary protections, *see* Ellen T. Hoen, The Global Politics of Pharmaceutical Monopoly Power: Drug Patents, Access to Innovation and the Application of the WTO Doha Declaration on TRIPS and Public Health 70–71, 74–75 (AMB Publishers, 2009).

170 *Id.*

171 Kenneth C. Shadlen, Bhaven N. Sampat & Amy Kapczynski, *Patents, trade and medicines: past, present and future,* 27(1) Rev. Int'l Pol. Econ. 75, 81 (2020).

172 *Id.*

173 *See* Edwin Mansfield, *Patents and Innovation: An Empirical Study,* 32 Mgmt. Sci. 173, 174 (1986); Scherer et al., Patents and the Corporation: A Report on Industrial Technology Under Changing Public Policy 130–35 (2nd ed.,1959); C.T. Taylor & Z.A. Silberston, The Economic Impact of The Patent System: A Study of The British Experience 201–07 (1973); Wesley M. Cohen et al., *Protecting their Intellectual Assets: Appropriability Conditions And Why U.S. Manufacturing Firms Patent (Or Not),* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000) at 9.

argue that if the benefits, including incentives for innovation and R&D investments, outweigh the costs, it represents an efficient outcome.[174] Essentially, a cost-and-benefit analytical justification. The hypothesis is that market transactions maximize wealth and efficiency.[175] Proponents of this economic analysis idealize the market order as the most effective means to promote social welfare and individual freedom because it is neutral.[176] In this paradigm, the patent system transforms knowledge goods into private property, with owners dictating not only the prices and availability of technologies but also who can access them.

The empirical validity of this normative underpinning remains inconclusive – it is not clear whether IP rights necessarily lead to innovation and socio-economic progress in every society, or whether such progress outweighs the social costs associated with the knowledge monopoly.[177] During the negotiations of the TRIPS Agreement, the advocates of the new regime persuaded developing countries to embrace the globalized IP regime as it would increase inflows of foreign direct investment (FDI) and technology transfers from advanced countries to poor nations. However, since the TRIPS Agreement came into force, there is no empirical evidence indicating a clear link between robust IPRs and the attraction of FDIs in poor countries.[178] It is questionable if foreign investors take into account the IPR regime of these countries when deciding whether to invest.[179]

As some commentators pointed out '[c]ountries with few innovative firms or small markets typically viewed the benefits of patents as limited, since small markets can do little to drive global R&D priorities, and local patents may do more to hurt the development of industry than stimulate invention in the absence of an industrial sector with inventive and innovative capabilities.'[180] For example, '[d]espite the existence of TRIPS-compliant laws on patents, trademarks, and industrial designs, it is virtually impossible to highlight benefits that have accrued to Guinea, Guinea-Bissau, Ghana, Mali, Mauritania, or Niger solely on the basis of their accession to TRIPS.'[181] Similarly, 'it is difficult to point out the benefits that [Central African Countries] have derived from changing their IPR laws and creating the institutions for the enforcement of IPRs.[182] Studies have indicated that drug prices have risen in Egypt since the implementation of TRIPS, whether this is merely

174 N. Mercuro & S. Medema, Economics and the Law: From Posner to Post-Modernism Chapter One (2nd ed., Princeton University Press, 2006).

175 Richard A. Posner, The Economics of Justice 60 (Cambridge: Harvard University Press, 1981).

176 *See* Melinda Cooper, Family Values (Zone Books, 2016); Nancy Fraser, Contradictions of Capitalism and Care, 100 New Left Rev. 99 (2016).

177 *See, e.g.,* Fritz Machiup, An Economic Review of the Patent System (1958) (study No 15 of the Sub-committee on Parents, Trademarks, and Copyrights of the Committee of the Judiciary, United States Senate, 85th Congress, Second Session).

178 For a contrary view, *see* R. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries,* 37(2) IDEA I (1997).

179 Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?,* 36 Duke L. J. 831 (1987).

180 Kenneth C. Shadlen, Bhaven N. Sampat & Amy Kapczynski, *Patents, trade and medicines: past, present and future,* 27(1) Rev Int'l Pol. Econ. 75, 77 (2020).

181 Mgbeoji Ikechi, TRIPS and TRIPS Plus Impacts in Africa 192, 279 (2007).

182 *Id.* at 287.

coincidental, or a result of a direct cause-and-effect relationship remains unclear.[183]

The globalized IP regime has not also increased funding for research that impacts developing countries. For example, despite the rush to implement IPR laws across the African continent, there is minimal or no financial support for research into diseases that affect Africans. As highlighted by MSF (Medecins Sans Frontieres), diseases that disproportionately threaten the lives of tens of millions of people, primarily in Africa, represented less than 0.001% of the $60-70 billion spent annually on global medical research.[184] Mario Azevedo reported that '[e]ven though Africa accounts for 11–13% of the world population, its disease burden is 24% and Sub-Saharan Africa 'commands less than 1% of global health expenditure.'[185] Most of the treatments available in Africa today were developed during the colonial era and were intended for use by the white population or were created by the US Army to protect its soldiers. Many medicines used in Africa to treat tropical diseases have no connection to the establishment of modern patent laws.[186]

The reason for this situation is not far-fetched; the economic model of the patent system is based on the 'willingness to pay' principle.[187] Since rich nations and individuals are the ones more willing to pay for expensive technologies, they benefit more from the patent system and the associated market exclusive rights. For example, studies have shown that millions of people from low-income groups suffer and die from diseases for which medicines exist that could vastly improve and prolong their lives.[188] They 'suffer and die' because they are not able to afford the relevant drugs, and sometimes, it is because there are no cheaper generic versions in the market.

The system privileges a select group of individuals based on wealth and power, regardless of the adverse distributional consequences on low-income groups.[189] Needless to say, the worst hit are the vulnerable and poor people living in low-income countries. As Christopher May rightly pointed out, the pharmaceutical knowledge economy system 'privileges the rights of owners (predominantly domiciled in already developed countries) and downplays or marginalizes the social costs (and curtailed public benefits) widely experienced in the developing countries.'[190]

183 A.S. Saleh, *Impact of Globalization on Drug Industry: Possible Risks and Means to Overcome Them,* at 7th International Conference on The Impact of Globalization on Development and Healthcare Service in Islamic Countries (Mar. 23–27, 2002). *See also* Jonathan D. Quick, *Ensuring Access to Essential Medicines in the Developing Countries and Least Developed Countries-Framework for Action,* 73(4) Clinical Pharm. & Therapeutics 279–83 (Apr. 2003).

184 The Guardian Weekly, June 5, 2003. (Unsure what this source is)

185 Mario J. Azevedo, *The State of Health System(s) in Africa: Challenges and Opportunities,* in Historical Perspectives on the State of Health and Health Systems in Africa 1–73 (Volume II: The Modern Era, 2017).

186 The Guardian, *supra* note 184.

187 *See* Zachary Liscow, *Is Efficiency Biased?,* 85 U. Chi. L. Rev. 1649, 1658–59 (2018).

188 Graham Dutfield et al, Dutfield and Suthersanen on Global Intellectual Property Law 399 (2nd ed., Edward Elgar Publishing , 2020).

189 Missing footnote citation here.

190 May, *supra* note 19, at 17.

Since the system relies on market transactions for the production of and access to medicines, government interventions to support vulnerable citizens are devalued. It shields market transactions from state democratic regulation and operates under the assumption that the market is impartial. For instance, Milton Friedman, one of the prominent advocates of this market ideology, whose ideas were significant in shaping the economic policy of the US, the UK, and other countries around the world in the 1970s and 1980s, argues that government intervention in the economy often had unintentional consequences of limiting private property rights, competition, and free markets, essential for economic prosperity.[191] Thus, he emphasizes the fundamental right of businesses to own and control their assets, including IP, with limited government intervention, and the need to incentivize individuals and businesses to invest in creating new ideas and innovations.[192]

This ideology encases IP market transactions from democratic principles and prevents human rights advocates and social justice activists from scrutinizing the impacts of the IP system on impoverished groups and the Third World. It decenters the role of power dynamics in the IP norm-making process and facilitates the proliferation of bilateral treaties and international investment agreements that progressively elevate patent standards and other supplementary protections. It permits broad interpretations and constructions of patent policies that favour the interests of the dominant party and IP rights holders. For instance, the TRIPS Agreement grants private monopoly rights that are broad and specific, while the obligations of developed countries to aid technology transfer and public health are outlined in general and ambiguous terms, making it challenging to enforce.[193]

Jedediah Britton-Purdy et al pointed out that although the economy (for example, the pharmaceutical knowledge system) is fundamentally shaped by power dynamics that require legal and policy interventions to promote equity and fairness, the normative system diminishes such interventions by prioritizing efficiency over issues of distribution and equity.[194] It places a higher emphasis on fostering future innovations than on ensuring access to new and essential technologies. It theoretically divorces market power from politics, thereby obscuring fundamental realities.[195] As stated by Laura Murray, privileging proprietary rights and control is a political choice rather than a wealth-maximizing mechanism and such rights and control distort the real-life experiences of socially situated actors and perpetuate the status quo.[196]

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191 *Id.*

192 *See* J. Hearing of the Subcomm. on 'Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary,' 103d Cong. 297-98 (1994) (statement of Gerald J. Mossinghoff, President, Pharmaceutical Research and Manufacturers of America).

193 Robert Hunter Wade, *What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of Development Space,* 10(4) Rev. Int'l Pol. Econ. 624 (2003).

194 Jedediah Britton-Purdy et al., *Building a law-and-political-economy framework: Beyond the twentieth-century synthesis,* 129 Yale L. J. 1784, 1819 (2019).

195 *Id.*

196 Laura Murray et al., Putting Intellectual Property in its Place: Rights Discourses, Creative Labour and the Everyday (Oxford IP, 2014); Julie E. Cohen, *The Place of the User in Copyright Law,* 74 Fordham L. R. 347 (2005); Jessica Silbey, The Eureka Myth: Creators, Innovators and Every Day Intellectual Property (Stanford UP, 2014).

Furthermore, the pharmaceutical political economy undermines domestic policymaking by globalizing an economic model of commercialization of knowledge goods that is antithetical to domestic social justice reordering. The regime sets 'strong limits on a state's capacity to define territorial property rights in ways that enhance national welfare.'[197] Ruth Okediji argues that the TRIPs Agreement turns 'the traditional national/international paradigm upside down; it appears to contemplate a substitution of domestic processes that have produced a competitive balance in domestic setting with an international process that presumes that the domestic balance should be renegotiated in the light of obligations in TRIPs.'[198] Specifically, it conceptualizes governments' interventionist policies seeking to promote social welfare as having the potential to slow economic growth and cause high inflation.[199]

The TRIPS Agreement is based on norms that prioritize individual rights over collective benefits by treating knowledge as a rigid private property, and public interest initiatives as political matters.[200] Thus, Rochelle Dreyfuss characterized the TRIPS Agreement as a 'one-way ratchet' and suggested the integration of a bill of rights for users to address this issue.[201]

Additionally, the system discourages stakeholders from questioning the political and economic forces that leave TRIPS flexibilities ineffective and unchecked, the unequal influence of various stakeholders and institutions on patent lawmaking, and how national rules and policies have a negative extraterritorial impact and disproportionately allocate resources, and the greatest losers in these contestations are low-income countries.[202] The stark vaccine inequities witnessed during the COVID-19 pandemic are the most recent global reminder.

This situation arises because the market has been insulated from democratic restructuring, guided by the prevailing lopsided utilitarianism that prioritizes the interests of powerful IP owners and nations over issues related to resource distribution and access to knowledge.[203] The primary beneficiaries of this system are the powerful Western states and their multinational corporations (MNCs).[204] It safeguards foreign markets, even in low-income countries, for producers of knowledge goods, who

197 Peter Drahos & John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? 75 (London: Earthscan Publications, 2002).

198 Ruth Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement,* 17(2) Emory Int'l L. Rev. 915 (2003).

199 Milton Friedman, Milton Friedman on Economics: Selected Papers 135 (Chicago: University of Chicago Press, 2010); *See* William W. Fisher III, The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States 22 (unpublished manuscript), https://cyber.harvard.edu /people/tfisher/iphistory.pdf [https://perma.cc/YZL2-F8QR].

200 Christopher May & Susan K. Sell, Intellectual Property Rights: A Critical History 164 (Lynne Rienner Publishers, Inc., 2006).

201 Rochelle Dreyfuss Cooper, *TRIPS-Round II: Should Users Strike Back? Special Issue, Colloquium on Intellectual Property,* 71(1) Univ. Chi. L. Rev. 21–35 (2004).

202 *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law,* 116 Yale L. J. 882, 884 (2007).

203 *See* Britton-Purdy et al., *Building a law-and-political-economy framework: Beyond the twentieth-century synthesis,* 129 Yale L. J. 1784, 1820 (2019).

204 P. McCalman, *Reaping What You Sow: An Empirical Analysis of International Patent Harmonization,* 5 5 J. Int'l Econ. 161–86 (2001).

are typically industrialized nations and their MNCs. These goods are often offered at high prices, particularly concerning breakthrough pharmaceutical products and processes, like the ART, Insulin, and the COVID-19 vaccines.

Therefore, there is an imminent need for an 'epistemological reconstitution' of the patent norm-making process to establish a more balanced utilitarianism.[205] The existing uniform and market-oriented approach fails to distinguish between those who can afford patented products and those who cannot, and developed countries from developing countries.[206] It privileges a small group of affluent economic and political actors while neglecting the right to health and the pervasive global income disparities, especially in non-European countries. Ironically, the very IP protection that developed economies ignored during their early stages of development is what they argue in multilateral negotiations and treaties would spur economic development in developing countries.

d. The Three-Prong Approach to the Pharmaceuticals Norm-Making Process

The normative underpinnings of the pre-20th-century knowledge system and how it reconciled competing private and public interests provide a solid foundation for re-examining and de-idealizing the prevailing market-oriented regime of the pharmaceutical industry, which has failed to adequately consider public welfare in the dissemination of protected technologies. As discussed in earlier sections, patent rights in that historical era were conceptualized as special privileges and strategic instruments, not necessarily market commodities, allowing for substantial domestic policy discretion and limited recognition of pharmaceutical patent products.

The historical analysis showed that weak patent protection and the relatively free cross-pollination of ideas between then-developing (now industrialized) countries may have contributed to their positive socioeconomic and technological growth.[207] The significance of this analysis lies in presenting an operational system that pursues equitable and public interest-oriented objectives and highlighting the fact that the current conceptual framework has not always been the case.

IP is certainly not a magical solution that can instantly transform a dysfunctional economy plagued by political instability, inadequate infrastructure, and insufficient investments in R&D into an industrialized powerhouse. Nonetheless, IP, especially patent rights and trade secrets within the context of the pharmaceutical industry, does represent a pivotal component in the broader socio-economic puzzle of industrial development and facilitating access to cheaper equivalents of original drugs for developing countries, which, if effectively harnessed and complemented by other factors,

205 Anibal Quijano, *Coloniality and Modernity/Rationality,* 21 Cultural Stud. 168, 169, 176 (2007).

206 Knowledge is an example of a global public good. The concept was articulated in Joseph E. Stiglitz, *The Theory of International Public Goods and the Architecture of International Organizations,* Background Paper No. 7, Third Meeting, High Level Group on Development Strategy and Management of the Market Economy, UNUIWIDER (Helsinki, Finland July 8–10, 1995). *See* Joseph E. Stiglitz, Economics of The Public Sector 469–70 (3rd ed. New York: W. Norton, 2000).

207 E. Schiff, Industrialization Without National Patents-The Netherlands, 1869-1912, Switzerland, 1850-1907 (Princeton University Press, 1971); D. Brennerbeck, *Do as I say, Not as I Did,* 11 UCLA PAB Asian 84 (1999).

has the potential to foster sustainable development in developing countries in general and low-income countries, in particular.

Temporary adjustments and amendments to IP rules, which have dominated discussions about making the IP system work for all, may not provide the solution, or at least not the appropriate starting point. Debates and calls for reform should be focused on the conceptualization of the knowledge economy and the norm-making process, which could potentially touch on several factors. However, for this work, I have limited my analysis to three key factors: understanding the IP norm-making process, democratizing the process, and recognizing 'flexibility' as a vital IP issue.

The first step in this reconstitution process is appreciating how the IP norm-making process works and the power dynamics involved. There is a need to pay attention to the politics embedded in the enactment of existing IP rules and how the rules create endowments that shape economic relationships and influence public decisions, whether through political pressure, investment agreements or representation exercise.[208] Additionally, it entails understanding how the proprietary knowledge economy serves as a crucial bridge between political decision-making and economic structures, with both realms influencing each other.[209]

This understanding highlights how the historical structure and process of the international IP norms and regulations marginalized developing countries. For instance, when the Paris Convention for the Protection of Industrial Property (Paris Convention) and Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) were negotiated in the nineteenth century, at the beginning of the internationalization of IP rights, most developing countries were under colonial rule, and where not part of the negotiations. Therefore, as expected, these conventions paid little regard to non-Western ethos and traditions, such as the protection of indigenous knowledge and folklore.[210]

The TRIPs Agreement was also the product of a dysfunctional negotiation process. The TRIPS Agreement was the outcome of extensive and forceful bargaining tactics and negotiations to establish a robust global IP regime without substantial consideration of the socio-economic interests of low-income countries.[211] The goal was to ensure that the patent protection for drugs that were available in developed countries was also available in developing countries US corporations played a significant role in the negotiations. Susan Sell pointed out that the TRIPs Agreement is a case of twelve US

208 *See also* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment,* 118 Colum. L. Rev. 1953 (2018) (asking if the First Amendment has egalitarian elements that could be recovered).

209 *See* Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law,* 45 J. Comp. Econ. 188 (2017).

210 P. Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Berween Individual and Communal Rights in Africa and the United States,* 46 Am. U. L. R. 769 (1999); D. Downes, How Intellectual Property Could be a Tool to Protect Traditional Knowledge, 25 Columbia J. Env't L. 253 (2000); P. Kuruk, *Protecting Folklore Under Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,* 46 Am. ULR 769 (1999).

211 *Id.* at 113; Peter K. Yu, *TRIPs and Its Discontents,* 10 Marq. Intell. Prop. L. Rev. 369, 379–83 (2006).

corporations making public law for the world.[212] 'Drug companies and their representatives were among the leading advocates of TRIPS, and more generally, of the integration of IP into the trade regime.'[213]

The negotiating history of the TRIPS Agreement shows that member states were divided over whether certain industries, like the pharmaceutical industry, should be exempted from patent protection to allow for flexible domestic regulation.[214] For instance, developing countries, such as India, Nigeria, Mexico, Uruguay, Tanzania, and Argentina, proposed that pharmaceutical products should be excluded or left to the discretion of States.[215] Most developing countries, before the Uruguay Round of negotiations, did not permit patent protection for pharmaceuticals.[216] The few that allowed only protected the processes, not the actual chemical products.[217] On the other hand, the US, European communities and their allies proposed to include 'all fields of technology' in the TRIPS Agreement.[218] The latter position prevailed in the end, and the Agreement was extended to apply to every sector in line with the wishes of wealthy nations.

Furthermore, the IP norm-making process has been established and sustained by imbalanced power dynamics. At the time of making the respective positivist IP laws, the benefits of IP rights are perceived and expressed by well-defined interest groups, such as industrialized nations and brand-name companies. On the other hand, the social costs, including economic, social, political, and moral costs, are diffused.[219] For instance, brand-name pharmaceutical companies are more willing and ready to invest in obtaining favourable laws - a behaviour that has been described as a 'rent-seeking mechanism.'[220] In contrast, users of IP-protected works, generic companies, and low-income countries, are often more dispersed and may not immediately realize how changes in patent law will

212 Susan K. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights 1, 96 (Cambridge University Press, 2003).

213 Peter Drahos, *Global property rights in information: The story of TRIPS at the GATT,* 13(1) Prometheus 6–19 (1995).

214 *See* Terence Stewart, The GATT Uruguay Round a Negotiating History (1986–1994) 474 (Kluwer Law International, 1993).

215 *See* Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights, Communication from India, ¶¶ 19–20, GATT Doc. MTN.GNG/NG11/W/37 (July 10, 1989) [hereinafter Communication from India 1989]; see also Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, arts. 3–4, GATT Doc. MTN.GNG/NG11/W/71 (May 14, 1990).

216 WCO Indonesia, The TRIPS Agreement and its Impact on Pharmaceuticals 11 (May 2–4, 2000), https://iris.who.int/handle/10665/206475.

217 *Id.* at 7.

218 *See* Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights, Communication from the United States, art. 2(1)(a), GATT Doc. MTN.GNG/NG11/W/70 (May 11, 1990) [hereinafter Communication from the United States]; see also Suggestion by the United States for Achieving the Negotiating Objective, Revision, ¶ 3, GATT Doc. MTN.GNG/NG11/W/14/Rev.1 (Oct. 17, 1988); *see* Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, Communication from the European Communities, art. 10(1), GATT Doc. MTN.GNG/NG11/W/68 (Mar. 29, 1990).

219 Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, 66 L. & Contemp. Probs. 173, 196 (2003).

220 *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History,* 72 Cornell L. Rev. 857 (1987); Jessica Litman, Copyright Legislation and Technological Change, 68 Or. L. Rev. 275, 337–38 (1989); see also 17 U.S.C. §§ 505-506 (2000).

impact them. For instance, when the TRIPS Agreement was signed, many developing countries did not appreciate the impact the Agreement may have on public health until the HIV/AIDs crisis.

These power dynamics have had far-reaching consequences for both economic structures and political processes governing patent rules creation and enforcement. The lobbying prowess and strategies of IP-driven industries, like multinational pharmaceutical firms, as a well-organized and distinct group have resulted in a century of advantageous IP legislation for them that has come at the expense of the public domain.[221] The prospects of marginal returns are unlikely to be sufficient to incentivize generics to match the brand-name companies' influence in law-making.

Since the mid-2000s, the US and like-minded developed countries have also deployed bilateral and regional negotiations on trade and investment to continue to expand IP protection under the guise of ensuring 'competitive liberalization' and 'free trade.'[222] Examples of these agreements include the Dominican Republic-Central America Free Trade Agreement, the Korea–United States Free Trade Agreement, and the Trans-Pacific Partnership Agreement – which became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) following the United States' withdrawal from the regional pact. These negotiations persuade (or implicitly compel) developing countries to adopt higher standards of IP protection that exceed those outlined in the TRIPS Agreement.

These TRIPS-plus treaties require developing countries to ratify new WIPO treaties containing TRIPS-plus measures; extend protection terms; reduce the transition period allowed by TRIPS; and eliminate or narrow permitted exceptions.[223] Both the United States and European countries employ these regional and bilateral strategies, but the United States has been notably more assertive.[224] For instance, although the bilateral use of sanctions to enforce WTO-based law is illegal, the US Trade Representative (USTR) has continued to use bilateral pressure to enforce IPRs.[225] At the root of these treaties is the lack of sufficient attention to the interests of low-income countries in the norm-making process.

Today, investment agreements between multinational companies and developing countries are being used to expand IP rights and establish new international IP norms. IIAs are usually the product of trade-offs between states and foreign private investors. The tradeoffs make countries provide IP outcomes (i.e., expansion of IP protection and enforcement) that would have been impossible under

221 Timothy Wu, *Copyright's Communications Policy,* 103 Mich. L. Rev. 278, 291–92 (2004).

222 Letter from Robert Zoellick to David Walker, Comptroller of the United States Patent Office (Dec. 2003), http://www.ustr.gov/releases/2003/12/2003□12□03□letter□gao.pdf.

223 *See generally* Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (2000).

224 Graham Dutfield & Uma Suthersanen, Global Intellectual Property Law 42 (Edward Elgar Publishing Limited, 2020).

225 Gautam Sen, *The United States and the GATT/WTO System, in* U.S. Hegemony and International Organizations 128 (R. Foot, S.N. MacFarlane, and M. Mastanduno, eds., Oxford University Press, 2003); Daya Shanker, *Legitimacy and the TRIPs Agreement,* 6(1) J. World Intell. Prop. 155–189, 186 (2003).

an 'IP-only' international regime. For instance, in exchange for greater market access to goods and services, the state party would be required to provide strong IP protection.[226] The net implication of this arrangement is that the IIAs constrain the dynamic development of domestic IP rules.

IIAs allow IP owners to sue foreign governments without the backing of their home governments. Ruth Okediji notes, that the intersection of IP and investment is 'not only a new frontier in investment arbitration but more importantly, uncharted territory in the increasingly complex and contested landscape of international intellectual property obligations'.[227] To attract foreign investments, states are left with little choice but to enter into IIAs to protect the investments of foreign investors against state interference.[228] Most IIAs include IP assets as one of the protected investments.[229] This differs from the protection offered by the traditional international IP system. Instead of expanding specific aspects of IP law, 'investment protection offers broad standards that restrict discriminatory, expropriation, or otherwise unfair or arbitrary legislative, administrative, or judicial acts of the host state vis-à-vis a protected investment asset.'[230] The net implication of IIAs is that they provide additional layers of protection for IP rights.

Furthermore, these IIAs seek to avoid possible arbitrariness of judicial institutions in the host state, the so-called 'judicial activism' of domestic courts. They allow private corporations to challenge regional and domestic laws that limit the enjoyment of their IP assets before arbitral tribunals. IIAs usually provide for the resolution of disputes within an international arbitration forum – commonly referred to as the investor-state dispute settlement (ISDS), which is distinct from the state-to-state dispute settlement under the WTO and FTAs. As US Senator Elizabeth Warren observed, ISDS gives corporations 'the right to challenge laws they don't like – not in court, but in front of industry-friendly arbitration panels that sit outside any court system'.[231]

226 *See generally* Henning Grosse Ruse-Khan et al., *Statement of Principles for Intellectual Property Provisions in Bilateral and Regional Agreements,* 36(4) European Intell. Prop. Rev. 207 (2014) [hereafter Grosse Ruse-Khan and others, 'Statement of Principles'].

227 Ruth L Okediji, *Is Intellectual Property 'Investment?' Eli Lilly v. Canada and the International Intellectual Property System,* 35 Univ. Penn. J. Int'l L. 1121, 1122 (2014).

228 *See* Carlos M. Correa & Jorge Viñuales, *Intellectual Property Rights as Protected Investments: How Open are the Gates?,* 19(1) J. Int'l Econ. L. 91 (2016); Henning Grosse Ruse-Khan, *Effects of Combined Hedging: Overlapping and Accumulating Protection for Intellectual Property Assets on a Global Scale, in* Global Intellectual Property Protection and New Constitutionalism 39 (Jonathan Griffiths and Tuomas Mylly eds., Oxford University Press, 2021).

229 *See* Tuomas Mylly, *Human Rights and Intellectual Property in Investor to State Dispute Settlement, in* Research Handbook on Intellectual Property and Investment Law 406 (Christophe Geiger ed., Edward Elgar Publishing, 2020).

230 Henning Grosse Ruse-Khan, *Effects of Combined Hedging: Overlapping and Accumulating Protection for Intellectual Property Assets on a Global Scale, in* Global Intellectual Property Protection and New Constitutionalism 39 (Jonathan Griffiths & Tuomas Mylly eds., Oxford University Press, 2021).

231 Deirdre Fulton, *As Countries Line up to Sign Toxic Deal, Warren Leads Call to Reject TPP,* Common Dreams (Feb. 3, 2016), http://www.commondreams.org/news/2016/02/03/countries-line-sign-toxic-deal-warren-leads-call-reject-tpp.

Peter Ku rightly lamented, 'ISDS could take away the many limitations, flexibilities, and safeguards that have been carefully built into the TRIPS Agreement and the larger international intellectual property system.'[232] Others have noted that ISDS cases could also undermine a country's sovereign ability to protect its citizens and regulate harmful activities to avoid costly arbitrations and ISDS processes.[233] Since international investment tribunals and their arbitrators usually have limited experience with IP systems, they are unable to understand the 'human rights issues that operate in the background in IP limitations and exceptions and exclusions from protection.'[234] This produces interpretations that favour exclusive rights and property interests of private corporations.

Furthermore, there is the concept of 'full protection and security' (FPS) that requires host states to adopt steps and measures to protect the investor's assets (including IP assets) against harm from private parties.[235] Of course, justiciable actions under the IIAs are limited to activities of host states, not private rights in private law relations unless they are 're-packaged' to implicate state obligations under the IIAs.[236]

An examination of the norm-making process of IP rights cannot be comprehensively exhausted without appreciating the colonial imposition of IP laws and institutions on developing countries.[237] For instance, the IP laws and institutions in Africa are in many instances a verbatim reproduction of the IP laws of their former European colonial masters without regard to the continent's cultural, economic and practical experiences.[238] Until 1962, patent law in French Africa was governed by French laws. Administratively, the French National Patent Rights Institute (INPI) was the National Authority for members of the African French Union.[239] Also, the Philippines adopted the Spanish patent law while it was a Spanish Colony, but when the US took over the running of the Philippines in December 1898, the US patent law applied in the Philippines.[240]

232 *See* Peter K. Yu, *The Second Transformation of the International Intellectual Property Regime, in* Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights 9 (Jonathan Griffiths & Tuomas Mylly, eds., Oxford University Press, 2021).

233 Brook K. Baker & Katrina Geddes, *The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS,* 49 Loy. U. Chi. L. J. 479, 505 (2017).

234 Tuomas Mylly & Jonathan Griffiths, *The Transformation of Global Intellectual Property Protection, in* Global Intellectual Property Protection and New Constitutionalism 1 (Jonathan Griffiths & Tuomas Mylly eds., Oxford University Press, 2021); *see also* Tuomas Mylly, *Human Rights and Intellectual Property in Investor to State Dispute Settlement, in* Research Handbook on Intellectual Property and Investment Law 406 (Christophe Geiger ed., Edward Elgar Publishing 2020).

235 *See generally* Christoph Schreuer, *Full Protection and Security,* 1(2) J. Int'l Disp. Settlement 353 (2010).

236 Monique Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law 66 (2nd ed., Wolters Kluwer, 2010).

237 Ruse-Khan, *supra* note 230, at 41.

238 A. Endeshaw, *The Paradox of Intellectual Property Law-Making in the new Millennium: Universal Templates as Terms of Surrender for non-industrial Nations; Piracy as an Offshoot,* 10 Cardozo. Int'l Compar. L. 47–77 (2002).

239 Ikechi Mgbeoji, TRIPS and TRIPS Plus Impacts in Africa 266 (2007).

240 Otherwise known as the Union Coloniale Framaise, the group is composed of sixteen French-speaking African colonies outside French North Africa. These are Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Coted'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo. *See* Ikechi Mgbeoji, TRIPS and TRIPS Plus Impacts in Africa 266 (2007).

These colonial legacies manifest themselves even in the 21st century through political and economic pressure by Western nations on developing countries. Despite the uncertainties around the benefits of strong IP regimes in the economies of developing countries, powerful Western states still exert pressure on the governments of these countries to embrace such IP regimes.[241] This approach aims to prevent developing countries from free-riding on technological breakthroughs made by Western states.

Unlike in earlier centuries, the industrial know-how and manufacturing abilities of industrialized nations are now within the reach of developing countries.[242] The emergence of the so-called 'information economy' has made it ideologically imperative for industrialized nations and their big pharmaceutical companies to establish a system where their manufacturing advantage is preserved through global protection of the knowledge embedded in innovative products regardless of how it impacts public health and needs.[243]

ii. Democratizing the Process

This second step involves democratizing the IP norm-making process, addressing power asymmetries and hierarchies within the patent norm-making process, and the necessity to grant substantive decision-making responsibilities to low-income countries. It goes beyond mere representation of developing nations at the table; rather, it ensures that their positions and interests are duly considered in the final draft. For example, there are valid concerns regarding the ongoing negotiations and versions of the proposed Pandemic Treaty, which aim to rectify the failures in the distribution of COVID-19 vaccines. Despite being represented, it is observed that the wishes of low-income countries are not fully reflected in these negotiations. Four international human rights groups: Amnesty International, the International Commission of Jurists, the Global Initiative for Economic, Social and Cultural Rights, and Human Rights Watch note as follows: 'The drafting process has repeatedly failed to ensure effective and meaningful participation by all stakeholders, especially those from marginalized and criminalized communities. In early 2022, the Civil Society Alliance for Human Rights in the Pandemic Treaty drew attention to the need to ensure full participation in the drafting process. The negotiating body disregarded these calls. Instead, the draft reflects a process disproportionately guided by corporate demands and the policy positions of high-income governments seeking to protect the power of private actors in health including the pharmaceutical industry.'[244]

241 *Id.*

242 Ruth Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,* 7 Sing. Int'l & Compar. L. 315 (2003).

243 Christopher May, *Cosmopolitan Legalism Meets 'Thin Community': Problems in the Global Governance of Intellectual Property,* 39(3) Gov. & Opposition 393–422 (2004).

244 K. Maskus, Intellectual Property Rights in the Global Economy (Institute for Int'l Economics, 2000); G. Evans, A Preliminary Excursion into TRIPS and Non-Violation Complaints, 3 World Intell. Prop. 1 (2000); S. Cho, *GATT Non-Violation Issues in the WTO Framework: Are they the Achilles Heel of the Dispute Settlement Process?,* 39 Harv. Int'l L. J. 311 (1998).

Substantive representation also requires identifying suitable forums for patent rulemaking and empowering social and public interest coalitions that advocate for the interests of vulnerable populations. The perception in many low-income countries is that the patent system serves as a facade for imposing import controls and perpetuating neocolonialism due to the political pressure and forceful negotiations involved in the IP norm-making processes and where the dominant players have their way at the end of the day.[245] Laurence Helfer explains how dominant IP stakeholders shift international IP negotiations and rulemaking to venues that support their interests, describing the successive ways in which strong IP norms and counter-norms are produced as a strategic process of 'regime shifting.'[246] Civil societies and IP users are more attracted to venues like the United Nations (UN) such as the WIPO and World Health Organization (WHO) that engage with human rights issues and are interested in developing exceptions and limitations of IP protection.[247] On the other hand, IP owners and multinationals are more interested in international rulemaking venues and processes like the WTO and investment tribunals that allow for the creation of overlapping IP protection and TRIPS-Plus treaties. For instance, the recent TRIPS waiver negotiations were conducted under the WTO regime, which is why, arguably though, the eventual Ministerial Decision did not reflect the wishes of the waiver supporters.

On June 17, 2022, the Ministers waived the obligation set out in Article 31(f) of the TRIPS Agreement, allowing developing countries to export COVID-19 vaccines and related ingredients that were produced under compulsory licenses or government use authorizations to other developing countries.[248] Also, the waiver amended Article 31bis to allow eligible members to re-export COVID-19 vaccines to other eligible members for humanitarian and not-for-profit purposes, but only in 'exceptional circumstances.' Additionally, the notification requirements under Article 31bis were slightly revised, enabling the notifications to be submitted as soon as possible after the information becomes available instead of immediately.

However, the waiver did not include COVID-19 diagnostics and therapeutics and was limited 'to the extent necessary to address the COVID-19 pandemic.'[249] These provisions were inserted to assuage the concerns of pharmaceutical companies and vaccine developers that mRNA technology may later be used for other diseases or non-COVID-19 products, highlighting the fact that it is the interest of for-profit companies that are paramount in these negotiations.[250]

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245 Human Rights Watch, *Draft 'Pandemic Treaty' Fails to Protect Rights,* HRW (Nov. 7, 2023) https://www.hrw.org/news/2023/11/07/draft-pandemic-treaty-fails-protect-rights.

246 Keith Maskus & Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods,* 7(2) J. Int'l Econ. L. 295 (2004).

247 *See* Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System,* 7(1) Perspectives on Pol. 39 (2009).

248 *See* Laurence R. Helfer & Graeme W. Austin, Human Rights and Intellectual Property Mapping the Global Interface (Cambridge University Press, 2011).

249 Carlos M. Correa & Nirmalya Syam, *The WTO TRIPS Decision on COVID-19 Vaccines: What is Needed to Implement it?,* South Centre (Nov. 8, 2022), https://www.southcentre.int/wp-content/uploads/2022/11/RP169_The-WTO-TRIPS-Decision-on-COVID-19-Vaccines_EN.pdf.

250 *See generally* WTO Document WT/MIN(01)/DEC/2, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

Furthermore, the usage of the phrase 'COVID-19 pandemic' instead of just 'COVID-19' appears to be deliberate, implying that the waiver may expire if the disease ceases to be classified as a pandemic, even though the waiver is set to last for five years.[251] In December 2022, the negotiations were essentially over as the WTO members indefinitely extended discussions on whether to expand the waiver to COVID-19 diagnostics and therapeutics.[252]

Thus, there is a need to de-idealize forums that serve as convenient platforms to expand IP rights without adequate and substantive regard for and accommodation of the vulnerable voices of developing nations, and one such forum is the WTO. Christopher May similarly notes, 'the global governance of IPRs in the WTO (at least for the developing countries) is the real problem, foregrounding as it does the 'trade relatedness' of IPRs.'[253]

Furthermore, IP policies should be negotiated independently, not as a part of a package trade or investment deal. Conflating different international regimes, especially those that further private and commercial interests, has the potential to decentralize the voices and diversity of countries and distract policymakers and negotiators from balancing social welfare costs and gains and the domestic socio-economic conditions to protect free trade and foreign investments.[254]

Although realizing this goal would be challenging – as the pharmaceutical patent and knowledge system is embedded in power dynamics and patterns of subordination that dominant stakeholders may be motivated to preserve – it offers the most promising route for understanding and reshaping modern IP structures.[255] While strong IP rights may generally benefit countries with robust and thriving technological industries, they may not be suitable for countries that are net importers of technologies.[256] Indeed, many industrialized nations did not provide extensive IP rights protection, particularly for foreign technologies, during the early stages of their economic development, which allowed for reverse engineering and domestic technological advancement.

iii. Centring 'Flexibility' as a Vital IP Policy Issue

The third and perhaps more profound step is relinking the idea of 'domestic flexibility' and IP rights as it was during the early stages of the development of the Western patent system. The economic

251 *See* Anna Fisher-Pinkert & Sarah Fortune, *We're better off with mRNA vaccines,* Harvard T.H. Chan School of Public Health, https://www.hsph.harvard.edu/news/multimedia-article/were-better-off-with-mrna-vaccines/.

252 Carlos M. Correa & Nirmalya Syam, *The WTO TRIPS Decision on COVID-19 Vaccines: What is Needed to Implement it?,* South Centre (Nov. 8, 2022), https://www.southcentre.int/wp-content/uploads/2022/11/RP169_The-WTO-TRIPS-Decision-on-COVID-19-Vaccines_EN.pdf.

253 Lisa Forman, *From the Universal Declaration of Human Rights to a Pandemic Treaty: Will a Right to Medicines Forever be 'Under Construction'?,* 15(3) J. Hum. Rts. Prac. 715–726 (2023).

254 May, *supra* note 19, at 19.

255 Peter K. Yu, *The Non-Multilateral Approach to International Intellectual Property Normsetting, in* International Intellectual Property: A Handbook of Contemporary Research 112 (Daniel J Gervais ed., Edward Elgar Publishing, 2015).

256 Carys J. Craig, *Critical Copyright Law & the Politics of 'IP,' in* Research Handbook on Critical Legal Theory 301 (Emilios Christodoulidis et al. eds., Edward Elgar Publishing, 2019).

and cultural imperatives of many nations are different and stronger IP regimes only make sense once a certain level of technological capacity has been achieved. Non-industrialized countries (non-ICs) should be given more domestic policy space to craft their IP policies to suit their level of development. As Assafa Endeshaw rightly observes, 'the extant literature on the nature, forms, and impact of IP does not distinguish between the roles of non-ICs and ICs in IP lawmaking. It tends to jumble them together as if the state of economic and technological development of nations matters little to the forms and scope of the IP law they adopt.'[257] Thus, the diversity of nations should be central to IP policy by allowing for domestic legislative flexibility.

During the early 19th century, as explained in part 1 of this article, domestic policymakers had significant freedom to shape patent policies, which led to divergent laws across nations. The US, Germany, and France, for example, granted patents for different terms, while others like the Netherlands had varying initial terms based on the invention's nature. Countries like Switzerland, the Netherlands, and Japan refrained from granting patents for a considerable time, and the US didn't recognize foreign technologies for over six decades. Italy engaged in 'knock-off' productions until 1978, without facing immediate foreign sanctions. This liberty also extended to the recognition of pharmaceutical products and processes.

During this era, generic drug companies in developing countries could copy patented medicines and compete globally. This policy flexibility allowed indigenous firms to absorb innovation and knowledge from abroad and industrialize. For example, by the 1990s, Indian generic manufacturers offered some of the lowest prices worldwide.

This legislative liberty was undermined by the TRIPS Agreement. Charles McManis states that 'the field of international intellectual property law underwent a tectonic shift with the promulgation of the [TRIPS Agreement].'[258] It transformed the international patent system,[259] by transferring the pharmaceutical patent norm-setting from the domestic domain to the international level as well as elevating the significance of trade law in the patent system.[260] As other commentators note, '[t]he TRIPS Agreement represented a sea change in the international regulation of [intellectual property rights]'.[261]

The outcomes are now entry barriers for generic companies and limited generic versions of medicines/vaccines as we witnessed during the COVID-19 pandemic. The rationale behind 'domestic flexibility' is based on the fact that there is a need for the recognition of the disparities

257 R. Sherwood, *The TRIPS Agreement: Implications for Developing Countries,* 37 IDEA 491 (1997).

258 Assafa Endeshaw, *The Paradox of Intellectual Property Law-Making in the new Millennium: Universal Templates as Terms of Surrender for non-industrial Nations; Piracy as an Offshoot,* 10 Cardozo. Int'l & Compar. L. 47–77 (2002).

259 Charles R. McManis, *Teaching Current Trends and Future Developments in Intellectual Property,* 52 St. Louis Univ. L. J. 855, 856 (2008).

260 Peter K. Yu, *The Second Transformation of the International Intellectual Property Regime,* in Global Intellectual Property Protection And New Constitutionalism: Hedging Exclusive Rights 1 (Jonathan Griffiths & Tuomas Mylly eds., Oxford University Press, 2021).

261 James Gathii & Cynthia Ho, *Regime shifting of IP law making and enforcement from the WTO to the international investment regime,* 18(2) Minn. J. L. Sci. & Tech. 429, 444 (2017).

in technological developments between industrialized nations and low-income countries in the IP norm-making process. While industrialized nations are typically net exporters of technologies with a robust economy that can support expensive drugs, the opposite is often true for low-income countries. Low-income countries theoretically require sufficient policy space to manage knowledge goods to promote domestic industrialization and public health. Such policy freedom would theoretically facilitate the cross-pollination of ideas and regional technology/health security and promote local industrialization.

The IP experience of some East Asian countries during earlier stages of their development is quite instructive. They adopted weak IP systems, which freed up foreign technologies for domestic consumption and industrialization. Nagesh Kumar notes, 'the East Asian countries, viz., Japan, Korea and Taiwan have absorbed a substantial amount[s] of technological learning under weak IPR protection regime[s] during the early phases [of economic development]. These patent regimes facilitated the absorption of innovation and knowledge generated abroad by their indigenous firms. They have also encouraged minor adaptations and incremental innovations on the foreign inventions by domestic enterprises.'[262]

Britain and the US adopted the same strategy when they were 'developing countries.' Commenting on the early IP policies of Britain and the US, Dru Brenner-Beck states that 'former pirate activities [of these countries] strongly contributed to the development of the infrastructure and technical capacity necessary to ensure that the touted advantages of intellectual property protection actually materialize.'[263]

It is only fair that the same advantage be extended to low-income countries (beyond the least developed countries) to further their industrialization efforts. As Ha-Joon Chang rightly states, 'It seems unfair to ask modern-day developing countries to behave to a standard that was not even remotely observed when the now-advanced countries were at the similar, or even more advanced, stages of development.'[264] This approach ensures that the social welfare costs of protecting essential knowledge goods do not outweigh the social welfare benefits and empowers less affluent nations to decolonize their knowledge economy by providing IP protection for only products and processes that genuinely warrant protection given their local context and for the requisite duration. For instance, a flexible system based on product-specific terms may offer a more balanced approach to the patenting of pharmaceutical products and processes.[265] A flexible patent term would take into account different patented products and processes. As F.M. Scherer notes, a good patent policy 'would tailor the life of each patent to the economic characteristics of its underlying invention through a flexible system of compulsory licensing, under which the patent recipient

262 Frederick M. Abbott et al., International Intellectual Property in an Integrated World Economy 4 (4th ed., Wolters Kluwer Law & Business, 2019).

263 *See* Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development,* 38(3) Econ. & Pol. Wk. 209–25, 216 (2003), http://www.epw.org.in/show Articles.php?root=2003&leat=01&filename= 53 91&filetype=pdf.

264 Dru Brenner-Beck, *Do as I Say, Not As I Did,* UCLA Pacific Basin L. J. 84, 115 (1992).

265 Ha-Joon Chang, *Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues,* 2(2) J. Hum. Dev. 287, 293 (2001).

bears the burden of showing why his patent should not expire or be licensed at modest royalties to all applicants three or five years after its issue.'[266]

This flexible patent term would provide domestic policymakers more leeway to determine the length of a drug patent based on relevant factors such as utility, sunk costs, and social costs, thereby preventing the creation of unnecessary monopolies, especially in the Global South, where generics/researchers need faster access to these technologies to produce lower cost products.

The inadequacy of a fixed patent term becomes evident when considering secondary patenting of drugs, where a pharmaceutical company makes only an improvement or repurposes an existing drug without incurring significant R&D costs. Under such circumstances, the company is also entitled to a fixed twenty-year term even though it could recoup its R&D costs and make profits within five years. The non-discriminatory patent term structure of the TRIPS Agreement has the potential to generate unnecessary deadweight losses with detrimental effects on access to medicines.

Centring 'flexibility' in the IP policy praxis would also allow domestic players to prioritize international human rights commitments (for example, the right to health and medicines) over economic policies and corporate profits. For instance, authoritative legal and political interpretations of the right to health under international and regional law treaties have identified access to medicines as a critical element of this right, but the rigidness of the IP system may limit the ability of states to protect the right.[267] Lisa Forman notes, '…multiple general comments of the UN Committee on Economic, Social and Cultural Rights (CESCR or the Committee) have definitively read access to medicines into the right to health and other ICESCR rights. The primary locus for reading medicines into the right to health is found in General Comment 14 issued by CESCR in 2000, which offered a foundational definition of the right to health and of the scope and nature of the entitlement and duties it creates. The CESCR indicates that the right to health places concrete obligations on governments to assure access to accessible, affordable, and good quality health care, with essential medicines identified as part of a state's most essential and core obligations under this right.'[268]

Peter Yu notes, '(t)his principle of human rights primacy helps address the continued tensions and conflicts between the protection of human rights and the non–human rights aspects of intellectual property rights.'[269] For example, Resolution 2000/7 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights reminded governments 'of the primacy of human rights obligations over economic policies and agreements.'[270]

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266 F.M. Scherer, *Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation,* 62 Am. Econ. Rev. 422, 422–23 (1972).

267 *Id.* at 427.

268 Lisa Forman, Basema Al-Alami, & Kaitlin Fajberm, *An Inquiry into State Agreement and Practice on the International Law Status of the Human Right to Medicines,* 24(2) Health & Hum. Rts. 125 (2022).

269 Lisa Forman, *From the Universal Declaration of Human Rights to a Pandemic Treaty: Will a Right to Medicines Forever be 'Under Construction'?,* 15(3) J. Hum. Rts. Prac. 715–26 (2023).

270 Yu, *supra* note 259, at 3.

In the meantime, low-income countries need to critically reflect on how to effectively utilize the international patent system and TRIPS flexibilities to serve their national economic interests and technological needs. Currently, it appears that IP laws in many developing countries primarily exist to demonstrate compliance with international obligations to satisfy the prying eyes of powerful Western states. Instead of being implemented to serve local interests.[271] For instance, numerous African countries have thriving agri-based industries, including coffee, cotton, cocoa, and textile sectors producing traditional attire, as well as entertainment industries. It would be beneficial for such nations to devise and implement IPRs that specifically cater to these niche markets and domestic strengths. Thus, emphasizing IPRs such as copyrights, trademarks, and geographical indications would be valuable in this context.

This can be achieved by improving the institutional and administrative framework of these rights. For instance, IP offices and institutions in low-income countries should be properly staffed with development experts and other qualified officials and integrated with other relevant government departments or agencies. The experts would ordinarily understand the importance of balancing between individual and collective interests. Existing IP rules should be interpreted and implemented in a way that furthers the IP bargain, and not just the rent-seeking activities of the traditionally dominant players.

Overall, the analysis in this section exposes the enduring legacies of colonialism, the complex political and economic dynamics shaping intellectual property norms, and the varying interests in the IP norm-making process. It further shows the structural flaws within the pharmaceutical knowledge economy; a system that inherently neglects the local realities of developing nations and underscores how the market approach is inequitable in financing a public good; the system fails to differentiate between high-income and low-income countries. Additionally, the section highlights the power dynamics of global IP norm-making processes, which disproportionately favour a select group of affluent actors while disregarding the right to health and the well-being of impoverished populations.

While it remains a subject of intense debate whether low-income countries would fare better without the existing IP system or an improved IP system as discussed, considering other intersecting local challenges like corruption, inadequate infrastructure, and limited social resources, historical conceptions of the patent system and their impact on the development of nations highlights the need to reexamine the prevailing market-oriented knowledge regime, which has failed to adequately consider public welfare in the dissemination of protected technologies. To the extent that patents and other associated rights restrict competition and limit generics from entering the market in due time for the benefit of low-income countries, they are likely to have the effect of keeping prices artificially high, limiting generic competition, and undermining domestic innovation, which will make it more difficult for countries to respond speedily to health crises. The current system creates

271 UNHCR, *Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7* (Aug. 17, 2000) E/CN.4/Sub.2/RES/2000/7, ¶ 3.

a situation where drugs may exist but cannot be widely accessed because they are either expensive or not sufficiently available in the market due to the activities of big market players.[272]

Moreover, when low-income nations allocate their limited resources towards expensive patented medicines for one disease, fewer resources are available in healthcare budgets overall for other pressing development needs. If patents (including the other supplementary protections like trade secrets, data exclusivities, and patent linkages) are meant to serve the public welfare, then the patent bargain should arguably be structured in a way that encourages the affordability and accessibility of essential medications regardless of location. A good starting point is to consider the historical idea of domestic flexibility within the IP policy regime. Thus, the patent regime should aim not just for efficiency but also fairness and equity.

IV. Conclusion

The conceptualization of the patent system has undergone various stages of transformation, particularly in balancing private and public interests. As discussed in the previous sections of this article, the early philosophical underpinnings of the patent system allowed for a fruitful international exchange of ideas, and countries showed reluctance to grant patents to pharmaceutical products. The knowledge system was flexible, and countries adopted different policies that suited their level of development. This contributed to the industrialization of now-developed nations. When non-Western nations arrived on the global scene after gaining independence from formal colonialist structures, they also enjoyed the liberty that this system provided. They structured their pharmaceutical policies in a way that furthered their local and technological interests, leading to the production of cheap generic versions of drugs in countries like India.

However, the enactment of the TRIPS Agreement shifted the norm-making process from the domestic to the international level and notably elevated private rights above public interests. Despite the presence of exceptions within the Agreement, their effectiveness has been limited due to political pressures, complexities, and the continued expansion of private rights in various forums. The inequities in drug and vaccine access experienced during recent public health crises like the HIV/AIDS and COVID-19 pandemics have highlighted the stark imbalance in the production and distribution of patented technologies, with life-saving vaccines being priced exorbitantly and inaccessible in low-income settings. This new regime, bolstered by the TRIPS Agreement, contrasts with the early stages of patent regime development, during which IP rights were viewed as tools to advance public objectives, and in cases where these rights failed to meet such standards, they were revoked in some countries.

This article argues for an epistemological reconstitution of the IP norm-making process by outlining a non-exhaustive three-step approach: an understanding of the political and economic dynamics involved in the global IP norm-making processes, democratizing the IP norm-making processes, and centring the norm of 'domestic flexibility' in this exercise. This integrated approach aims to provide

272 B. Naomi, *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. 191–222 (2002).

policymakers in low-income communities the liberty to structure their patent system to suit their level of development and public health needs, which involves encouraging generic competition,[273] and reimagining the law to embrace multiculturism and social welfare.[274]

Policymakers in low-income countries should be empowered to address the distributional implications of patent rights and accommodate non-traditional perspectives on knowledge creation, ownership, and management.[275] Primary patents may not entirely be the problem in this context, but secondary patents and other supplementary protections such as trade secrets, data exclusivities, and patent linkages on non-active elements of drugs/vaccines continue to limit generic producers. The current approach that idealizes the global harmonization of IP rules, which has led to increasing expansion of IP rights, disregards the historical evolution of the patent system and how industrialized nations initially conceptualize it. It sustains the power dynamics in the IP law-making process that has insulated it from democratic restructuring despite empirical studies identifying the various social welfare costs.

273 *Id.* at 401.

274 *See* Anjali Vats & Deidre A. Keller, *Critical Race IP,* 36(3) Cardozo Arts & Ent. 735, 788 (2018).

275 *See* Walter Mignolo, *Epistemic Disobedience, Independent Thought and Decolonial Freedom,* 26 Theory, Culture & Soc'y 1 (2009).

276 *See* Vats & Keller, *supra* note 273, at 795.

African Practice in International Economic Law 2022-2023

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From 2022 - 2023, the international trade agenda of the African continent was dominated by steps taken towards the operationalization of the African Continental Free Trade Area Agreement (AfCFTA), an agreement of huge significance for future trade relations both between African States and between Africa and the outside world. With the AfCFTA being negotiated in stages amidst the continued euphoria surrounding its adoption, the AfCFTA Protocols adopted between 2022 - 2023 constituted a vital component of the fleshing out of the trade objectives envisaged under the AfCFTA Agreement. Meanwhile the growing challenge of climate change, the consequences of global climate policy for Africa's future industrial policies, a crisis in one of Africa's most successful regional economic blocs – the Economic Community of West African States (ECOWAS) – in the aftermath of the July 2023 military coup in Niger, the geopolitical and trade implications of the Russia-Ukraine war and the global backlash against Investor-State Dispute Settlement (ISDS) which reached a climax in 2022 with the mass withdrawal of many European Union (EU) member States from the Energy Charter Treaty were developments competing for the continent's attention. African Practice in International Economic Law in the period under discussion demonstrated the continent's measured assertiveness in charting its own course and seeking to speak with one voice at this pivotal transitional period in global economic relations and governance. The practice of the period equally demonstrates the continent's leveraging of and contribution to the dividends of international economic cooperation.

Introduction

The entry into force of the African Continental Free Trade Area Agreement (AfCFTA)[3] in May 2019 following the deposit of the 24th instrument of ratification, and the official launch of trading under the Agreement on 1 January 2021 ushered in a game-changing era of trade relations between African countries. The AfCFTA was adopted under the auspices of the African Union (AU) as a framework for boosting trade between African States (as well as facilitating industrialization, regional value chain development, job

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3 African Union, Agreement Establishing the African Continental Free Trade Area, 21 March 2018 (AfCFTA Agreement) <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf>

creation and economic growth on the continent). Considering its emphasis on increasing Africa's economic self-reliance and self-sustained development, the AfCFTA also looked set to affect the dynamics of Africa's future trade relations with the outside world. Between January 2022 to December 2023, there were 8 AfCFTA ratifications. This brought the total number of ratifications as at 2023 from 39 to 47, with 7 signatories (Benin, Liberia, Libya, Madagascar, Somalia, South Sudan and Sudan) yet to ratify the agreement, and only one out of all 55 member States of the African Union – Eritrea – yet to both sign and ratify the AfCFTA.[4]

Between 2022 – 2023, Africa made significant steps towards the operationalisation of the AfCFTA. Several AfCFTA protocols were finalised within this period including protocols on Investment, Competition Policy, Intellectual Property, Digital Trade, and Women and Youth in Trade. Additionally, the number of countries part of the Guided Trade Initiative increased with the latest admission of Nigeria and South Africa as members.

Considering the centrality of AfCFTA to the African trade agenda of the period under consideration, the first section of this article focuses on key developments in the operationalization of AfCFTA. These include national and regional implementation strategies developed for the AfCFTA, trade-related protocols that have been finalised under the AfCFTA and the AfCFTA Investment Protocol. The section also highlights the role of the Pan-African Payments and Settlement System (PAPSS). The section, in addition, discusses the AfCFTA legal framework on Economic Partnership Agreements (EPAs) and Free Trade Agreements (FTAs), which have been a prevalent feature in recent economic relations between African countries and Third Parties.

Section 2 of the article looks at the continued effect on Africa's trade relations of its heightened diplomatic and strategic importance in the wake of the 2022 Russia-Ukraine War and the crisis in the Economic Community of West African States (ECOWAS) triggered by the July 2023 military coup in Niger as well as its economic effects. In Section 3, African practice on the Energy Transition is discussed through the prism of the continent's participation at COP28. Section 4 discusses some recent development in trade involving African States, focusing on trade and trade-related disputes between African countries in regional courts. Lastly, Section 5 highlights a number of international investment (-related) agreements signed by African States during the period under discussion. It concludes by examining the future of the now controversial system of dispute settlement known as investor-State dispute settlement (ISDS) from an African perspective.

4 For the status of AfCTFA ratifications, see AfCFTA, 'State Parties' <https://au-afcfta.org/state-parties/>; Trade Law Centre (TRALAC), 'Status of AfCFTA Ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>

1. Developments in the Operationalization of the AfCFTA

As part of steps taken to operationalize the AfCFTA, AfCFTA State Parties made significant efforts to come up with implementation strategies for the AfCFTA Agreement between 2022 – 2023. AfCFTA implementation strategies are essentially policy documents and action plans State Parties are expected to prepare in order to expedite the implementation of the AfCFTA Agreement and realise its benefits at national as well as regional level. In these policy documents, State Parties as well as African regional integration organizations (RECs) identify areas of strategic national or regional interest and key interventions to be made in order to fully reap the benefits of the AfCFTA. AfCFTA State Parties are required to set up National Implementation Committees (NICs) to facilitate implementation.[5] So far, Kenya, Ghana, Nigeria, Côte d'Ivoire Tunisia, Comoros and Congo are some of the countries having a NIC.[6]

Kenya and Ghana (August 2022), Namibia (November 2022), Nigeria (December 2022) and ECOWAS (July 2023) were among countries/RECs that unveiled their AfCFTA implementation strategies between 2022 – 2023. The East African Community was in the process of developing its AfCFTA implementation strategy during the 2022-2023 period.[7] In all, at least 25 countries and RECs had unveiled their AfCFTA implementation strategies by 2022-2023, with countries like Cameroon, Guinea, Togo and Zimbabwe having already concluded the preparation of their national AfCFTA implementation strategies before 2022.[8]

The 2022- 2023 period also saw a continued expansion in the number of AfCFTA State Parties part of the Guided Trade Initiative (GTI). The GTI is an initiative launched in October 2022 by the AfCFTA Secretariat to kickstart meaningful trade among interested State Parties that have met the minimum requirements for commencing trade. As at

5 This requirement is in line with the Decision of the 31st Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Mauritania from 1–2 July 2018. On AfCFTA implementation strategies, ECA's role and NICs, see David Luke, Judith Ameso and Mahlet Girma Bekele, 'On Implementing the AfCFTA in 2021' (Enhanced Integrated Framework, 16 March 2021) <https://www.enhancedif.org/en/op-ed/implementing-afcfta-2021>; ECA, 'AfCFTA Implementation Strategies: Synthesis Report - January 2024', 26 March 2024 <https://www.uneca.org/afcfta-implementation-strategies>; Million Habte and Dirk Willem te Velde, 'How Implementation Committees are Moving the African Free Trade Area from Talks to Action' (World Economic Forum, 21 April 2023) <https://www.weforum.org/agenda/2023/04/moving-from-talks-to-implementation-of-the-african-free-trade-area-through-national-implementation-committees/>

6 Million Habte and Dirk Willem te Velde (note 5)

7 For news on the development of the EAC AfCFTA Implementation Strategy, see East African Community, 'EAC Experts Meeting on the Draft EAC Regional Strategy on the Implementation of the AfCFTA' <https://www.eac.int/news-and-media/calendar-of-events/event/956-eac-experts-meeting-on-the-draft-eac-regional-strategy-on-the-implementation-of-the-afcfta>

8 For the number of countries and RECs that had prepared and unveiled their national implementation strategies by December 2022, cf: ECA, 'Nigeria Validates Its AfCFTA Implementation Strategy', 7 December 2022 < https://www.uneca.org/stories/nigeria-validates-its-afcfta-implementation-strategy>; David Luke, Judith Ameso and Mahlet Girma Bekele (note 5)

January 2024, 12 State Parties had finalised their legal modalities to enable trade under the GTI to commence. The latest admission of South Africa and Nigeria in January and July of this year – 2024 - brings the total number of GTI countries to 14.

To support further operationalisation of the AfCFTA, and in particular the AfCFTA Trade in Goods Protocol, AfCFTA State Parties also concluded several trade – related protocols during the period under consideration. The following sub-section 1.1 will limit itself to three trade-related protocols, i.e. the Digital Trade Protocol, the Intellectual Property Protocol, and the Women, Youth and Trade Protocol. The objective of the sub-section is to analyse salient provisions of the trade-related protocols and provide an assessment of their legal nature in terms of their coming into force.

1.1 Latest trade and trade related AfCFTA Protocols.

1.1.1 AfCFTA Protocol on Digital Trade

The Digital Trade Protocol was concluded in February 2024 in Durban, South Africa, having been negotiated between 2022 – 2023. The general objective of the Digital Trade Protocol is to establish harmonised rules and standards that enable and support digital trade.[9] As a start, the Protocol defines a digital product as constituting "an electronic programme, text, video, image, sound, recording, or any other product that is digitally encoded, that is produced for commercial sale or distribution, and that can be transmitted electronically except for a digitised representation of a financial instrument, including money".[10] While this definition is limiting in terms of scope, AfCFTA Members' purpose is to adopt an Annex on Rules of Origin for digital products. [11]

The Digital Trade Protocol adopts the same approach as the World Trade Organisation (WTO) e-commerce moratorium by restricting State Parties from imposing customs duties on digital products transmitted electronically.[12] It also incorporates within its framework the standard Most-Favoured Nation (MFN) and National Treatment obligations, restricting State Parties from discriminating between imported and locally produced digital products. It permits State Parties to engage in digital trade preferential arrangements with Third Parties so long as such trade arrangements do not frustrate or impede the objectives of the Digital Trade Protocol.[13]

9 AfCFTA Digital Trade Protocol, Art. 3.

10 Ibid Art. 1.

11 Ibid Art. 5.

12 Ibid Art. 6.

13 Ibid Art. 7(3).

The Digital Trade Protocol addresses trade facilitation concerns in Part II of the protocol. Article 10 of the protocol mandates State Parties to accept electronic versions of trade administration documents as the legal equivalent of the paper version of such documents. In practice, it includes documents such as bills of lading, manifests, certificates of origin, and export and import licences. In order to facilitate online transactions, State Parties are to adopt laws and regulations to support electronic authentication for payments,[14] and permit contracts to be concluded electronically.[15]

The protocol also requires State parties to support cross border payments through the promotion of interoperability between digital payments and settlement systems.[16] To bring this into operation, an initiative spearheaded by the African Export-Import Bank, the Pan-African Payment and Settlement System (PAPSS) was launched in January 2022. [17] PAPSS is an online, cross border financial market infrastructure enabling payment transactions across the continent. PAPSS took effect before the Digital Trade Protocol was finalised. A more detailed discussion on PAPSS and its operation is captured later in Section 1.3.

The protocol recognises that digital trade finds anchorage in infrastructure. To this end, Article 18 of the Digital Trade Protocol obligates State Parties to promote the development of digital infrastructure through for example, fostering partnerships between governments, investors, financial institutions and development partners. Additionally, State parties are to support logistics and last mile delivery through the enhancement of the regulatory environment for the operation of logistic companies, establishment of transport coordination mechanisms among themselves, promoting international multimodal transport and interconnectivity between different modes of transports, among other things. [18]

The Digital Trade Protocol also regulates non-trade related issues which may arise in the course of cross border digital trade. Article 14 of the protocol, for example, requires AfCFTA State Parties to adopt and maintain digital identity regimes for both natural and juridical persons. Part IV of the protocol speaks to data governance. Specifically, Article 21 of the protocol expects State Parties to adopt or maintain data protection laws and regulation for both natural persons involved in digital trade.

14 Ibid Art. 9.

15 Ibid Art. 12.

16 Ibid Art. 15.

17 See for the launch of the Pan- African Payment and Settlement System, Afreximbank, 'Pan-African Payment and Settlement System Launched by President Akufo-Addo Foreseeing $5 billion Annual Savings for Africa', Press Release, 13 January 2022 <https://www.afreximbank.com/pan-african-payment-and-settlement-system-launched-by-president-akufo-addo-foreseeing-5-billion-annual-savings-for-africa/>

18 AfCFTA Digital Trade Protocol, Art. 11.

1.1.2 AfCFTA Competition Policy

Ordinarily, competition law seeks to safeguard competition in markets by prohibiting anti-competitive behaviour such as abuse of dominance, and regulating mergers and acquisitions with the aim of reducing the risk of monopoly. The inclusion of competition law chapters in FTAs or as separate protocols to FTAs is to ensure that the expected benefits from trade liberalisation are not countered by the effects of anti-competitive behaviour of entities operating in the liberalised market.[19]

The AfCFTA Competition Policy was adopted in February 2023, adding another layer to the already existing, five regional competition regimes. The five pre-existing competition regimes include the East African community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the Central African Economic and Monetary Union (CEMAC), and the Economic Community of West African States (ECOWAS). [20] The Competition Policy applies to economic activities by persons or undertakings within or having significant effect on competition in the market or conduct with continental dimension and having significant effect on competition in the market.[21] The Competition Policy takes cognisance of the fact that a number of State Parties have their own national competition regulations. Therefore, it restricts its application from extending to matters within the respective jurisdictions of the national competition authorities.[22] Moreso, the Competition Policy expressly excludes labour-related issues aimed at advancing employment terms and conditions as well as employees collective bargaining agreements from the scope of its application.[23]

Part II of the Competition Policy regulates anti-competitive business practices and conduct. The section outlaws corporate practices such as abuse of dominance, imposition of minimum resale prices by undertakings, collusive tendering and mergers and acquisitions that are likely to result in preventing, restricting or distorting competition in the market among others. The policy mandates the notification of mergers and acquisitions that have continental dimensions.[24] The exact threshold for notification is to be set in a regulation. The AfCFTA Competition tribunal is established in Article 24 of the policy to handle implementation of the policy.

19 Willard Mwemba, 'The African Continental Free Trade Area Competition Protocol: A Necessity or an Overzealous Endeavour?' (2003) Competition Law International, Vol. 19 (2), p. 186.

20 Vellah Kedogo Kagwiri and Tom Buthe, 'The Spread of Competition Law and Policy in Africa : A Research Agenda' (Fall 2020) African Journal of International Economic Law, Vol. 1, pp. 56-61.

21 AfCFTA Competition Policy, Art. 3.

22 Ibid Art. 3(2).

23 Ibid Art. 4.

24 Ibid Art. 10.

1.1.3 AfCFTA Protocol on Intellectual Property

Intellectual property is integrally linked to trade in goods and services, protection of investment and regulation of competition law. Intellectual property rights may restrict the importation of goods and services from one country to another because of their territorial nature.[25] Perhaps this is what the drafters of the Intellectual Property Protocol had in mind, as the objective of the Protocol as captured in the preambular section is to "harmonize the rules and principles on intellectual property rights to boost intra-African trade in line with the objectives of the Agreement Establishing the African Continental Free Trade Area and promoting economic growth and development within the continent".[26] Just like the Competition Policy, the AfCFTA Intellectual property protocol takes the stage in an already fragmented intellectual property architecture alongside the sharp disconnect between regional aspirations and sub-regional realities.[27]

The AfCFTA Intellectual Property Protocol was adopted in February 2023 in Addis Ababa, Ethiopia. The protocol aligns with the objective of Article 4(3) of the AfCFTA Agreement which states that, " state parties shall cooperate on investment, intellectual property rights and competition policy". Additionally, Article 7 of the AfCFTA Agreement mandates AfCFTA Members to enter into Phase II negotiations on these three topics. The AfCFTA Agreement recognises the protocols together with their annexes and appendices as constituting integral parts of the Agreement.[28]

The scope of application of the protocol includes plant variety protection, geographical indications, marks, patents, utility models, industrial designs, undisclosed information including trade secrets, layout designs (topographies) of integrated circuits, copyright and related rights, traditional knowledge, traditional cultural expressions, genetic resources, emerging technologies and other emerging issues. [29] The AfCFTA intellectual property rights cover products that have been introduced into the African market by the intellectual property rights holder or with their consent.[30]

The Protocol delegates the enforcement mandate to the AfCFTA State Parties.[31] Although the Protocol establishes an intellectual property office, its mandate, structure and composition is to be established by the AfCFTA Council of Ministers.

25 Alexander Peukert, 'Territoriality and Extra-territoriality in Intellectual Property Law' in G. Handl and J. Zekoll, J (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Nijhoff, 2012), pp. 189-228.

26 AfCFTA Protocol on Intellectual Property, Preamble, see also Art. 2(1).

27 Titilayo Adebola, 'Mapping Africa`s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol' (Fall 2022) African Journal of International Economic Law, Vol.1, p. 235.

28 AfCFTA Agreement, Art. 8.

29 AfCFTA Protocol on Intellectual Property, Art. 3.

30 Ibid Art. 7.

31 Ibid Art. 25.

1.1.4 AfCFTA Protocol on Women, Youth and Trade

The Women, Youth and Trade protocol corresponds to the objective of the AfCFTA Agreement to promote and attain sustainable and inclusive economic development, gender equality and structural transformation of the State Parties.[32] Further to this, the AfCFTA Agreement substantively warrants State Parties to mobilise resources to improve the export capacity of both formal and informal service suppliers with particular attention to micro, small size, women and youth suppliers. [33] This same obligation to State Parties is reiterated in the AfCFTA Protocol on Trade in Services,[34] and the AfCFTA Digital Trade Protocol.[35]

The Women, Youth and Trade Protocol defines a women or youth-led business to be one that is at least twenty-five percent owned by one or more women or youth, or whose management and control lie with one or more women or youth who make important strategic and operational decisions of the business.[36] In terms of ownership, the protocol qualifies a women or youth-owned business as one that is more than fifty percent owned by a woman or a group of women, or by a youth or a group of youth.[37] The Protocol designates the age limit for youths to be between that of above the age of majority and below thirty- five.[38]

Substantively, the Women, Youth and Trade Protocol seeks to guarantee affirmative action by State Parties towards women and youth-led (and owned) businesses in order to facilitate their participation in international trade. In this regard, it contains several state obligations including, elimination of non-tariff barriers, provision of access to finance, protection of intellectual property, enhancement of digital trade, etc. The protocol retains State Parties` rights to introduce new regulations on trade activities relating to women and youth. However, State Parties have a five-year period from the time of entry into force of the protocol to align their national laws, regulations and policy with the protocol.[39]

Comments on the trade-related protocols.

In terms of enforcement, all the trade related AfCFTA Protocols mandate that any dispute arising from the Protocols shall be settled in accordance with the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes. While this can be seen as a step in the right direction, this provision is not pragmatic for the AfCFTA Protocol on Women, Youth and Trade. This is because a majority of the state obligations in the Protocol are best endeavour clauses, dependent

32 AfCFTA Agreement, Art. 3(e).

33 Ibid Art. 27(2)(d).

34 AfCFTA Protocol on Trade in Services, Art. 27(2)(d).

35 AfCFTA Protocol on Digital Trade, Art. 31.

36 AfCFTA Protocol on Women, Youth and Trade, Art. 1.

37 Ibid.

38 Ibid.

39 Ibid Art. 26(2).

majorly on availability of economic resources and provision of technical assistance to State Parties. Notwithstanding this, the best endeavour clauses could still be utilised by State Parties in aligning their national laws with international best practices.

One other issue that this paper calls to attention is the legal effect of the finalisation of the AfCFTA trade-related protocols. All these protocols simply have a clause to the effect that they shall be open for signature and ratification by state parties, in accordance with their respective constitutional procedures.[40] The aforementioned clauses provide an entry into force sub-clause that ordinarily makes reference to Article 23(2) and Article 23(3) of the AfCFTA Agreement. Article 23(2) of the AfCFTA Agreement provides that the AfCFTA Protocols on Investment, Intellectual Property and Competition Policy and any other instrument within the scope of the AfCFTA Agreement shall enter into force thirty days after the twenty-second ratification by a State Party. No updates have so far been provided on the State Parties who have ratified the trade related protocols that have been finalised. This is unlike the AfCFTA Agreement that has ratification status list that is periodically updated to reflect the latest AfCFTA State Parties.
This therefore puts to question the legal effect of the finalisation of the 2022-2023 trade-related protocols.

1.2 The AfCFTA Investment Protocol (AIP)

The crucial importance of the AfCFTA Investment Protocol to the AfCFTA project cannot be underestimated. Investment plays a highly significant role in the economic development and prosperity of States and regions. Yet, despite the well-known examples of South African and Nigerian companies investing in retail, banking, telecommunications, energy and other sectors in various African countries[41], the volume of intra-continental investment in Africa has been significantly low compared to that in other regions of the world (eg. Asia, Europe and North America). Increasing the volume of intra-African investment has therefore long been seen as an important goal of African economic integration, with huge potentials of strengthening the economic resilience of the continent.

Hence with the goal of promoting, facilitating and protecting intra-African investments, the AfCFTA Investment Protocol (hereafter AIP or Investment Protocol) was adopted by the 36th Ordinary Session of the AU Assembly of Heads of State and Government held in Addis Ababa in February 2023. The Protocol which is expected to boost intra-African trade by more than 81 percent in the

40 See for example Article 47 of the AfCFTA Digital Trade Protocol, Article 26 of the Women, Youth and Trade Protocol.

41 See, for example, Yash Ramkolowan, Stephanie Craig and Samantha Munro, 'The Dynamics of South African Investment in the Rest of Africa', Global Economic Governance Africa, Discussion Paper, October 2018 <https://saiia.org.za/wp-content/uploads/2018/10/GA_Th3_DP-Ramkolowan-Craig-Munro_20181023.pdf>; Edwin Agwu, 'Foreign Direct Investments: A Review from the Nigerian Perspective' (2014), Research Journal of Business & Management (RJBM), Vol.1(3) <https://ssrn.com/abstract=3122352; GA_Th3_DP-Ramkolowan-Craig-Munro_20181023.pdf (saiia.org.za) >

next decade[42] will enter into force 30 days after the deposit of the 22nd instrument of its ratification. The text of the Protocol adopted in February 2023 is currently not made public. However, the January 2023 draft,[43] which is not expected to differ from the draft adopted in February 2023, reveals notable features of the Protocol which include:

- an enterprise definition of investment (in other words, a definition that makes the establishment, acquisition or expansion of a company in a host African State a condition for an allocation of resources to qualify as an investment promoted and protected by the Protocol. This enterprise definition aligns with the view of many African States that the establishment of an enterprise in a host State makes more tangible and lasting contribution to the development of the State and local industry than portfolio investments (such as the ownership of government bonds or company stocks). The latter are more short-term and speculative in nature and are infact explicitly excluded from the scope of investments covered by the Protocol (Article 1),

- a duty of African States to promote and increase awareness of Africa as the preferred investment destination and to provide financial and other incentives that would attract investments – including low carbon investments – to the continent (Articles 6, 7 and 8),

- the establishment of a Pan-African Trade and Investment Agency as a technical institution of the AfCFTA secretariat to assist governments, their investment promotion agencies and private sector in their investment activities (Article 42),

- the innovative provision in the Protocol for national focal points that will support investors from other State parties by providing them with relevant information on legal, policy and institutional frameworks governing investments in the host State (Article 9),

- a strong emphasis on sustainability as well as the Protocol's leveraging of best practices and "decades of investment policy reform"[44] contained in global and African instruments such as the Pan-African Investment Code, the investment instruments of Africa's pre-existing regional economic communities (RECs), national investment laws, bilateral investment treaties (BITs) concluded by African States, as well as other relevant international investment instruments (preamble and provisions),

42 Baker Mckenzie, 'Africa: The African Continental Free Trade Area Investment Protocol - The Start of a New Era in Sustainable Trade and Investment', 14 March 2024 <https://insightplus.bakermckenzie.com/bm/international-commercial-trade/africa-the-african-continental-free-trade-area-investment-protocol-the-start-of-a-new-era-in-sustainable-trade-and-investment>

43 African Union, Protocol on Investment to the Agreement Establishing the AfCFTA (AfCFTA Investment Protocol) (2023), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/5114/afcfta-investment-protocol-2023->

44 Danish, Hamed El-Kady, Makane Moïse Mbengue, Suzy H. Nikièma and Daniel Uribe, 'The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and What's Next for the Continent?' (International Institute for Sustainable Development, Investment Treaty News, 1 July 2023) <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/>

- investor protections, namely national treatment, most favoured nation treatment, "administrative and judicial treatment", "physical protection and security", protection against expropriation, and the ability to transfer funds in and out of the country. As evidence of its focus on investment policy reform, the Protocol explicitly clarifies that "administrative and judicial treatment" replaces "fair and equitable treatment"(a broadly phrased catch-all clause found in older generation investment treaties, which has been controversially used by investors to challenge almost any State measure to the perceived detriment of States). Also "physical protection and security" replaces the more expansive term "full protection and security" found in older investment treaties (Articles 12 - 23), a balancing of investor protections with investor obligations towards African host States and communities, including "investment-related human rights" (Articles 31 - 40),
- an affirmation of the right of African States to take, in accordance with international law, regulatory measures that may affect investments inorder to safeguard certain public goals (including sustainable development, climate action and essential security interests); also, a clarification that such regulatory action can neither give rise to compensation claims by investors nor, when taken by an African State party to comply with other relevant treaty obligations, constitute a State breach of the AIP (Article 24).
- a definition of the "investor" national whose investments are protected by the Protocol by reference to the criterion of effective or dominant nationality (for individuals/natural persons with dual African nationality) as well as by reference to the twin criteria of incorporation/registration in the "Home" African State and maintenance of a statutory seat together with substantial business activities in that "Home State" (for companies or legal persons). Since the Protocol defines an investor as "a national of a State Party" investing "in the territory of another State Party", its reformist[45] stipulation that a dual national must be deemed to be exclusively a national of his/her country of effective nationality or place of ordinary/permanent residence helps clarify which nationality/place of residence will be used to determine whether a dual national is investing in "another State party" - and thus entitled to investor protections - when (s)he invests in an African State whose nationality (s)he possesses (Article 1).

1.2.1 Comments on the AfCFTA Investment Protocol

The existence of a plethora of African agreements regulating investment naturally raises questions as to the added value of the AIP as well as the future relationship between the Protocol and these already existing African agreements (which as at 2022 include as many as 173 intra-African bilateral

45 See Javier Garcia Olmedo, "Dual Nationals in Investment Treaty Arbitration: An Emerging Field of Inconsistent Decisions" (EJIL Talk! Blog, 27 July 2023) <https://www.ejiltalk.org/dual-nationals-in-investment-treaty-arbitration-an-emerging-field-of-inconsistent-decisions/> for the controversy surrounding situations where an investor possesses the nationality of both the respondent investment-hosting State and another contracting State. With this stipulation in the AIP, a dual national whose effective nationality is that of the State (s)he has invested in will arguably not qualify as an investor "in the territory of another State Party" (in line with the AIP's primary goal of boosting investment between rather than within African States).

investment agreements[46] as well as several agreements with investment provisions adopted under the auspices of the RECs). An obvious added value of the Protocol is that it provides an investment framework that covers the entire continent, thus uniting African countries which even if already parties to bilateral investment treaties signed between two African States (intra-African BITs), have not signed intra-African BITs or REC agreements containing investment provisions between themselves. However, the Protocol itself points to an added and crucial significance it has for future investment relations on the African continent and beyond.

The relevant provision is Article 49 which remarkably provides for the Protocol's replacement of all existing bilateral investment treaties concluded between AfCFTA Member States five years after the coming into force of the Protocol, together with any survival clauses contained in those BITs (i.e clauses which heighten stability of commitments made under an agreement by providing for continued applicability of certain provisions beyond the agreement's termination). The provision also prohibits AfCFTA State Parties from concluding new BITs between themselves "after the adoption" of the Protocol. It, further, requires them to make "best endeavours to review and revise" relevant existing investment agreements adopted by the RECs inorder to achieve alignment with the Protocol within 5-10 years of the latter's entry into force. Lastly, the provision goes on to prescribe what should be the approach of the parties to the Protocol in their future investment relations with third parties or countries outside Africa. It states that AfCFTA State parties "may take into account" the contents of the Protocol when negotiating new international investment agreements and reviewing existing international investment agreements with such third Parties.

From the foregoing, it is evident that the Protocol has the added value of harmonizing investment policy in the AfCFTA single market (an aim given added significance by the Protocol's reform-oriented protections). Thus, in the case of existing intra-African BITs, the "replacement principle" of the Investment Protocol would apply to end future application of BIT provisions that are inconsistent with or overlap with the Protocol's provisions. While the best efforts duty of State parties to align investment agreements concluded under the auspices of the RECs with the Protocol paves way for reconciling conflicts and overlaps between the Protocol and relevant REC agreements (which remain in force since Article 5 AfCFTA treats the RECs and their agreements as building blocks of the AfCFTA).

Lastly, Article 49's stipulation that State parties "may take into account" the contents of the Investment Protocol when negotiating new international investment agreements and reviewing existing international investment agreements with third Parties brings the added value of ensuring that Africa as much as possible "speaks with one voice" in its investment relations with the outside world. This is because while the use of the word "may" implies they are not bound to take the Protocol into account in their extra-African investment relations, African States are nonetheless

46 Thomas Kendra, Lédéa Sawadogo-Lewis and Georgia Crawford, 'Zooming in on the Investment Protocol to the AfCFTA: A New Era for Investment Disputes across Africa?' (Hogan Lovells, Engage: Legal Insights and Analysis, 20 June 2023) <https://www.engage.hoganlovells.com/knowledgeservices/news/zooming-in-on-the-investment-protocol-to-the-afcfta-a-new-era-for-investment-disputes-across-africa>

encouraged by the provision to rely on the Protocol – which represents a common African position on investment – in negotiating and revising their investment agreements with non-African parties. Therefore, a non-African country or entity seeking to negotiate a new investment treaty with an African country or to revise an existing one can expect the AIP and its reform-oriented provisions to shape negotiations.

The future of intra-African BITs as prescribed by Article 49 echoes the EU's years long campaign to terminate intra-EU investment treaties within its territory, which achieved its most public expression in the landmark ruling of the European Court of Justice in Achmea[47] that reverberated across Europe as well as the Multilateral Agreement for the Termination of All Intra-EU Bilateral Investment Treaties signed in May 2020 by 23 EU member States.[48] It remains to be seen whether the member States of the African Union in deciding to terminate all intra-African BITs will encounter the same legal questions faced by the EU with regard to its termination of intra-EU BITs. One such question is whether the termination of an intra-continental BIT and/or its survival clauses validly operates to nullify any rights an investor may have acquired prior to such termination.[49]

1.3 The Pan-African Payments and Settlement System (PAPSS)

PAPSS was developed by the African Export-Import Bank (Afreximbank) in collaboration with the African Continental Free Trade Area (AfCFTA) Secretariat and formally launched in January 2022. The system enables businesses in Africa to receive and make payments for intra-African trade transactions instantly and in their local currencies.[50] This centralized simple, risk-controlled payment clearing and settlement system for intra-African trade[51] partly realises the broader vision of a Pan-African monetary union which formed part of early discussions on the AfCFTA[52] and which though ultimately not adopted in the Agreement, continues to capture the imagination of many on the continent.

47 Slowakische *Republik v Achmea* BV, European Court of Justice, Judgment of 6 March 2018 (Case C-284/16) [GC].

48 See European Commission, 'EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties', 5 May 2020

<https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en>

49 See Natalie Colin, Gregorio Pettazzi, Alexandre Alonso and Florence Frühling, 'The EU's Campaign to End Intra-EU Investor-State Arbitration: Pushing Investor Creativity' (Freshfields Bruckhaus Deringer, 2024), <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2024/eu-campaign-to-end-intra-eu-investor-state-arbitration-pushing-investor-creativity/>; also Art 70 (1)(b) of the Vienna Convention on Law of Treaties where it states: Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

50 Mike Ogbalu III, 'Boosting the AfCFTA: The Role of the Pan-African Payment and Settlement System: A Commentary'(The Brookings Institution, 11 February 2022) < https://www.brookings.edu/articles/boosting-the-afcfta-the-role-of-the-pan-african-payment-and-settlement-system/ >; Pan-African Payment and Settlement System, 'Afreximbank and AfCFTA announce the Operational Roll-out of the Pan-African Payment and Settlement System (PAPSS)' (Cairo and Accra, 28 September 2021)

<https://papss.com/media/afreximbank-and-afcfta-announce-the-operational-roll-out-of-the-pan-african-payment-and-settlement-system-papss/>

51 See Pan-African Payment and Settlement System, 'About PAPSS' <https://papss.com/about-us/>

With money being the lifeblood of any economy – including a regional economy like AfCFTA – and a well-implemented payment infrastructure being its circulatory system[53], the importance of PAPSS for facilitating the operation and smooth running of the AfCFTA cannot be underestimated. Before PAPSS, African businesses and their local banks used correspondent banks – often outside of Africa – to settle payments between two African countries, in a third and external currency, usually dollars or euros, This arrangement entailed currency conversion costs amounting to as much as 5 billon US dollars annually as well as foreign exchange and liquidity requirements for individual African central banks involved in the process.[54] With PAPSS, which works in conjunction with African central banks to facilitate direct transactions among the more than forty currencies used throughout the continent, African currencies will be convertible without a need to rely on external currencies.[55] Businesses will be able to pay and receive payment instantly via their local bank accounts in their local currencies. This would save businesses across the continent billions in transactions costs each year.

The first phase of PAPSS' implementation took place in 2022 and in that phase African central banks and the PAPSS connected with 25 of the largest commercial banks in Africa, including Djibouti's Saba African Bank, Nigeria's United Bank for Africa and Ghana's GCB Bank. In the second phase of PAPSS' roll out in 2022, fintech companies such as MFS Africa joined PAPSS, with MFS thereby extending its reach to over 320 million people across 35 African markets.[56]

Amidst the calls in Africa for monetary union and considering strong reservations regarding the African continent's readiness for a full blown monetary union,[57] PAPSS stands out as the mechanism that best satisfies the immediate monetary system needs of the continent-wide market place now established under the AfCFTA.

52 Julia Conrad, 'What We learn from WAEMU for Regional Integration on the African Continent' (Harvard Growth Lab, 15 August 2022)

< https://growthlab.hks.harvard.edu/blog/what-we-learn-waemu-regional-integration-african-continent#16>

53 Mike Ogbalu III (note 50)

54 United States International Trade Administration, 'Pan-African Payment and Settlement System', 5 November 2022, <https://www.trade.gov/market-intelligence/pan-african-payment-and-settlement-system >

55 Zainab Usman and Alexander Csanadi , 'Latest Milestone for the African Continental Free Trade Area: The Pan-African Payment and Settlement System' (Carnegie Endowment for International Peace, 7 February 2022) < https://carnegieendowment.org/posts/2022/02/latest-milestone-for-the-african-continental-free-trade-area-the-pan-african-payment-and-settlement-system?lang=en>

56 Tyler Pathe, 'MFS Africa Joins PAPSS in a Massive Step Forward for Intra-African Trade' (The Fintech Times, 17 February, 2022) <https://thefintechtimes.com/mfs-africa-joins-papss-in-a-massive-step-forward-for-africa>

57 See for example, Célestin Monga, Africa Isn't Ready for Currency Unions (CGTN, 26 February 2020) <https://news.cgtn.com/news/2020-02-26/Africa-isn-t-ready-for-currency-unions-Onpo4LNene/index.html>; Giuseppe Fontana and Mohamed Sheriff Hamid Kamara, Towards Monetary Union in the Economic Community of West African States (ECOWAS): Better Policy Harmonisation and Greater Intra-Trade are Needed' (2003) Journal of Policy Modeling, Vol. 45 (1), pp. 58-73

1.4. AfCFTA and Economic (Trade and Investment) Partnership Agreements

In the backdrop of the finalisation and operationalisation of the AfCFTA Agreement and its protocols, AfCFTA State Parties have negotiated, or are in the process of negotiating Economic Partnership Agreement with Third Parties. While some African countries are negotiating such EPAs as individual State Parties, others are doing so collectively as members of a regional trade agreement. This section of this paper highlights the growth and development of Economic Partnership Agreements between African countries and Third Parties between 2022-2023 and how such trade arrangements fit into the overall AfCFTA framework.

1.4.1 The Prevalence of Economic Partnership Agreements between African and Third Parties

Economic Partnership Agreements (EPAs) are essentially treaties that envisage the creation of a Free Trade Area between two or more countries. Based on the principle of reciprocity, countries in an EPA commit not to charge duties on goods imported and exported between them. EPAs ordinarily cover trade in goods and services and also beyond the border issues such as competition, government procurement, intellectual property and trade facilitation.[58]

Trade agreements between developing and Least Developed Countries (DCs and LDCs) on one hand and developed countries on the other hand, can either be under the Enabling Clause framework, the Generalised System of Preferences or the general Article XXIV GATT on the formation of Customs Unions and Free Trade Areas.

The Generalised System of Preferences (GSP) was granted in 1971 at the request of certain developed countries. Its origins can be traced to the 1964 United Nations Conference on Trade and Development (UNCTAD).[59] Essentially, the GSP allows developed countries to grant trade preferences to developing countries and LDCs, without extending the same to all other GATT Contracting Parties.[60] The Enabling Clause re-enacted the terms of the 1971 GSP decision, albeit on a permanent basis. It is a product of the Tokyo multilateral trade round. The formal name of the Enabling Clause is the 1979 "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries".[61]

58 Marieke Meyn, 'Economic Partnership Agreements: A 'Historic Step' Towards a 'Partnership of Equals'?' (2008) Overseas Development Institute, Vol. 26, p. 4.

59 Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community GSP Programme' (2013) Journal of International Economic Law, Vol. 6 (2), p. 508.

60 Ibid.

61 Lawrence E. Hinkle and Maurice Schiff, 'Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective' (2004) The World Economy, Vol. 27 (9), p.1324.

According to the conditions attached to the Enabling Clause, the differential treatment of developing countries must accordingly be designed to promote and facilitate the trade of developing countries, and must not create obstacles for the trade of countries not parties to the preferential arrangements.[62] The commonality between GSP and preferences granted by the Enabling clause is that they are both granted on a voluntary basis.

At the moment, a number of trade preferences are granted by developed countries to LDCs and developing countries under the premise of the Enabling Clause. These include the Everything But Arms Initiative, granted by the European Union, and the Africa Growth Opportunity Act (AGOA). The Everything But Arms Initiative removes all restrictions, tariffs and non-tariff quotas, on virtually all exports, except for arms from thirty-three LDCs to the European Union. [63]AGOA on the other hand provides trade preferences to Sub-Saharan African exports of eligible products to the United States.[64] This essentially means that all countries in the AGOA eligibility list are able to export certain products to the United States, quota free or duty free.

Unlike trade arrangements made under the Enabling Clause, EPAs are legally binding bilateral contracts that operate on a reciprocal basis, meaning that in a given number of years, the developing country or LDC will open its markets to the developed country`s goods and services. As of end of the last quarter of 2023, the European Union was at that time negotiating 79 EPAs with countries in the African, Caribbean and Pacific (ACP) regions.[65]

In December 2023, Kenya signed an EPA with the EU. The EU-Kenya EPA aims to implement the provisions of the EU-East African Community (EAC) EPA that was concluded in 2014. The scope of the agreement includes trade in goods, fisheries and agriculture. In the agreement, Kenya commits to liberalise 82.6% percent of imports from the EU, with the remainder to be liberalised between 15-25 years. Other African countries still in the negotiations phase of an EPA with the EU include Comoros Madagascar, Mauritius, Seychelles and Zimbabwe. The United Kingdom (UK) also concluded its first EPA with its first African country, Nigeria between 2022-2023.

The 2022 - 2023 period also saw the commencement of talks for the renewal of the AGOA Initiative which is set to expire in 2025. The talks were initiated after the conclusion of the 20th AGOA Forum that took place in South Africa.[66] If extended, which is more likely to be the case, the initiative

62 Abdulqawi A. Yusuf, 'Differential and More Favourable Treatment: The GATT Enabling Clause' (1980) Journal of World Trade Law, Vol. 14 (6), pp. 488-507.

63 Wusheng Yu and Trine Vig Jensen, 'Tariff Preferences, WTO Negotiations and the LDCs: The Case of Everything But Arms Initiative' (2005) The World Economy, Vol. 28 (3), p. 377.

64 Nathaniel PS Cook and Jason Cannon Jones, 'The African Growth Opportunity Act (AGOA) and Export Diversification', The Journal of International Trade & Economic Development (2015), Vol. 24 (7) p. 947.

65 See Trade Law Centre Africa (TRALAC), 'EU Economic Partnership Agreements resources' <https://www.tralac.org/resources/by-region/eu-epas.html >

66 Calvin Manduca, 'AGOA Renewal: Committing to trade and development in Africa' (Institute for Agriculture and Trade Policy, 31 January 2024) <AGOA renewal: Committing to trade and development in Africa | IATP>

would have a further lifeline of 16 years, extending the duty free and quota free market access of the 32 AGOA beneficiaries to the United States (US) market until the end of 2041. The AGOA Renewal and Improvement Act (2024) aims to expand its geographical scope beyond Sub-Saharan African countries to countries in North Africa in an effort to support the development of intra-African supply chains. At the moment, African countries are calling for an expansion of the product lines benefitting from the scheme, with the EAC specifically hoping for the inclusion of services in the trade deal.[67]

During the AGOA extension negotiations talks, the US in October 2023 removed Uganda, Gabon, Niger and the Central African Republic (CAR) as beneficiaries of the scheme. The US cited rule of law related reasons for withdrawing the preferences to Gabon and Niger. Uganda on the other hand was excluded on the ground of "gross violations of internationally recognised human rights".[68] The impact of this decision by the US on the four countries has been stated to be minimal as the four countries had a low utilisation rate of the AGOA initiative.[69]

Another EPA still in the pipeline in terms of negotiations between 2022-2023 is the Kenya – United States Strategic Trade and Investment Partnership (STIP). The US intends to use STIP as a blueprint for negotiating trade arrangements with other sub- Saharan African countries. The STIP is regarded by the two countries as a placeholder for an FTA. The overriding objectives of the STIP are to "increase investment, promoting sustainable and inclusive economic growth, benefiting workers, consumers, and businesses, and supporting African regional economic integration."[70] It covers topics such as digital trade, agriculture, trade facilitation, and customs procedures. Having highlighted the existence of a number of FTAs between African and Third Parties countries, the next sub-section of the paper analyses how the AfCFTA Agreement regulates such EPAs within its legal framework.

1.4.2 AfCFTA Provisions on Economic Partnership Agreements

Article 5 of the AfCFTA Agreement sets out a number of guiding principles that are to guide its implementation. One such principle that is important in the context of EPAs between African and Third Parties is the principle of transparency. Article 17(2) of the Agreement places an obligation on each State Party to notify other State Parties of any actual or proposed measure that is either material to the operation of the AfCFTA Agreement or substantially affects other State Party`s interest in the AfCFTA Agreement.[71] Article 17(3) AfCFTA Agreement additionally requires State Parties

67 Herald Aloo, 'EAC hopes Revised AGOA Deal will Include Services and Relax Visa Requirements' (The Africa Report, 5 June 2024) <https://www.theafricareport.com/350103/eac-hopes-revised-agoa-deal-will-include-services-and-relax-visa-requirements/>

68`Gloria Arado, 'US to Remove Uganda and Three other African Countries from Agoda Trade Deal' (BBC, 31 October, 2023) <https://www.bbc.com/news/world-africa-67236251>

69 Ohio Omiunu, 'US Suspends Four Countries from AGOA: Reassessing the Human Rights Trade Nexus' <https://www.afronomicslaw.org/category/analysis/us-suspends-four-countries-agoa-reassessing-human-rights-trade-nexus>

70 Office of the United States Trade Representative, 'Readout of the April 2-12 Negotiating Round Under the U.S-Kenya Strategic Trade and Investment Partnership', Press Release, Washington D.C, 15 April 2024, <https://agoa.info/images/documents/15754/readout-of-april-2-12-negotiations.pdf>.

71 AfCFTA Agreement, Art. 17(2).

to promptly provide information and respond to questions, pertaining to an actual or proposed measure, irrespective of whether or not the requesting State Party was previously notified of that measure. [72]

While both Articles 17(2) and 17(3) do not expressly refer to trade arrangements between AfCFTA State Parties and Third Parties, EPAs between AfCFTA State Parties and Third Parties are material to the operation and implementation of the AfCFTA Agreement and its protocols.

Such EPAs when negotiated on a reciprocal basis, grant market access to the entire African continent. In as much as Article 17(3) gives other AfCFTA State parties the right to raise questions pertaining to a potential or existing EPA between an AfCFTA State Party and a Third Party, no further provision exists as to the notification procedures for such a measure to the AfCFTA Secretariat, the nature of questions that are to be raised by the other State Parties and the overall effect of the questions on the potential existence or ongoing existence of such an EPA.

Article 18 of the AfCFTA Agreement partly also touches on EPAs between AfCFTA State Parties and Third Parties. It provides that State Parties to the AfCFTA shall accord to each other, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties.[73] Additionally, Article 18(2) requires a State Party to afford an opportunity to other State Parties to negotiate preferences granted to Third Parties prior to the entry into force of the AfCFTA Agreement and guarantees such preferences to be on a reciprocal basis. A reading of the Article 18 of the AfCFTA Agreement indicates that it does not apply to preferences granted by AfCFTA State Parties after the entry into force of the AfCFTA Agreement. This therefore excludes EPAs negotiated after 30 May 2019 from the scope of application of Article 18 of the AfCFTA Agreement. It is also important to note that neither of both the Protocol on Trade in Goods and the one on Trade in Services makes reference to trade agreements between AfCFTA State Parties and Third Parties.

2. Conflict and Trade/Investment on the Continent: From the Russia-Ukraine War to the Niger Coup

2.1 The Russia-Ukraine Conflict – One Year Later

The first year of the Russian "Special Military Operations" or full-scale invasion of Ukraine that began in February 2022 brought with it grain shortages and a rise is staple food prices in countries around the world, including African countries such as Egypt, Eritrea, Uganda and Tanzania (which prior to the conflict relied heavily on imported grain or vegetable oils from Russia and/or Ukraine). The mixed trade and diplomatic implications of the war soon became obvious as various interested parties/allies in the conflict – including Europe and the United States – vied for Africa's support (as the continent with the largest voting bloc at the United Nations (UN) General Assembly where the conflict had been tabled for resolution and as a trading partner whose future trade relations with

72 Ibid Art. 1

73 Ibid, Art. 18. 7(3).

the warring parties could shape the future of the conflict). With sanctions placed on Russian oil in the US and Europe, it was important for Russia to explore new markets for its oil products. At the same time, Europe needed new oil sources to fill the gap in its supply resulting from its ban within its territory of imports of Russian oil.

The increased diplomatic activity directed towards Africa since 2022 has led to increased economic relations between some African countries and key parties to the conflict. For eg., in May 2023, following a meeting with Russian Foreign Minister Sergey Lavrov in Nairobi, Kenya, Kenya announced plans for both countries to sign a comprehensive trade agreement which would foster increased trade exchanges and investment opportunities between the two countries. At the same time, Kenya's President Ruto emphasized the importance of resolving the Russia-Ukraine conflict through peaceful means.[74]

Notably, the Kenya-Russia bilateral meeting occurred on the heels of Ukraine's donation in March 2023 of 30,000 metric tons of wheat to Kenya.[75] Lavrov had visited Africa at least three times in 2023, while Ukraine's foreign minister Dmytro Kuleba travelled to African countries including Ethiopia, Rwanda and Mozambique the week before the Kenya-Russia meeting. Also, at the meeting, Ruto and Lavrov had agreed on an issue of strategic importance to Africa - the need for UN reform to meet the needs of the 21st century and the importance of African representation in the Security Council.[76] Kenya's approach of maintaining ties with the two warring parties and their allies (despite its UN envoy's strong condemnation of the Russian operations at the UN Security Council in February 2022) has been described in some quarters as "strategic ambiguity"[77] aimed at protecting the country's interests. However this approach aligns with a view among many African countries that continued engagement by third parties with both parties to the conflict has a better chance of bringing lasting peace. Indeed in June 2023, a historic African peace delegation consisting of South Africa, Egypt, Senegal, Congo-Brazzaville, Comoros, Zambia, and Uganda visited both Russia and Ukraine with a 10-point proposal for peace.[78]

Meanwhile, on the oil trade front and with gaps in European oil supplies resulting from the sanctions imposed on Russian oil, the war opened a new trade frontier for Morocco in the form of exports of gasoline and naphtha to Europe. Nigerian crude exports to oil refineries in Europe also increased (though the country simultaneously experienced drops in demand for its crude as countries like

74 See Bhargav Acharya, 'Kenya and Russia to Sign Trade Pact, President Ruto Says' (Reuters, 29 May 2023) <https://www.reuters.com/business/kenya-russia-sign-trade-pact-president-ruto-says-2023-05-29>

75 Susan Nyawira, 'Kenya Receives 30,000 Tonnes of Wheat From Ukraine' (AllAfrica, 20 March 2023) <https://allafrica.com/stories/202303200564.html>

76 Bhargav Acharya (note 74). Also, as at June 2024, Ukraine which had 10 embassies in Africa before the conflict (compared to Russia's 43) had opened six new embassies in Africa, including in Rwanda, Botswana and Mozambique, with four more being planned. See in this regard, Kate Hairsine, 'How Ukraine is Combating Russia's Influence in Africa' (Die Welt, 27 June 2024) <https://www.dw.com/en/how-ukraine-is-trying-to-combat-russias-influence-in-africa/a-6946187/>

77 Jeff Otieno, 'Russia-Ukraine war: Why Kenya is Now Playing Both Sides' (The Africa Report, 12 June 2023) <https://www.theafricareport.com/312267/russia-ukraine-war-why-kenya-is-now-playing-both-sides?>

78 Mayeni Jones, 'Africa's Ukraine-Russia Peace Mission: What was achieved?' (BBC News, 19 June 2023). <https://www.bbc.com/news/world-africa-65951350>

India reduced the volume of their Nigerian oil imports to make way for crude sold by Russia at discounted wartime prices). At the same time, refined oil exports from Russia to Africa increased 14-fold in just over a year to countries such as Tunisia, Nigeria, Morocco, Libya, and Egypt following a diplomatic "onslaught" on the continent by Russia and despite US attempts to dictate what Africa could buy from Russia (grain, yes; oil, no).[79]

Out of the Nigerian experience comes a notable development relevant to Africa's economic self-sufficiency, one of the goals of the AfCFTA. With the oil embargo on Russia, Nigeria's dependence on refined oil from two European countries which prior to the war imported large portions of their crude from Russia - the Netherlands and Belgium – meant a disruption in the supply of refined petrol to the country. The disruption brought renewed urgency to the need for a functional oil refinery in Nigeria. That need appears answered by the accelerated launch in May 2023 in Nigeria of the Dangote Refinery, Africa's biggest and the world's largest single-train refinery. The launch attended by many African Heads of State[80] looks set to end the decades-long dependence of Nigeria/Africa on refined oil products from Europe.

2.2 The Niger Coup and its Economic Effects

On 26 July 2023, a group of military officers overthrew the civilian government of the West African State of Niger. Coming on the heels of similar military coups in Burkina Faso (January and September 2022), Guinea (September 2021) and Mali (August 2020), the coup sent shock waves through the continent,[81] with fears of a continued domino effect of coups sweeping through the region. In response to the coup, the 15 member Economic Community of West African States (ECOWAS) imposed various economic sanctions on Niger and suspended the country from ECOWAS. ECOWAS States (excluding Burkina Faso, Guinea and Mali which had also been suspended after coming under military rule) closed their borders with Niger, suspended commercial and financial transactions between their countries and Niger, and froze Nigerien assets in banks within their territories.[82] In addition, Nigeria (whose President Ahmed Bola Tinubu then held and still holds the rotating chairmanship of ECOWAS) cut off electricity supply to Niger acting in line with the sanctions decided by ECOWAS. Before the coup, Niger sourced 70% of its electricity from Nigeria.

79 See Charlie Mitchell and Rosemary Griffin, 'Russian Oil Product flows to Africa Jump following Western Sanctions (S&P Global, 4 July 2023); <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/070423-russian-oil-product-flows-to-africa-jump-following-western-sanctions>; Rodney Muhumuza, 'US: Africa can buy Russian grain but risks actions on oil'(Associated Press, 4 August 2022) <https://apnews.com/article/russia-ukraine-global-trade-united-nations-africa-c58713fe80a3bd0549501a08ed390640>

80 Emmanuel Addeh, Peter Uzoho, Dike Onwuamaeze and Yinka Kolawole, ' Game Changer: Seven African Presidents Join Buhari to Open Dangote Refinery' (Arise News, 22 May 2023) <https://www.arise.tv/game-changer-seven-african-presidents-join-buhari-to-open-dangote-refinery/>

81 Nnamdi Obasi, 'ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate' (International Crisis Group, 5 December 2023) <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate>

82 ECOWAS/CEDEAO, Final Communique – Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Political Situation in Niger (Latest Version) (Ecowas Commission Abuja, 20 July 2023) <https://www.ecowas.int/final-communique-fifty-first-extraordinary-summit-of-the-ecowas-authority-of-heads-of-state-and-government-on-the-political-situation-in-niger/>

The sanctions – intended to pressure the coup's leaders to free the country's civilian President Mohamed Bazoum (who they had placed under detention) and restore him to power – had serious economic repercussions for Niger. It also affected its sanction-imposing neighbours as well as Niger's foreign economic partners. Business operations and regional supply chains were disrupted as Nigerien businesses relying on electricity from Nigeria faced collapse and truckloads of agricultural produce were stuck at border towns between Niger and Nigeria. The disruptions affected millions who worked in the cross-border economy straddling the Nigeria-Niger border or relied on it for their food supply.[83] Benin and Togo, two countries that depend on transit trade in the region (with large volumes of trade passing through Benin's port of Cotonou being destined for Niger) were also affected. Also threatened was the US$13 billion Trans-Saharan gas pipeline project to transport gas from Nigeria, Niger and Algeria to Europe (fuelling 11 countries along the African coast on its way), which had been given fresh impetus by Russia's 2022 cutting of gas supplies to Europe in the midst of the Russia/Ukraine conflict.[84] In August 2023, a Chinese company suspended its construction of a hydroelectric dam in Niger after coup-related sanctions halted its access to funds.[85] Though Niger's new military rulers sued ECOWAS before the ECOWAS Court of Justice challenging the legality of the sanctions and its adverse effects on its citizens (including shortage of food, medicine and electricity), the Court declared the suit inadmissible. Its reasoning was that the military junta was an unconstitutional and unrecognized government, lacking standing to institute action before the Court.[86]

The coup and its aftermath have highlighted the importance of intra-African trade for economic stability and food security in the region. The coup also made West Africa a new case study for the old debate[87] in international law on economic sanctions, their legality and their humanitarian consequences. It raised questions about the propriety of and modalities for utilizing economic sanctions (a weapon used by powerful States to subdue adversaries/"rogue States" in faraway lands, with humanitarian consequences for civilian populations then described as "collateral damage") to resolve problems of democratic deficit arising within a region of States geographical proximate to each other and bound by centuries of political, historical, trade, cultural, post-colonial and ethnic ties. It also brought into focus popular resentment in Niger and some other coup-plagued countries about stagnant economies as well as perceived unequal economic relations with foreign

83 Nnamdi Obasi (note 81); Bruce Byiers, Poorva Karkare, Amanda Bisong and Martin Ronceray, 'Niger's Coup: Who Loses from ECOWAS Sanctions? (European Centre for Development Policy Management, 18 September 2023) <https://ecdpm.org/work/nigers-coup-who-loses-ecowas-sanctions>

84 Samuel Ajala, 'Trans-Saharan pipeline uncertain after coup: experts' (Gas Outlook, 15 September 2003) <https://gasoutlook.com/analysis/trans-saharan-pipeline-uncertain-after-coup-experts/>

85 Sofia Christensen et al, 'Construction of China Gezhouaba Group's Kandadji Dam in Niger Suspended Due to Coup – Company' (Reuters, 10 August 2023) < https://www.reuters.com/world/construction-china-gezhouaba-groups-kandadji-dam-niger-suspended-due-coup-2023-08-10/ >

86 See Ameh, Ejekwonyilo, 'ECOWAS Court rejects Niger junta's plea to lift regional sanctions' (Premium Times (8 December 2023) <https://www.premiumtimesng.com/news/top-news/649824-ecowas-court-rejects-niger-juntas-plea-to-lift-regional-sanctions.html> for reference to the court judgment which is yet to be available on the Court's website.

87 Cf: Yale Journal of International Law, 'Symposium: Third World Approaches to International Law (TWAIL) & Economic Sanctions', 20th June 2023. <https://www.yjil.yale.edu/symposium-third-world-approaches-to-international-law-economic-sanctions>

powers (whose economic presence/investments did not appear to significantly benefit the local population).[88] Popular disillusionment with the economy and the realities of seeming unfair terms of mining investment contracts signed with French entities were among factors said to underlie the considerable civilian support for the Niger coup. Many citizens speculated that military rule could be a solution to their socio-economic problems. The presence of French and other foreign military bases on Nigerien soil were also factors triggering popular resentment.

The mixed political and economic factors underlying civilian support for the coup in Niger, the humanitarian consequences of sanctions and the role of sustainable investment/trade in ameliorating economic challenges in the continent are together with the crucial importance of upholding democracy on the continent points for reflection for African leaders charged with devising solutions to coup d'états. Indeed, a balancing of these reflection points may explain ECOWAS' February 2024 lifting of most of the sanctions on Niger "on purely humanitarian grounds", while apparently maintaining the country's suspension from the bloc.[89] This was done regardless that Niger had not acceded to ECOWAS' demands but had instead, together with Mali and Burkina Faso, announced their withdrawal from ECOWAS (thereby creating what has been described as the biggest crisis for the bloc since its formation in 1975).

But withdrawal from ECOWAS also entails a loss of access to ECOWAS' large single market as well as the free movement privileges ECOWAS membership provides for the about 70 million strong combined populations of the three countries. This will have consequences for trading under the ECOWAS and ultimately the AfCFTA of which RECs like ECOWAS are building blocks. In addition, the AU's suspension of Niger and other African countries that have respectively fallen under military rule since 2019 (namely Guinea, Burkina Faso, Mali, Gabon and Sudan) raises questions about their participation in the ongoing operationalization of the AfCFTA (a flagship project of the AU) and the consequences any suspension-related non-participation will have for these countries populations and the rest of the continent. Notably, Art 30 of the Constitutive Act of the AU[90] states that governments which come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

To conclude, both ECOWAS and the AU will have to find innovative ways of resolving the tension in upholding both democracy and intra-regional trade, posed by the Niger coup and other coups. Addressing the underlying causes of coups (which often include bad governance and/or flawed elections) and devising "targeted" sanctions that affect coupists rather than entire populations are ways African leaders can fulfil their duty of safeguarding democracy and the stability necessary for

88 For eg., Niger at the time of the coup was France's third-largest supplier of natural uranium, mined in the country by the French multinational Orano. Yet decades of uranium exports had failed to boost Niger's economy, as is often the case with raw material mining without local processing. See in this regard, Gilles Yabi, 'The Niger Coup's Outsized Global Impact' (Carnegie Endowment, 31 August 2023) <https://carnegieendowment.org/posts/2023/08/the-niger-coups-outsized-global-impact?lang=en>

89 Cf: Felix Onuah, West African Bloc Lifts Sanctions on Junta-led Niger (Reuters, 26 February 2024). <https://www.reuters.com/world/africa/west-african-ecowas-bloc-mulls-new-strategy-towards-junta-states-2024-02-24/>

90 African Union, Constitutive Act of the African Union , 11 July, 2000 <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>

the undisrupted functioning of Africa's internal markets. The targeted sanctions approach which the ECOWAS is already adopting will protect intra-African trade while at the same time ensuring ECOWAS complies with the principle of "zero tolerance for power obtained or maintained by unconstitutional means" [91] enshrined in the ECOWAS treaties.

3. Africa and The Energy Transition: COP28

The 28th Conference of Parties to the United Nations Framework Convention on Climate Change (COP28) took place in Dubai, the United Arab Emirates from 30th November to 13th December 2023. It was the biggest of its kind (with about 85,000 participants in attendance, including over 150 Heads of State/Government, civil society organizations, businesses, indigenous peoples, youth and international organizations).[92] Like previous COP conferences, it was devoted to devising global solutions to climate change. Prior to COP28, The Government of Kenya and the African Union Commission (AUC) had hosted an inaugural Africa Climate Summit (ACS) in Nairobi, Kenya from 4 - 6 September 2023 at which African leaders unanimously adopted the Nairobi Declaration[93] as the basis for Africa's common position at COP28 and beyond. In addition, a COP28 African common agenda was negotiated and spearheaded by the African Group of Negotiators on Climate Change (AGN) and Civil Society Organizations (CSOs).[94] Among Africa's top-most priorities at COP28 as outlined by AGN Chair, Ephraim Mwepya Shitima were climate finance (that is, finance for climate actions including investment in renewable energy), operationalization of the "Loss and Damage" Fund (established at COP27 to provide financial support to vulnerable countries hardest hit by climate disaster), strengthening adaptation actions (i.e., actions to reduce vulnerability and boost resilience of populations and cities to negative effects of climate change), a special needs and circumstances status for Africa in the energy transition and a just energy transition.[95] These priorities echoed the demands of a wholly civil society-led African People's Climate Assembly which held in Kenya from 3 – 6 September (parallel to the government-organised Africa Climate Summit) but went even further to demand "system change not climate change", in other words, a radical, fundamental change of the "neoliberal, authoritarian, extractive, neo-colonial, racist, patriarchal systems and societies" that underlie climate change. The African People's Climate Assembly also demanded a rejection of "false solutions" like "carbon markets".[96]

91 Economic Community of West African States, Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security of 21 December 2001, Art. 1(c)

92 United Nations Framework Convention on Climate Change,'COP28: What Was Achieved and What Happens Next?' (United Nations Framework Convention on Climate Change, 12 January 2024) <https://unfccc.int/cop28>

93 African Union, 'The African Leaders Nairobi Declaration on Climate Change and Call to Action' <https://www.afdb.org/sites/default/files/2023/09/08/the_african_leaders_nairobi_declaration_on_climate_change-rev-eng.pdf>

94 Grace Mbungu, Edith Ogallo and Diana Rudic, 'Falling Short or Following Through? COP 28 Outcomes for Africa' (Africa Policy Research Institute, 12 February 2024) <https://afripoli.org/falling-short-or-following-through-cop-28-outcomes-for-africa>

95 Ibid.

96 See Port Harcourt Wakawaka (PHwakawaka), 'The Real Climate Summit People's Declaration!', PHwakawaka Blog, 6 September, 2023 <https://phwakawaka.home.blog/2023/09/06/the-real-climate-summit-peoples-declaration>; also Lauren Nel, The Gap Between The Africa Climate Summit and The "Real Africa Summit" (Natural Justice, 23 October 2023) <https://naturaljustice.org/the-gap-between-the-africa-climate-summit-and-the-real-africa-summit/>

The key outcomes of COP28 integrated many of Africa's concerns, though with shortcomings that stand to be ameliorated in the future. The key outcomes included the conclusion of the first-ever global stocktake of progress on implementation of the Paris agreement, a framework agreement on global adaptation (and adaptation finance) and agreement on climate change mitigation/reduction. Importantly, the outcomes included an agreement to operationalize the Loss and Damage Fund which was widely seen as one of the key measures of success of COP28 from an African point of view. However, the voluntary rather than mandatory nature of the Fund – which is in line with demands of developed countries – has been viewed by critics as among the shortcomings of the COP28 outcomes, just like the around 700 million US dollar worth of commitments made to the Fund at COP28 (which fell short of the trillions of dollars needed by African and other "developing" countries to deal with the negative effects of climate change). As critics point out, the voluntary nature of the Fund stands at odds with the climate justice demands of Least Developed Countries – the majority of which are African countries – and "Small Island Developing States" (SIDS) which include several African countries, that the main climate polluters (developed countries) should be fully responsible for paying for climate loss and damage.[97]

Also an outcome of COP28 that raises issues of climate justice is the landmark agreement of State parties for the first time in COP history to progressively transition away from fossil energy use – the predominant cause of climate change - by 2050. The statement in COP28's global stocktake conclusions that the transition must occur in a "just ... and equitable manner"[98] is a reminder of a climate justice-related view of many in Africa that rich/developed countries whose emissions are largely responsible for climate change should take the lead in transitioning away from fossil fuels. According to that view, African countries - which according to experts account for 0.01% of past emissions of approximately 266 years and 3 - 4% of emissions in the last few years[99] - deserve to temporarily exploit their natural resources and develop like rich countries (or be provided with alternative options, including renewables/climate finance, by the countries primarily responsible for climate change).[100] The March 2023 request of the UN General Assembly to the International Court of Justice for an Advisory Opinion on the Legal Obligations of States in Respect of Climate Change, and the attendant legal proceedings (at which the African Union, the Organization of the

97 Ibid.

98 United Nations Framework Convention on Climate Change, 'Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Fifth Session, United Arab Emirates, 30 November to 12 December 2023: Outcome of the First Global Stocktake (Doc FCCC/PA/CMA/2023/L.17), 13 December 2023, para. 28(d) <https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf>

99 For references to data on Africa's contributions to global carbon emissions, see for example, Hannah Ritchie, 'Who Has Contributed Most to Global CO2 Emissions?' (Our World In Data, Global Change Data Lab, 1 October 2019) <https://ourworldindata.org/contributed-most-global-co2>; also United Nations, 'Africa Climate Week 2023: Charting a Fresh Course for Climate Action', UN Climate Press Release, 4 September 2023 <https://unfccc.int/news/africa-climate-week-2023-charting-a-fresh-course-for-climate-action >

100 See for example, Yemi Osinbajo 'Yemi Osinbajo on the Hypocrisy of Rich Countries' Climate Policies' <https://www.economist.com/by-invitation/2022/05/14/yemi-osinbajo-on-the-hypocrisy-of-rich-countries-climate-policies> (The Economist, 14 May, 2022); Ridwan Karim Dini-Osman, 'COP28: African Nations Resist Fossil Fuel Phaseout, Citing Economic Realities (The World, 7 December 2023) <https://theworld.org/stories/2023/12/07/cop28-african-nations-resist-fossil-fuel-phase-out-citing-economic-realities>

Petroleum Exporting Countries and several African States will appear alongside their developed country counterparts as court-authorized participants) may assist in clarifying the division of responsibilities for a just and equitable energy transition.

4. Update on trade and trade-related disputes between African countries in regional courts.

This section paper highlights trade related disputes that have been filed before regional courts in Africa between 2022-2023. The objective of this section is to highlight the issues raised in the disputes and how they relate to regional integration in the continent. The number of trade disputes covered in the section is relatively low due to the fact that although the regional courts were primarily established as sub-regional courts/trade courts, the majority of them, save for the COMESA Court of Justice resolve human rights and democracy related cases. [101]

The first dispute the section focuses on is East African Court of Justice (EACJ) Reference No. 48 of 2023 *Attorney General of the Republic of Uganda v. the Attorney General of the Republic of Kenya.* This dispute relates to the freedom of transit of goods. The facts concern the geographical limitation of Uganda being a landlocked country. Uganda imports 90% of its refined oil products through the port of Mombasa in Kenya. The refined petroleum products are transported to Uganda through Kenya's pipeline. Traditionally, this has been done through Oil Marketing companies operating in Kenya.[102]

In 2023, Uganda made a policy shift, granting only the Uganda National Oil Corporation (UNOC) the sole power of importing refined petroleum products. To implement the policy, UNOC needed to transport the refined petroleum products through Kenya's infrastructure. Consequently, UNOC had to get authorisation from Kenya's Energy regulatory agency (EPRA).[103]

EPRA requested UNOC to fulfil several requirements so as to enable it to utilise the infrastructure. These included (a) incorporation of a subsidiary or registration of UNOC as a company branch in Kenya and, (b) application for an issuance of a licence by the regulatory agency. UNOC proceeded to register as a branch in Kenya with the sole purpose of obtaining the licence. On the first try, the application for the licence was rejected by EPRA on the basis that UNOC had failed to provide the following documents: (a) proof of annual sales of 6.6 million litres (b) ownership of 5 licenced retail petrol stations, (c) ownership of a licenced petroleum depot. [104]

101 James Thuo Gathii and Harrison Otieno Mbori, Reference Guide to Africa's International Courts An Introduction in James Thuo Gathii (ed.), *The Performance of Africa's International Courts* (Oxford University Press, 2020) <https://doi.org/10.1093/oso/9780198868477.003.0009>

102 EACJ Reference No. 48 of 2023: *Attorney General of the Republic of Uganda versus Attorney General of the Republic of Kenya*, Reference para. 4.1.

103 Ibid at para. 4.4.

104 Ibid at para. 4.9.

The Ministry of Energy in Uganda then proceeded to write to the Cabinet Secretary in charge of Energy in Kenya requesting a waiver of certain requirements on the basis that UNOC is not an Oil Marketing Company (OMC), it was merely seeking access to the petroleum transiting infrastructure. The Cabinet Secretary in charge of Energy indicated that he would present the request to the Kenyan Cabinet. The Cabinet`s decision regarding the issue was that it requested the regulatory authority to review the application in light of Uganda's new policy.

UNOC resubmitted the application. As the application was being reviewed for the second time by EPRA, a petition was filed before the Kenyan High Court in November 2023 challenging UNOC application for the licence. The High Court issued conservatory orders restraining the regulatory agency from granting UNOC a licence. Uganda then instituted this reference on the basis that Kenya`s High Court conservatory order restricting EPRA from processing UNOC's licence was a violation of the EAC Treaty and the United Nations Convention on the Law of the Sea. [105]

The dispute was ultimately resolved through diplomatic means in March 2024, when the two countries Uganda and Kenya signed an agreement authorising UNOC to import oil through the port of Mombasa. [106]Although the dispute is now moot, it is important to consider the claim raised by Uganda in the reference and how the same aligns with Kenya`s treaty obligations.

Comments on the case.

Uganda`s main claim was on Article 89(1)(b) and (e) and Article 93(d) of the EAC Treaty. In Article 89(1)(b) and (e) of the Treaty, EAC Partner States undertake to evolve coordinated, harmonised and complimentary transport and communications policies, improve and expand the existing transport and communication links and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the EAC. To achieve this, EAC Partner States undertake to construct, maintain, upgrade, rehabilitate and integrate critical infrastructure such as rail, road and pipeline.

Article 93(d) mandates coastal states to co-operate with the land locked Partner States and grant them easy access to port facilities and opportunities to participate in the provision of port and maritime activities. This paper holds the view that the two provisions, read together or independent of each other, contain good faith obligations, with no clear recourse on the part of a land-locked country whose freedom of transit has been restricted by a coastal state. Nonetheless, the case is still important as it is the first of its kind, at least within the African continent relating to the balance between freedom of transit and whether the same is enforceable on a practical level, against a costal or transit state.

105 Ibid at para. 4.20.

106 BDA Writer, 'Kenya resolves oil dispute with Uganda amid port shift' (Business Day Africa, 28 February 2024) <https://businessdayafrica.org/kenya-resolves-oil-dispute-with-uganda-amid-port-shift/>

The second trade dispute before a regional court is *Agiliss Limited v. The Republic of Mauritius.* This matter was instituted in 2019 before the COMESA Court of Justice. It continued all through 2022-2023. The Applicant in this case is Agiliss Limited, a company incorporated in Mauritius, importing oil from Egypt. The Respondent is Mauritius.[107]

The Respondent, through a letter notified the Secretary General of the COMESA Secretariat of its intention of imposing a safeguard measure on imports of edible oil origin from the COMESA region, pursuant to Article 61 of the Treaty. In response to this, the Applicant sought an order from the court restraining the Respondent from imposing customs duty of 10% on edible oil from COMESA countries which it alleges breaches several provisions of the COMESA Treaty.[108] These include Article 46 on restriction on the imposition of customs duties, Article 48 on Rules of Origin and Article 49 on the elimination of non-tariff barriers amongst other provisions.

The Respondent, through their statement of defence raised a preliminary objection citing that the Applicant was a legal person and as such, was required to exhaust the local remedies in Mauritius before initiating the dispute before the Court, as per Article 26 of the COMESA Treaty.[109] In response to this, the Applicant averred that it was not bound to pursue local remedies because of the Mauritius Supreme Court decision in *Polytol Paint & Adhesive Manufacturers Co. Limited v. the Minister of Justice SCJ 106.* In the aforementioned decision, the Supreme Court had held that it could only take cognisance of the provisions of the COMESA treaty to the extent that they have been incorporated into Mauritian law. [110]

The First Instance Division held that it did not have jurisdiction over the matter because the Applicant had failed to exhaust the local remedies. The court's reasoning was that the Applicant need not to have pleaded treaty infringement before the Mauritius national courts. Thus, the Respondent action could still be challenged as a purely administrative action. [111] The Applicant being dissatisfied with this outcome made an appeal to the Appellate Division of the Court.

The Appellate Division overturned the decision of the First Instance Division. It did find that the Applicant had established exceptional circumstances exempting it from complying with the exhaustion of local remedies rule. The Appellate Division additionally stated that although judicial review and injunction were remedies available to the Applicant, the Respondent had proved that there were effective remedies.[112]

107 COMESA Court of Justice Reference No. 1 of 2019 *Agiliss v. The Republic of Mauritius, First Instance Division*, Judgement, para. 9.

108 Ibid para.14

109 Ibid para. 15.

110 Ibid para. 75.

111 Ibid para. 93.

112 *Agiliss Limited v. The Republic of Mauritius and Others,* Appeal No. 1 of 2022.

Comments on the case

This is the first international trade law case focusing on the COMESA safeguard and subsidies regime. At the onset, the Respondent's measure was regarded as a safeguard but later on analysed by the Appellate Division as a subsidy program. While the First Instance Division did not analyse the legal nature of the Respondent's measure, the Appellate Division's examination devolved into an analysis of the legal nature of the program. The Appellate Division rightfully concluded that imposition of the 10 % supposed countervailing duty could not be legally justified under Article 52 of the COMESA Treaty as it was a local subsidy to a domestic Mauritian company, not concerning the importation of oil subsidised by another Member state and subsequently causing injury to the domestic oil industry in Mauritius.

Generally, the COMESA Treaty has a robust legal framework on all the three trade remedies. Article 51 of the Treaty relates to dumping while Article 52 of the Treaty applies to subsidies and authorises imposing countervailing duties on subsidised imports. Lastly, Article 61 of the Treaty provides for safeguards measures, which are subject to review and extension by the Council of Ministers.[113]

5. International Investment (Related) Agreements (IIAs) Involving African States

5.1 Bilateral Investment Treaties and Treaties with Investment Provisions

Because intra-AU BITs will remain in force until their termination 5 years after the AfCFTA Investment Protocol enters into force, BITs entered into between AU Member States will retain their relevance for at least 5 years to come. But considering the anticipated entry into force of the AfCFTA Investment Protocol, it is understandable that BITs signed by African States during the period under consideration have been signed mainly with 3rd States and regional integration organizations. According to the available data, eleven IIAs involving African States were signed during the period. Among them are the Kenya/EU Economic Partnership Agreement (18th December 2023), the Angola/China BIT (6 Dec 2023), Members of the Organisation of the African, Carribean and Pacific States/EU and EU Member States Partnership Agreement (15 Nov 2023), the Angola/Japan BIT(9 August 2023) and the Cabo Verde/Morocco BIT (9 May 2023).[114] The signing between 2022 – 2023 of at least one intra-African BIT - the Cabo Verde/Morocco BIT - may come as a surprise. This is considering that an AfCFTA Investment Protocol (AIP) to regulate investment for the whole continent was being negotiated during the same period, and also Article 49 of the AIP states that no new intra-African BITs shall be concluded after its adoption by its State Parties (i.e. by States that have ratified or acceded to the Protocol). One may speculate that

113 Jackson Okoth, 'Lethargic Sugar Sector Gets Lifeline as COMESA Issues Another Two-year Safeguard (The Kenyan Wall Street, 29 November 2023) <Lethargic Sugar Sector Gets Lifeline as COMESA Issues Another Two-year Safeguard - Kenyan Wall Street - African Business and Global Finance>

114 See United Nations Trade and Development (UNCTAD), International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements> for its listing of 11 IIAs involving African States signed during the period. The remaining 6 of the 11 IIAs listed are the Belarus/Equatorial Guinea BIT (9 Dec 2023), the Angola/EU Sustainable Investment Facilitation Agreements (17 Nov 2023), the Brazil/Sao Tome and Principe BIT (27 Aug 2023), the Belarus/Zimbabwe BIT (31 Jan 2023), the Mozambique/United Arab Emirates BIT (7 February 2022) and the Angola/Cabo Verde BIT (14 March 2022). The listed 2022 Angola/Cabo Verde BIT may be a renegotiation of a pre-existing 1997 BIT between the two countries rather than a completely new BIT.

the signing of the Cabo Verde/Morocco BIT three months after the February 2023 adoption of the AIP was simply an end result of BIT negotiations that may have started long before the negotiation of the Investment Protocol. It may also be speculated that neither of the two signatories nor any other African State is yet party to the AIP and its prohibition of new intra-African BITs, because one of the Protocol's annexes is yet to be finalised.[115] From that perspective, the Cabo Verde/Morocco BIT may well be an interim arrangement entered into in favour of Cabo Verdean and Moroccan investors pending ratification of the AIP by both countries, and importantly, the coming into force of the AIP (whose date is uncertain since it depends on the ratification of 22 AfCFTA States).

5.2 The Investment Facilitation for Development Initiative

The Investment Facilitation for Development (IFD) is an initiative launched in 2017 by a group of developing and least-developed World Trade Organization (WTO) members with the aim of developing a global agreement on investment facilitation. The initiative is aimed at enabling participating countries - especially developing and least developed countries - attract foreign investment that advances their sustainable development objectives.[116]

Under the auspices of the initiative, the text of an Investment Facilitation for Development Agreement (IFDA) was finalised in November 2023 by 112 members[117] of the 164 member World Trade Organization after over five and half years of work and text-based negotiations.[118] Though originally intended by its initiators to be a multilateral agreement establishing obligations for all WTO members, the finalised IFDA is a plurilateral agreement that will bind only WTO members that accept it. As at December 2023, participants in the IFD initiative were WTO members from all continents. The participants represent all levels of development and include China, Chile, the European Union, The Republic of Korea Japan, the Russian Federation and at least 22 African countries (including Angola, Congo, Morocco and Nigeria). The participants aim to have the agreement incorporated into Annex 4 of the Marrakesh Agreement Establishing the WTO as a most-favoured-nation-based plurilateral agreement open to all members. [119]

115 See discussion in Section 5.3 of this article for reference to an annex to the Investment Protocol that is still to be finalised and made public.

116 World Trade Organization, Investment Facilitation for Development, 13th Ministerial Conference: Briefing Note, April 2024.
<https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/investment_facilitation_e.htm>

117 Karl P. Sauvant, 'The New WTO Investment Facilitation for Development Agreement', Columbia FDI Perspectives No. 363, 7 August 2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4531684>

118 See World Trade Organization, 'Negotiations on Investment Facilitation for Development - Investment Facilitation for Development (IFD) Agreement' (Doc INF/IFD/W/52) (Restricted), 23 November 2023, available at Trade ß Blog
<https://tradebetablog.wordpress.com/wp-content/uploads/2024/01/2023-11-27_inf-ifd-w-52-final.pdf>. For the 2024 official language version of the agreement, see World Trade Organization, Investment Facilitation for Development Agreement <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W55.pdf&Open=True>

119 See World Trade Organization (note 118). The benefits of incorporation into the WTO rule book (which would require consensus among the entire WTO membership) include the setting up of a committee to oversee implementation and the subjection of the agreement to WTO dispute settlement. As at July 2024, the efforts of the IFDA's participants to have it included on the WTO rule book have not been successful. See in this regard, Peter Ungphakorn, '125 WTO Members Fail at 4th Attempt to Formalise Plurilateral Investment Deal' (Trade ß Blog, 24 July, 2024) <https://tradebetablog.wordpress.com/2024/07/22/128-fail-4th-try-plurilateral-investment/>

The finalized document emerging from the IFD initiative stands out among investment-related international agreements that involve African States because the WTO has not been the usual forum for negotiating investment facilitation provisions. Such provisions are usually integrated into bilateral investment treaties or feature as trade-related investment provisions in free trade agreements.[120] Notably, IFDA does not seek to regulate investment policy matters like market access and investor protection, but rather focuses on technical measures that would facilitate the flow of foreign direct investment between parties to the agreement. It imposes State obligations with respect to such technical measures with the aim of facilitating sustainable investments. Those measures include streamlining and speeding up administrative procedures, improving the transparency of State investment measures (by, for eg., making information about a State's investment framework available to investors), improving domestic regulatory coherence and improving cross-border cooperation between State authorities responsible for procedures related to investments.[121] IFDA's institutional arrangements include a Committee on Investment Facilitation that will, inter alia, monitor implementation progress and facilitate the sharing of information and experiences on investment facilitation by Parties.[122]

With both investment facilitation and sustainable investment already a focus in the AfCFTA Investment Protocol, analysts point to ways in which the Protocol and the IFDA despite their overlapping mandates in that respect can work together in the future to facilitate sustainable investment on the continent. First, IFDA which focuses broadly on global FDI flows can continue where the Protocol – which focuses on securing the flow of intra-African investment – stops, by facilitating the flow of investment from outside Africa into the continent and vice versa. In addition, the IFDA's more detailed provisions on investment facilitation can be regarded as minimum global standards for investment facilitation which can help accelerate intra-African investment.[123]

5.3 The Future of ISDS: Is there an (Emerging) African Perspective?

The years 2022 - 2023 witnessed an unprecedented development in the history of international economic law – the mass proposed withdrawal of a group of States from an international trade and investment agreement. In 2022, seven EU Member States (France, Germany, The Netherlands, Spain, Poland, Luxembourg and Slovenia) announced plans to withdraw from the Energy Charter

119 See World Trade Organization (note 118). The benefits of incorporation into the WTO rule book (which would require consensus among the entire WTO membership) include the setting up of a committee to oversee implementation and the subjection of the agreement to WTO dispute settlement. As at July 2024, the efforts of the IFDA's participants to have it included on the WTO rule book have not been successful. See in this regard, Peter Ungphakorn, '125 WTO Members Fail at 4th Attempt to Formalise Plurilateral Investment Deal' (Trade β Blog, 24 July, 2024) <https://tradebetablog.wordpress.com/2024/07/22/128-fail-4th-try-plurilateral-investment/>

120 Rashmi Jose, 'Investment Facilitation for Development Agreement: A Reader's Guide' (International Institute for Sustainable Development Published by the International Institute for Sustainable Development, 2024). p. 1 <https://www.iisd.org/system/files/2024-02/investment-facilitation-development-agreement-wto.pdf >

121 Ibid. See generally Arts. 1, 6-26 of the IFDA.

122 Ibid Art. 39; also Karl P. Sauvant (note 117).

123 See Teniola Tayo and Khalid Alaamer, 'How the AfCFTA and WTO can Work towards Sustainable Investment in Africa' (World Economic Forum, 1 December 2023) <https://www.weforum.org/agenda/2023/12/afcfta-wto-work-towards-sustainable-investment-africa/>

Treaty (ECT), one of the most widely litigated investment and trade treaties in the world. This was followed, amongst other proposed withdrawals, by a July 2023 proposal by the European Commission for a coordinated withdrawal of all EU Member States, the EU and the European Atomic Energy Community (Euratom) from the ECT (as well as the UK's February 2024 announcement that it intended to withdraw from the Treaty). The key reason for these developments was that the ECT's provisions on investor protection and Investor-State Dispute Settlement (ISDS) enable foreign investors to initiate international arbitral lawsuits challenging and demanding compensation for State measures taken in the fossil fuel sector (thereby inhibiting action to address climate change); also that the recent attempts to reform the treaty's provisions to align it with the Paris Climate Agreement goals and the European Green Deal had not yielded the desired reforms.[124]

The mass withdrawal from the ECT, as at September 2024 official for 5 EU countries - France, Germany, Luxembourg and Poland (as well as Italy which already withdrew in 2016)[125] constitutes a climax of an already existing global backlash against ISDS litigation before international arbitral tribunals (international ISDS). The reasons for the backlash include the limits a sizeable number of international ISDS awards have placed on the powers of States to regulate in the public interest as well as huge compensation awards rendered by some tribunals in favour of foreign investors and against States.[126] Examples of countries around the world that have either circumscribed the application of international ISDS to foreign investor disputes or rejected it totally, abound. One example within Africa is South Africa which passed national legislation to limit ISDS to mediation or arbitration via domestic adjudicatory bodies. Also examples are Tanzania which recently passed legislation excluding international ISDS and member States of the Southern African Development Community (SADC) who amended Annex 1 to the SADC Finance and Investment Protocol to replace international ISDS with the use of domestic courts and tribunals.[127] In addition, critics have

124 Regarding announcements of intentions to withdrawal from the ECT, see Christina Eckes, Lea Main-Klingst and Lucas Schaugg, 'Why a Coordinated Withdrawal From the Energy Charter Treaty is Inevitable' (Euractiv, 24 January 2023) <https://www.euractiv.com/section/energy/opinion/why-a-coordinated-withdrawal-from-the-energy-charter-treaty-is-inevitable/> ; European Commission, 'European Commission proposes a Coordinated EU Withdrawal from the Energy Charter Treaty', Directorate-General for Energy, News Announcement, 7 July 2023. <https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en>

125 Withdrawal from the ECT takes effect one year after written notification of withdrawal to the depositary of the ECT as required by Art. 47(1) - (2) ECT. The names of countries and organizations that have followed up their announcements of proposed withdrawal with official notifications, together with the dates their withdrawals will take effect can be found on the Energy Charter Secretariat website (<https://www.energycharter.org>). Russia, a non-EU member that opted for provisional application of the ECT rather than full membership, terminated provisional application in 2009. Because investments made before a termination of provisional application or withdrawal from the ECT remain protected for 20 years after the said termination or withdrawal by virtue of the ECT's sunset clauses, EU States are taking steps to nullify the application of the ECT's sunset clause in their mutual relations. See in this regard, Markus Burgstaller and Scott Macpherson, 'EU Member States reach agreement on ECT arbitration clause' (Hogan Lovells, Hogan Lovells, Engage: Legal Insights and Analysis, 1 July 2024) <https://www.engage.hoganlovells.com/knowledgeservices/news/eu-member-states-reach-agreement-on-ect-arbitration-clause>

126 For a list of reasons underlying the backlash, see for example, Stephan W. Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward' (E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, Geneva, July 2015), p. 2 <https://pure.uva.nl/ws/files/2512304/163092_E15_Investment_Schill_FINAL.pdf >

127 Talkmore Chidede, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol', Tralac Blog, 11 December 2018. <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.htm>

counted at least 8 highly costly lawsuits[128] against African States that in their view justify an end to the use of international ISDS. One of those cases is *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria (hereafter P & ID No. 1).*[129] The case saw a hefty US$6.6 billion damages award with interest (i.e US$11 billion inclusive interest, as at 2023) made against the Nigerian State by an arbitral tribunal seated in London. It concerned a claim alleging that Nigeria had wrongfully repudiated a natural gas supply and processing contract with P & ID Ltd. Though the arbitral award was eventually set aside by a UK High Court on the basis that it was obtained against Nigeria by fraud and conduct contrary to public policy (including bribery of a witness), the case is widely considered in international circles as a lesson on the pitfalls of international arbitration for States. Notably, the valuation method used by the arbitral tribunal to decide the quantum of compensation awarded to P &ID – a method critiqued by both Nigeria and the High Court judge in *P & ID No.1* – echoed the method used to award compensation to the foreign investor in *Rockhopper v Italy.*[130] *Rockhopper* is a high profile 2022 Energy Charter Treaty arbitral award that generated controversy in Europe.

But despite the wide-spread criticism of the international ISDS system, the reality is that the practice of African States on the issue has been diverse, with an equally strongly favoured approach of African States being that of reform of ISDS and other investment treaty provisions posing a threat to the regulatory powers of States. This is evidenced by the Pan-African Investment Code, the 2016 Morocco-Nigeria BIT and even the AfCFTA Investment Protocol itself. The latter, as earlier noted in this article, clarifies that certain regulatory actions taken in the public interest or to fulfil international obligations can neither give rise to compensation claims by investors nor constitute a breach by an African State of the Protocol.

The advent of the AfCFTA Investment Protocol has provided an opportunity for the continent to develop a common African position on international ISDS. At first sight, the Protocol's dispute settlement provisions (Articles 44 - 46) seem to suggest that the parties to the Protocol, inspired by the ISDS reforms of countries like South Africa, opted to move away from international ISDS.

128 Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration against African States', October 2019 <https://www.tni.org/files/publication-downloads/isds_africa_web.pdf>

129 *Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria* (Final Award), 31 January 2017.

130 Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No. ARB/17/14, Final Award, 23 August 2022. The case concerned alleged violations of the ECT arising from an Italian government refusal to grant the claimants an oil production permit following Italy's re-introduction of a ban on oil and gas exploration within 12 miles of its coastline. This affected the claimants' investments in an oil rig for which they had expected to be awarded a production permit, having previously been granted a 6 year oil exploration permit by the government. In both *P & ID and Rockhopper,* the Tribunals in place of calculating compensation based on costs actually incurred by the investor (the "sunken" or "historic" costs method preferred by respondent States) opted for the discounted cash flows (DCF) valuation method proposed by the claimants. The DCF method awards compensation for expected future profits rather than actual costs incurred. Since the DCF method does not necessarily consider that the vagaries of the business environment make it uncertain that such future profits would actually have been realised, the method appears to turn ISDS into an insurance policy for future profits. For critiques of the DCF method in ISDS, see Tony Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (EJIL Talk! Blog, 19 January 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>; also *The Federal Republic of Nigeria v. Process and Industrial Developments Ltd,* Judgment of 23 October 2023 [2023] EWHC 2638 (Comm) *(hereafter P &ID No. 2)*, para. 398(3), and more generally paras. 365 – 399 for the discussion of the Tribunal's decision on compensation.

Those provisions provide for a right of States to make claims on behalf of their nationals through the exercise of diplomatic protection and for initial recourse of the investor to amicable dispute resolution mechanisms available in the host state. However, Article 46 (2)–(3) of the Protocol states that in the event an investor and a host State are unable to resolve a dispute amicably, they may rely on dispute resolution mechanisms that will be provided for in an annex that will be negotiated after the adoption of the Protocol.[131] This phrasing leaves open the possibility that ISDS could be one of those mechanisms. It therefore remains to be seen from the Annex – which is yet to be finalised and made public – whether international ISDS will have a future under the AfCFTA.

Conclusion

The 2022- 2023 period has been instrumental in the operationalisation of the AfCFTA. This two-year period, commencing four years after establishment of the AfCFTA has seen the development of the legal framework to support the implementation of the Agreement. These include the conclusion of important protocols including the protocols on intellectual property, competition, investment, and women and youth in trade. There have also been continued negotiations of relevant annexes to these protocols. In the midst of all these AfCFTA developments, the continent, just like the rest of the world, has been striving to get back to its feet after the Covid 19 pandemic, amidst other global challenges like climate change, coups and the Russia-Ukraine conflict. At the moment, Africa still remains committed on its path to establishing its continent-wide economic community, capable of charting the continent's development. To achieve this, the continent in the next phase must establish strong strategies in engaging with Third Parties, undertake significant review of national laws to align with the AfCFTA and accelerate commercially meaningful trade.

128 Transnational Institute, 'ISDS in Numbers: Impacts of Investment Arbitration against African States', October 2019 <https://www.tni.org/files/publication-downloads/isds_africa_web.pdf>

129 Process and Industrial Developments Ltd v Ministry of Petroleum Resources of the Federal Republic of Nigeria (Final Award), 31 January 2017.

130 Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No. ARB/17/14, Final Award, 23 August 2022. The case concerned alleged violations of the ECT arising from an Italian government refusal to grant the claimants an oil production permit following Italy's re-introduction of a ban on oil and gas exploration within 12 miles of its coastline. This affected the claimants' investments in an oil rig for which they had expected to be awarded a production permit, having previously been granted a 6 year oil exploration permit by the government. In both *P & ID and Rockhopper,* the Tribunals in place of calculating compensation based on costs actually incurred by the investor (the "sunken" or "historic" costs method preferred by respondent States) opted for the discounted cash flows (DCF) valuation method proposed by the claimants. The DCF method awards compensation for expected future profits rather than actual costs incurred. Since the DCF method does not necessarily consider that the vagaries of the business environment make it uncertain that such future profits would actually have been realised, the method appears to turn ISDS into an insurance policy for future profits. For critiques of the DCF method in ISDS, see Tony Marzal, 'Polluter Doesn't Pay: The Rockhopper v Italy Award' (EJIL Talk! Blog, 19 January 2023) <https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/>; also *The Federal Republic of Nigeria v. Process and Industrial Developments Ltd,* Judgment of 23 October 2023 [2023] EWHC 2638 (Comm) *(hereafter P &ID No. 2)*, para. 398(3), and more generally paras. 365 – 399 for the discussion of the Tribunal's decision on compensation.

131 Art. 46 (3) states that the Annex shall be negotiated after the adoption of the Investment Protocol by the Assembly of Heads of State and Government of the Africa Union, and finalised within 12 months at the latest from the date of adoption of this Protocol.

Book Review

The Investment Treaty Regime and Public Interest Regulation in Africa

By Dominic Npoanlari Dagbanja, Oxford University Press, 2022

Ibironke T. Odumosu-Ayanu*

Background

International investment law (IIL) is contested.[1] Contestation is not new to this area of international law given the "colonial origins" of IIL and the challenge to the international economic system that the Third World marshalled in the 1960s-1970s and before those decades.[2] In the turn to economic development as a postcolonial and neoliberal concept and the promise that foreign investment presented, African and other Third World states appeared to embrace the IIL regime in what has emerged as an ambivalent relationship.[3] A direct connection between IIL and socio-economic wellbeing is, however, also contested.[4] Amidst ongoing contestations, African states are incorporating some limited changes in recent intra-African investment instruments.[5] Dr. Dominic Dagbanja's book, *The Investment Treaty Regime and Public Interest Regulation in Africa,* emerges in this climate of contestation and calls for change in IIL.[6] It presents a uniquely African constitutional challenge to IIL while being global in potential impact.

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1 *See generally* Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press, 2015).

2 Antony Anghie, Imperialism, Sovereignty and the Making of International Law 3, 4, 224 (Cambridge University press, 2005); *see generally* Mohammed Bedjaoui, Towards a New International Economic Order (Holmes & Meier, 1979).

3 Ibironke Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World,* 8 San Diego Int'l L. J. 345 (2007).

4 M. Sornarajah, *International Law and Development: Foreign Investment, in* The Oxford Handbook of International Law and Development 387 (Ruth Buchanan et al. eds., 2023).

5 Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law,* 53 Case W. Res. J. Int'l L. 7 (2021).

6 Dominic N. Dagbanja, The Investment Treaty Regime and Public Interest Regulation in Africa (Oxford University Press, 2022).

Dagbanja's book is a major contribution to IIL scholarship in Africa. Although there has been a turn in the literature to Africa's perspectives on IIL and the workings of the discipline on the continent, this book is one of the few book-length manuscripts on IIL in Africa.[7] It centers constitutional governance and the public interest regulation and protection obligations of African states in its assessment. The book examines the compatibility of African states' investment treaty obligations with their constitutional obligations to regulate in the public interest as well as obligations in general international law, international environmental treaties (IETs), and international human rights treaties (IHRTs). Central to the book's core position are Dagbanja's questions regarding African states' capacity to agree to the obligations that they assume in investment treaties considering the "fundamental rights of citizens" and "legal norms that define what African states can or cannot do with public power" (p. 62). The book's assessment covers African states' constitutional and general international law obligations to regulate in the public interest on matters regarding the environment, human rights, and development. While the book draws examples from all parts of Africa, it specifically studies six countries (Cameroon, Egypt, Ghana, Kenya, Nigeria, and South Africa) spanning all the subregions in Africa.

IIL has provoked calls for reform.[8] Situated in the reform context, Dagbanja's book is an indictment of the current construction of IIL, arguing that "African states' investment treaty obligations are largely incompatible with their legal obligations to protect the public interest under national constitutions and general international law" (p. 38). Dagbanja's critical intervention provides a conceptual approach for assessing IIL, the public interest, and regulatory autonomy in Africa. He makes an original contribution to constitutional and public interest analysis of IIL especially in light of the legitimacy challenges that IIL has presented for host states. While there are other constitutional analyses of IIL,[9] and much has been written about the public interest and IIL,[10] Dagbanja combines constitutional analysis with IIL in a specifically African context relying on detailed assessments of the constitutions of African countries. He offers an elegant articulation of the constitutionality of the public interest-impacting nature of constraints on states' regulatory autonomy in investment treaties while also marshalling similar analysis in general international law. Dagbanja's book has the potential to inform similar challenges in many Third World countries with comparable historical background and challenges as most African countries.

7 For a recent book, see generally Won L. Kidane, Africa's International Investment Law Regimes (Oxford University Press, 2023).

8 *See e.g.,* James Thuo Gathii & Harrison Otieno Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. World Inv. & Trade 535 (2023).

9 On constitutions and IIL, *see, e.g.,* David Schneiderman, Constitutional Review and International Investment Law: Deference or Defiance (Oxford University Press, 2024); International Investment Protection and Constitutional Law (Stephan W. Schill & Christian J. Tams eds., 2022).

10 *See, e.g.,* Alessandra Arcuri & Federica Violi, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives, in* Handbook of International Investment Law and Policy (Julien Chaisse et al. eds., 2020).

Imperatives Theory

Dagbanja's analyses are organized around at least three notable areas and contributions. These three areas mirror the structure of the book. The first is the theoretical framework on which Dagbanja builds his claims. This framework, which Dagbanja calls the imperatives theory and which relies on *constitutional-general international law imperatives* (the "legal rights of human beings and the corresponding core duties of states" (p.113)), is a major contribution of Dagbanja's book. The imperatives theory, which Dagbanja had been developing for some years, is at the core of his analysis of states' competence to restrict their regulatory autonomy in investment treaties.[11] It also informs the book's analysis of conflicts between states' public interest obligations under constitutional and general international law on one hand and investment treaty obligations on the other hand. By this perspective, African states' obligations to regulate in the public interest with regards to environmental protection, human rights protection, and the right to development derive from domestic constitutions and general international law; hence, the *constitutional-general international law imperative.* For Dagbanja, "these legal norms and the higher values of society contained in them concerning the public interest must determine and shape the investment treaty-making powers of African states" (p. 56).

The imperatives define the limits to obligations that may be imposed on states in investment treaties. Informed by his analysis of the imperatives theory, Dagbanja concludes that constitutions and general international law regarding states' regulation in the public interest limit African states' competence to form investment treaties. This view is based on at least two factors that Dagbanja identifies. First, the powers that African states exercise are derived from their people through the instrumentality of their constitutions and are intended to be exercised for the benefit of those people. The "public source" of states' powers and the "public purpose" for which they hold these powers essentially limit states' capacity to enter investment treaties that constrain their obligation to regulate in the public interest (p. 56). Second, investment treaties are only created, valid and enforceable based on constitutional and general international law and their creation, validity, and enforceability is determined by states' constitutions and by general international law. Primarily then, African "constitutions and the very rights, interests, and values they preserve should dictate the content of international agreements that African states enter into in the first place" (p. 74). This imperatives theory and the claims derived from the perspective are at the core of Dagbanja's intervention.

11 Dominic N. Dagbanja, *The Conflict of Legal Norms and Interests in International Investment Law: Towards the Constitutional-General International Law Imperatives Theory,* 6 Transnat'l Legal Theory 518 (2015).

The Public Interest

A second notable contribution of the book is Dagbanja's engagement, through the lens of the imperatives theory, with key public interest issues, that is, human rights protection, environmental protection, and the right to development. The "constitutional imperatives place the public interest at the centre of the exercise of the powers of governments in Africa" (59-60). Dagbanja, for example, argues that the duty to protect human rights and the environment "should be superior to investment treaty obligations" (p. 253). This is a key claim as the most controversial investment arbitration cases impact the public interest.

Investor-state arbitration, indeed, has many difficulties and has engendered significant criticism.[12] It is a major stage on which competing interests play out. However, it is a stage that effectively excludes the voices of the peoples of the host state who are often directly impacted by the disputes.[13] In his examination of investment treaties and public interest regulation, Dagbanja first assesses the jurisdiction of national courts and investor-state arbitration's displacement of these courts before he discusses human rights, the environment, and development. His analysis is a departure from current investor-state arbitration orthodoxy. He weaves difficult issues together as he examines the competence and authority of African states to settle disputes through investor-state arbitration, assesses the jurisdiction of domestic courts, and analyzes three issues have been difficult to reconcile in IIL: investor protection, citizens' rights, and state obligations.[14] Dagbanja centers domestic courts instead of investor-state arbitration[15] noting that "African states must never include investor-state arbitration in future investment treaties and other international contract and agreements if they are to reassert the authority of municipal courts" (p. 174). Where states retain investor-state arbitration as a dispute settlement mechanism, Dagbanja insists on exhaustion of local remedies and a list of non-arbitrable matters.

Dagbanja turns to human rights and the environment in chapter four. He argues that in light of the constitutionalization of environmental protection and human rights in the African constitutions that he assesses as well as provisions of IETs and IHRTs, "it is a *constitutional-general international law imperative* for African countries to respect and uphold their human rights and environmental law obligations" (p. 195). This imperative "must be treated as taking precedence over an investment treaty obligation which seeks to prevent or limit the adoption of measures required for the realization of this … right" (p. 213). As a result, the obligations that states can assume under investment treaties are limited and African states' competence to form investment treaties is also limited. Dagbanja also departs from positions that only suggest incorporating the right to regulate in investment treaties and adopts the view that affirming the right to regulate in these treaties is insufficient. This is significant

12 *See* Gus Van Harten, The Trouble with Foreign Investor Protection (Oxford University Press, 2020). On critique of ongoing reform and reform debates, *see also* Gus Van Harten & Anil Yilmaz Vastardis, *Special Issue: Critiques of Investment Arbitration Reform – An Introduction,* 24 J. World Inv. & Trade 363 (2023).

13 Ibironke T. Odumosu-Ayanu, *Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law,* 24 J. World Inv. & Trade. 792 (2023).

14 Dagbanja, *supra* note 6, at 140–41.

15 *Id.* at 172–75.

given acontextual calls to affirm states right to regulate in the public interest. Such affirmations, by themselves, are insufficient. Dagbanja argues for a position that supports imposing "positive and negative obligations on foreign investors which must be enforceable against the investors" (p. 252); a "reciprocity of benefit" and "reciprocity of obligation" (p. 260). Meanwhile, he affirms that foreign investors and foreign investment must be protected while noting that states' environmental and human rights duties "must not be subordinated to investment treaty obligations" (pp. 258-259).

Many investment treaties and even arbitral institutions proceed(ed) on the promise of economic development in host states which, at the inception of contemporary IIL, were mostly Third World states. African states embraced the IIL regime and institutions such as the International Centre for Settlement of Investment Disputes based on this promise.[16] However, not only is there no clear connection between economic development and IIL, but investment treaties also have significant impacts on African states' development policy making. In chapter five, Dagbanja focuses on development and development policy making. This is essential as the neoliberal era has been informed by the discourse and various forms of the practice of 'development'. Dagbanja problematizes the concept of development and sides with the basic needs approach articulated in the constitutions of the six African states. He challenges the narrative that foreign investment/ investment treaties promote development while also assessing the impacts of investment treaty provisions on development policies.

Like the other public interest matters, Dagbanja locates the right to development and states' development obligations in African constitutions and general international law and views them as constitutional-general international law imperatives. For Dagbanja, the articulation of this right and corresponding state duties limits the competence of African states to form investment treaties that curtail their regulatory autonomy regarding development policy making. If investment treaties are to be formed in the future, for Dagbanja, they must require that foreign investment contribute to development to qualify for protection. The *Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area,* which incorporates some shifts in investment treaties, insists that investments must contribute significantly to the sustainable development of the host state.[17] However, the extent of the Protocol's contributions is yet to be ascertained. Moreover, newer investment treaties in other contexts have not always yielded results different from those produced by older treaties.[18]

Negotiating IIL and the International System

A third notable point in Dagbanja's book is the attempt to navigate the complex exercise of negotiating space in the international system for his claims about the course of IIL in Africa while sometimes incorporating proposals that recognize that African states may continue to pursue IIL in

16 *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* 5 ILM 524, ¶ 9 (1965). *See also* Odumosu, *supra* note 3.

17 *See generally* AFCFTA, Draft Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (Addis Ababa, Feb. 2023).

18 Wolfgang Alchner, Investment Arbitration and State-Driven Reform: New treaties, Old Outcomes (Oxford University Press, 2022).

its current frame. For example, Dagbanja proposes that African states should not adopt investor-state arbitration but recognizes that states may choose this position and as a result, supports exhaustion of local remedies in the latter case.

Chapter six offers insights on the reconciliation of investment protection (which investment treaties focus on) and regulation in the public interest (which is a core constitutional principle). Dagbanja focuses on three areas in this reconciliation exercise: a framework for future investment treaties with tangible suggestions for the content of the treaties, an assessment and a basis for interpreting existing treaties. Following his careful assessment of African states' regulatory autonomy and competence to form the types of investment treaties that have prevailed, Dagbanja also challenges reliance on investment treaties as the book draws to a close. He notes that:

> ongoing reforms of investment treaties and investor-state arbitration to accommodate states' right to regulate reinforce the relevance of the question whether investment treaties are necessary and needed at all. If investment treaties and investment arbitration are not bringing about the neutrality and efficiency that underlie them, the question arises as to why their reform is necessary and must be pursued at all costs but a return to municipal law and domestic courts for investment protection must never be raised or considered (p. 347).[19]

African states and other actors recognize that a shift is necessary in investment treaties.[20] The extent of the shift is being debated and Dagbanja offers an approach rooted in constitutional analysis as the basis for changes in the investment system. However, the political economy of the international system, the realities of material power, and the prospect of economic prosperity fueled by foreign investment could impact realization of the vision that Dagbanja articulates in his book. Dagbanja briefly turns to these matters, but the assessment could have benefited from more detailed analysis. Chapter five considers the politics of investment treaty-making which has significant implications for the origins, formation, and contents of investment treaties of the modern bilateral investment treaties (BITs) era. In chapter one, Dagbanja also briefly traces the background to contemporary IIL, situates BITs in the postcolonial era calling them "instruments of neocolonialism" (p. 5), and refers to the Calvo doctrine (p. 5). While Dagbanja recognizes, in chapter 3, Third World efforts to establish a new international economic order (NIEO) and encourages a return to these debates, a dedicated assessment of mechanisms that the Third World sought to develop which may have led to a different trajectory for investment law would have been apt. This is particularly relevant given that Dagbanja prioritizes domestic law. For example, the *Charter of Economic Rights and Duties of States* also prefers domestic laws and regulations in accordance with "national objectives and priorities" as well as states' "economic and social policies".[21] However, the movement to establish a NIEO was fiercely contested and the neoliberal system that now prevails was preferred. BITs proliferated,

19 *See* Dagbanja, *supra* note 6, at 349 (noting that there is, "a legitimate question of whether the time has come to return to the protection of foreign investment under municipal law. Ongoing reforms of the investment treaty regime challenge the need to continue with them.").

20 This is demonstrated in recent intra-African investment instruments which incorporate some limited reforms. *See* AFCFTA Investment Protocol, *supra* note 17.

21 G.A. Res. 3281 (XXIX), at art. 2 (Dec. 12, 1974) (describing the Charter of Economic Rights and Duties of States, UN Doc A/3235).

investment arbitration outside domestic jurisdictions multiplied, and wider public interest became often subordinated to the interests of transnational capital.

Many factors continue to pull African states towards submitting their most pertinent economic systems and policies to international disciplines as was the case in the immediate post-NIEO era. In Dagbanja's view, "[w]hat Africa needs for the realization of its development goals is strong governance systems that respect rights, including domestic legal systems that work for both domestic investors and foreign investors, not an international legal and institutional regime that favours, pampers, and privileges foreign investors" (pp.354-355). Dagbanja's call is for African states to give primacy to their constitutional orders and the interest of the people from whom they derive sovereign authority. His book invites the reader to imagine, visualize, and operationalize an investment system that is based on the obligations of African states as articulated in their constitutions and general international law.

Cultural Heritage in International Economic Law

by Valentina Vadi, Brill/NIJHOFF, 2023.

*Suzzie Onyeka Oyakhire**

'Since antiquity, trade, and investment on the one hand and cultural production on the other have characterised human endeavour. These areas of human activity have thus inevitably intersected: not only have trade and foreign investment facilitated interaction among different civilizations but cultural goods have also been traded for millennia. Therefore, there can be mutual supportiveness between the safeguarding of cultural heritage and the promotion of trade and foreign investment.'[1]

Introduction

These words by the author sum up the core of the analysis in this 400 + pages book which highlights the linkages between economic interests and cultural interests and how the dynamics of these relationships could result in tension(s) requiring amicable settlement: in this case adjudication. Typically, the subject of cultural heritage finds its relevance generally within the confines of international humanitarian law or specifically within its own distinct branch of international law that is international cultural heritage law. Together, they focus on the protection of cultural objects/property during armed conflicts[2] and in peace time[3]. Although several publications examine cultural heritage in international law,[4] and its intersection with international humanitarian law, international environmental law, and international human rights law, they rarely explore the intersection between cultural heritage law and international economic law (IEL).

Valentina Vadi's book is an important addition to the existing literature and brings a unique dimension to the discussions on cultural heritage by exploring the intersection between international economic law and international cultural heritage law (p.5). This intersection is explored by examining the

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1 Valentina Vadi, Cultural Heritage in International Economic Law 143 (Brill Nijhoff, 2023).

2 Convention for the Protection of Cultural property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague (May 14, 1954), https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention.

3 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Preamble, (Paris, Oct. 17, 2003), https://international-review.icrc.org/sites/default/files/irrc_854_unesco_eng.pdf.

4 *See generally* Max Planck Encyclopaedias of International Law, Cultural Heritage Law and Policy Series, or the Oxford Scholarly Authorities on International Law, all of which are available at https://opil.ouplaw.com/page/881#1 (last visited Aug. 14, 2023).

'interplay between the protection of cultural heritage and the promotion of trade and investment in international economic law' (p. 12). The discussions are analysed through the lens of the IEL dispute settlement mechanisms (DSM); the World Trade Organisation (WTO) adjudicative bodies on one hand and the investment treaty arbitral tribunals on the other (referred to by the author as the international economic courts). In particular, this book considers whether common approaches have emerged in the way international economic courts balance economic interests with cultural heritage concerns/cultural interests in adjudicating cultural heritage related disputes.

As acknowledged by Francesco Francioni,[5] 'one of the most serious threats to cultural property today is the rampant illicit and clandestine traffic of cultural objects and antiquities across national boundaries.'[6] This inference by Francioni agrees with a specific argument put forward by the author that, 'the commodification of culture, that is, the transformation of cultural practices or items into commodities or objects of trade can dilute their cultural value unless it is conducted in a culturally appropriate way.' (p.2) It is within this context that disputes may arise necessitating the adjudication of such cultural related disputes within the field of IEL. It is thus fascinating to see how the author uses this as a lens to explore the contribution of IEL to developments in International Cultural Heritage Law by highlighting the relevant disputes concerning cultural elements adjudicated before international economic courts (p.12). Even where research has shown the link between cultural heritage and international trade law, they have not examined it from the dispute settlement perspectives of the international economic courts which makes this book a valuable contribution to scholarship.

The Structure of the Book

The book is divided into three parts: part 1 and 2 are divided into three chapters each and part 3 provides the conclusion.

Part 1-Cultural Heritage, Trade and Foreign Direct Investment: Defining and Connecting the Fields

Part 1 consists of chapters one to three. It maps out the legal framework governing cultural heritage, free trade and foreign direct investment. Chapter 1 begins by tracing the importance and recognition of cultural heritage in international law. In analysing the concept of cultural heritage and the main features of international law that governs it, the chapter examines five different but related categories of cultural heritage: world heritage, underwater cultural heritage, intangible cultural heritage, cultural diversity, and indigenous heritage. The chapter effortlessly illustrates the impact of globalization on all these varieties of cultural heritage. A major finding of the chapter is that despite the recognition given to cultural heritage in international law, it lacks a compulsory dispute settlement mechanism, but rather, different international cultural heritage law instruments contain 'weak' dispute settlement provisions mostly stipulating diplomatic means of dispute settlement. (p.55).

5 Francesco Francioni, Cultural Heritage, in Max Planck Encyclopaedia of Public International Law (Oxford Public International Law, Nov. 2020), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1392?prd=EPIL.

6 *Id.* at ¶ C.

In Chapter 2, the author links the conversations to the analysis in Chapter 1 by exploring the 'converging divergences between international trade law and international investment law in relation to their interplay with cultural heritage protection.' (p. 92). Here, the author emphasizes the link between cultural heritage protection and international economic law in theory and in practice. The chapter finds that given the non-binding nature of the dispute settlement mechanisms available within international cultural heritage law, cultural disputes involving investors or traders' rights have been frequently brought before international economic courts (p. 104). The preference for these courts is attributed to the binding dispute settlement mechanism available under international economic law.

Chapter 3 concludes the discussion in part one by highlighting 'the distinct interplay between international cultural heritage law and international economic law and select areas where this interaction takes place.' (p.126). The chapter confirms that international economic courts have attracted a significant number of cultural heritage-related international economic disputes. A major argument in the chapter is that international disputes relating to the intersection between cultural heritage interests and economic interests are 'characterised by the need to balance the state's duty to adopt cultural policies on one hand, and the economic interests of investors and traders on the other.' (p.124). The author also brings to the fore the advantages and disadvantages of instituting cultural heritage related disputes before international economic courts and simultaneously emphasizes the dangers of prioritizing economic interests over cultural heritage interests/concerns.

Part 2- When Cultures Collide: Cultural Heritage, Trade and Foreign Direct Investment

Part 2 consists of chapters four to six. Together, these chapters form the crux of the analysis in this book. A crucial question for determination in this part of the book is whether 'international economic courts have paid attention to cultural heritage concerns and if so, how have they balanced economic interests and cultural policies of host states?' (p.149). Chapter 4 examines cultural heritage in international investment law and arbitration. Questions about the ability of arbitral tribunals to consider cultural interests in the adjudication of investment disputes are assessed. The author considers the adjudication of several international investment disputes in arbitral tribunals across different jurisdictions. The cases examined here, and the jurisprudence of the tribunals across the jurisdictions reveal a tension between state obligations under investment treaty provisions and state cultural policies (p. 221). Specifically, the chapter confirms that cultural heritage concerns are not at the heart of the petitions brought before arbitral tribunals but rather the protection of investment/economic interests are prioritized. A key finding in this chapter is that 'arbitral tribunals cannot rule on violations of international cultural heritage law unless the relevant investment treaty or contract requires them to do so.' (p. 201) This is because the jurisdiction of arbitral tribunals is limited and usually concerned with investment treaty obligations. However, the chapter confirms that the jurisprudence of arbitral tribunals is contributing to the development of international law requiring the protection of cultural heritage.

In Chapter 5, the author takes an interesting approach by analysing the complex intersection between trade and cultural heritage law and exploring how the WTO dispute settlement bodies deal with cultural heritage. Specifically, the chapter investigates whether the WTO dispute settlement

bodies consider cultural concerns when adjudicating cultural heritage-related disputes. (p. 234). Several cultural heritage disputes relating to diverse areas of international trade law are examined. The evidence clearly points to the fact that WTO members have in fact brought cultural heritage-related disputes before the DSM where they claim that [cultural] regulatory measures adopted by member states affect their economic interests and are in breach of relevant WTO laws. (p. 233). In such instances, the underlying objective is to ensure that a balance is reached in the preservation of cultural heritage and the promotion of free trade. Despite the wide range of scenarios put forward by the author, there is no doubt left in the mind of the reader that the WTO system is not very interested in cultural heritage issues because they are not economic concerns which is the focus of the free-market system of the WTO. The author thus acknowledges that the WTO courts may not be the most appropriate court for settling cultural heritage related disputes.

Chapter 6 considers the institutional and jurisprudential convergencies and divergencies in the cultural heritage-related adjudication in the international economic courts. (p.330) While the author draws various similarities between the WTO DSM and arbitral tribunals in terms of substantive and procedural similarities, a major inference from this chapter is the noticeable divergences in the jurisprudence and practice in respect of cultural heritage-related disputes instituted in these courts. Accordingly, this chapter confirms that while arbitrators take cultural elements into consideration when adjudicating these disputes, the WTO DSM has instead adopted a more limited approach in its consideration of other international laws (pp.330-331). It is worthwhile to note that this chapter shows that a major point of departure in the jurisprudence of international economic courts in determining cultural heritage-related disputes is that 'while cultural concerns have influenced if not shaped some significant awards in the investment tribunals, cultural concerns remain marginal topics at the WTO.' (p. 337). The author continually reiterates that international economic courts ultimately settle international disputes in accordance with international economic law and are likely to favour economic interests over other interests including cultural heritage interests.

Although this book makes a compelling argument for a unique jurisprudence emerging from international economic courts in the way they settle cultural heritage related disputes by prioritizing economic interests over cultural heritage interest, it is difficult to see how this differs substantially from the way other courts decide cases brought before them. In fact, courts both at the domestic and international level tend to stick to the subject matter of the legislation or treaty establishing them.[7] Instead, the book corroborates this practice: that is, most courts including international economic courts in exercising jurisdiction are limited to the subject matter of the treaty establishing them. This is similar to the proposals for the jurisdiction of the International Criminal Court (ICC) to be expanded to include corporate criminal responsibility so that Multinational Companies (MNCs)

7 Annabelle Bennett & Sam Granata, When Private International Law Meets Intellectual Property Law – A Guide for Judges 32 (Hague Conference on Private International Law & World Intellectual Property Organization, 2019) https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1053.pdf; see also Guénaël Mettraux, International Crimes and Ad Hoc Tribunals 5–12 (OUP, 2006) (accessible online with ISBN no. 9780191709203).

can be sued in the ICC.[8] Until such a time when the Rome Statute is amended to allow the ICC to prosecute companies, it is unlikely that these MNCs can be sued in the ICC as collective entities; the ICC will have limited jurisdiction. Whether personal or subject matter jurisdiction, courts must be seized with either to consider a case.

What is clear from the analysis in Part Two of this book is that the arguments provide another layer of justification for the protection of cultural heritage not only during armed conflict/war but also in peace time. That is, examining the jurisprudence of the international economic courts in relation to cultural heritage-related disputes, confirms the need to strengthen international cultural heritage law. Also, the analysis in Part Two contributes to existing scholarship that demonstrate that litigation can be used as an instrument for political, legal, and social change.[9] By highlighting that international economic courts should expand their jurisprudence or become activist courts and include cultural heritage interests in their decisions, the author contributes to this body of scholarship.

Part 3- Challenges and Prospects

Part 3 provides the conclusion in Chapter 7. Here, the author asks a very crucial question: 'what strategies are available to avoid collisions between the promotion of foreign investments and free trade on one hand and the safeguarding of cultural heritage on the other? (p. 364) In answering the question, the author proposes several tools that may help adjudicators in international economic courts and policy makers to reconcile the different interests at stake when considering cases involving cultural heritage related disputes. (p. 439). For example, the adoption of Alternative Dispute Resolution (ADR) methods as a possible tool is proposed. In the words of the author, 'while adjudication is not designed to address extra-legal issues which are deemed non-justiciable, alternative dispute resolution (ADR) methods… can be suited to resolve complex disputes involving political, economic, and cultural interests.' (p. 366). The author explains how these ADR methods are already intricate parts of the DSM of the international economic courts. The argument made here is that these could be utilized in resolving cultural heritage disputes before international economic courts. The author is careful not to present an alternative without its own shortcoming(s). Consequently, the difficulties that may arise in adopting these suggestions are also highlighted. For example, the author notes that 'without adequate safeguards, ADR may fail to address power imbalances' that may exist between disputing parties. (p.370).

8 Photeine Lambridis, *Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity,* 53 Int'l L. & Pol. 144–51 (2021); *see also* Antony Crockett et al., *International Criminal Court to Prosecute business and human rights,* Herbert Smith Freehills (Nov. 2, 2016), https://www.herbertsmithfreehills.com/insights/2016-11/international-criminal-court-to-prosecute-business-and-human-rights.

9 *See* James Thuo Gathii, The Performance of Africa's International Courts- Using Litigation for Political and Social Change (James Thuo Gathii ed., 2020); Tom Ginsburg, Book Review – The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change 384 (James Thuo Gathii ed., Oxford University Press, 2020); *see Tim Ginsburg, The Performance of Africa's International Courts: Litigation for Political, Legal, and Social Change,* 115(4) Am. J. Int'l L. 777 (2021).

The conclusion in the book could be summarised as follows: with the lack of a compulsory dispute settlement mechanism within international cultural heritage law, cultural heritage-related disputes have gravitated towards international economic courts. (p.442). The author reiterates that these courts may not 'constitute the most suitable courts for settling cultural heritage related disputes.' (p.442). This is because international economic courts could dilute or neglect significant cultural interest and instead emphasize economic interests. The author admits that despite the number of cultural heritage-related disputes adjudicated before the international economic courts, IEL has not 'developed any institutional machinery for the protection of cultural heritage through dispute settlement.' (p.445).

Conclusion

This book makes for an interesting read. It captivates the reader by weaving the conversations from the introduction to its conclusion using simple and comprehensible language and maintaining a central theme. In unpacking the analysis, an explorative and analytical methodology is adopted, and it engages in literature that transcends the field of culture, economics, and law. It is enriched by the depth of case laws examined. This book will be useful for legal academics and scholars, researchers, students, (international) adjudicators, cultural heritage experts, political and social scientists, economists, and policy makers. Moreso, at a time where world events have brought to the fore conversations which centre on the fragmentation and intersectionality of international law, this book is timely as it draws attention to the need for researchers to consider a re-focus of research on intersectionality of international law viz-a-viz the lens of international economic law and international cultural heritage law.